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COMPRISING ALL THE DECISIONS OF
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AND SOUTH CAROLINA, AND THE SUPREME
COURT AND COURT OF APPEALS
OF GEORGIA

WITH KEY-NUMBER ANNOTATIONS

AUGUST 27 — DECEMBER 3, 1921

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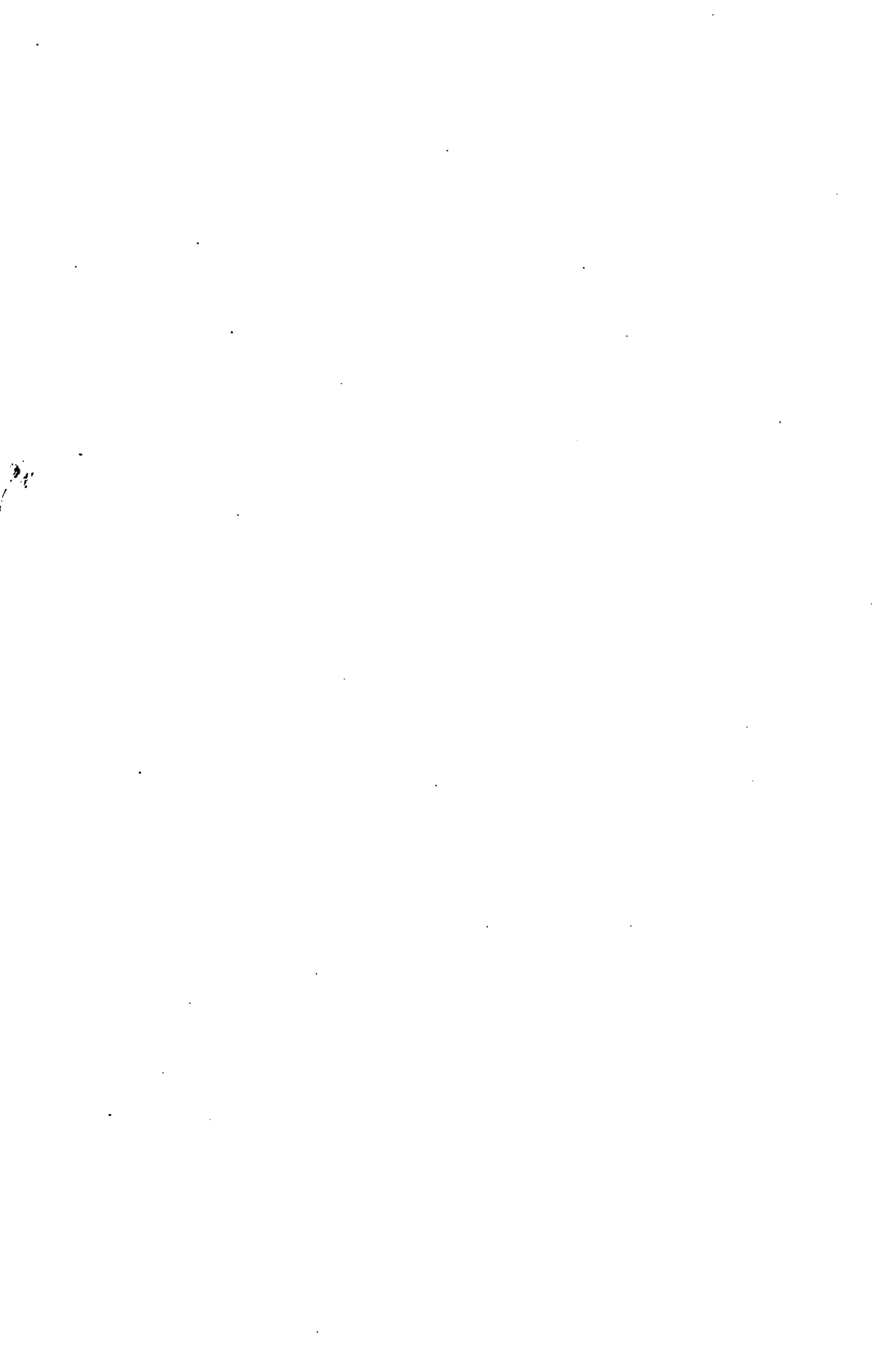
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¹ Died September 8, 1921.

² Appointed September 19, 1921.



AMENDMENTS TO RULES

SUPREME COURT OF SOUTH CAROLINA ¹

The following rule of the Supreme Court has been promulgated as of November 15, 1921:

Rule 30.

After the return for appeal in a criminal action shall have been filed with the clerk of this court, the court in open session may dismiss the appeal where it is made to appear that the grounds thereof are manifestly without merit. The solicitor moving for such dismissal shall present a petition therefor to

the Chief Justice, or the presiding Associate Justice, who, if satisfied of the reasonable grounds of the motion, shall fix a day for the hearing of the motion; a copy of the petition and of the order of the said Justice shall forthwith be served upon appellant's counsel not less than five (5) days before said date.

The court has announced a policy of strict enforcement of rule 8, and the portion of rule 13 relating to the dress of attorneys.

¹ For other rules, see 90 S. E. vi; 96 S. E. ix.
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THE
SOUTHEASTERN REPORTER
VOLUME 108

(130 Va. 55)

BUNKLEY et al. v. COMMONWEALTH.

(Supreme Court of Appeals of Virginia.
June 16, 1921.)

1. Equity ⚡377—Courts should order jury issue of own motion in difficult case.

In cases of exceptional difficulty and conflict in the testimony, it is error for the court to fail to order an issue out of chancery on its own motion, and when an issue is properly ordered, the chancellor should abide by the verdict, unless good cause appears to the contrary.

2. Equity ⚡377—Propriety of ordering issue out of chancery is determined by sound exercise of discretion.

The propriety of ordering an issue out of chancery for jury trial is determined by the application of sound legal discretion to the circumstances, and a mistake in the exercise of such discretion is reviewable by appeal; Code 1904, § 3381, not being intended to make the directing of an issue a matter of right and not of discretion.

3. Equity ⚡379—Petition and affidavit held not to require ordering of issue.

A petition for an issue out of chancery for a jury trial, which alleged that petitioners would introduce a large number of witnesses who would contradict the witnesses of the complainant, and that there would result a great conflict in the testimony, so that it was proper the court should direct an issue, merely states the opinion of the petitioners, and does not require the ordering of the issue.

4. Nuisance ⚡84—Evidence held to show house was disorderly.

In a suit to have a boarding house declared a nuisance, and abated, evidence by the commonwealth's witnesses, showing that the house was of ill fame, and used for prostitution, which was contradicted only by evidence for the defense that witnesses, who were present on other occasions, did not see any improper acts, held sufficient to sustain the chancellor's finding that the house was of ill fame.

5. Appeal and error ⚡1008(1)—Conclusions of trial court on oral testimony entitled to substantially same credit as verdict.

The conclusions of the trial court on oral testimony are substantially entitled to the same credit as the verdict of a jury.

6. Nuisance ⚡84—Conflict in evidence held not to require special issue as to character of house.

In a suit to abate a disorderly house, evidence on behalf of defendant that witnesses had not seen any disorderly acts when they were present, and that they would not have remained in the house if they had thought it was used for prostitution, though in the sense conflicting with evidence for the commonwealth showing the house was used for prostitution does not raise such a conflict as to require the court of its own motion to order an issue out of chancery for trial by jury.

7. Statutes ⚡117(1)—Omission of forfeiture provision from title of abatement statute does not invalidate act.

Abatement Act 1916, the title to which was "An act to abate and enjoin disorderly houses to declare the same to be nuisances," is not in violation of Constitution, § 52, requiring the object of law to be expressed in its title, because the title does not include the forfeiture provisions contained in body of the act.

8. Statutes ⚡105(1)—Constitutional provision as to title liberally construed and act upheld if practicable.

The constitutional provision relating to the title of an act is to be liberally construed, and the act upheld if practicable.

9. Eminent domain ⚡2(1)—Provision against taking or damaging private property does not apply to forfeiture for unlawful use.

Const. § 58, prohibiting the taking or damaging of private property for public use without just compensation, does not prohibit a forfeiture of property imposed upon an owner, who has been convicted of using the property for unlawful and immoral purposes.

10. Constitutional law ⚡303—The abatement statute does not deny due process of law.

The statute authorizing abatement of disorderly houses as nuisances, and providing for forfeiture thereof, does not deprive the owner of due process of law, since he must be impleaded on the specific charge and afforded an opportunity to make his defense before the forfeiture can be enforced.

11. Nuisance ⚡80—Statutory abatement of disorderly houses within police power.

The enactment of Abatement Act of 1916 providing for the abatement of disorderly houses

es as nuisances, was within the police power of the state.

Appeal from Corporation Court of City of Newport News.

Suit by the Commonwealth against Blanche R. Bunkley and another to have the premises maintained by defendants declared a nuisance and enjoined and abated. Decree for complainant, and defendants appeal. Affirmed.

Jno. N. Sebrall, Jr., of Norfolk, and J. Winston Read, of Newport News, for appellants.

The Attorney General, for the Commonwealth.

SAUNDERS, J. In February, 1920, the commonwealth of Virginia, at the relation of C. C. Berkeley, commonwealth's attorney for the city of Newport News, brought its bill in equity, pursuant to the provisions of the Acts of Assembly 1916, p. 780, c. 463, alleging that Blanche R. Bunkley, alias Blanche R. Wilson, and William C. Bunkley, her husband, since November, 1918, had knowingly and unlawfully maintained and kept, and were knowingly and unlawfully maintaining and keeping a certain designated building as a house of ill fame and for the purposes of lewdness, assignation and prostitution, resorted to during said period of time by idle and dissolute persons, both men and women, for the purposes of lewdness and prostitution. The bill contained other allegations appropriate under the statute, and concluded with the prayer that the house and lot, and contents of said house, be declared a nuisance, and the same be enjoined and abated, as provided by law.

Petitioners in error filed an answer to this bill, denying all of its allegations.

Further, they filed an application for an issue out of chancery with accompanying affidavits. Upon this application the court ordered an issue, and a jury was impaneled to try the same. Thereafter the jury returned a verdict for the petitioners upon all of the issues submitted by the court.

The attorney for the commonwealth moved the court to set aside this verdict, upon the ground that the issues had been improvidently awarded, and that the said verdict was contrary to the evidence, and to enter "judgment upon the case, notwithstanding said verdict." The court having taken time to consider, concluded that the evidence sustained the allegations of the bill, declined to accept the findings of the jury, and entered a decree whereby the lot and house thereon, and the furniture and equipment of same, were declared to be a nuisance, and enjoined and abated. The equipment and paraphernalia were directed to be sold, and the house and every part thereof ordered to be closed by the officer of the court for the

period of one year from date. The further provisions of the decree need not be recited.

From this decree an appeal was allowed, and the case is now before this court for review. The petition for appeal assigns the following errors:

I. The court erred in disregarding the verdict of the jury, and entering a decree sustaining the allegations of the bill and ordering the destruction of the property.

II. The said act is in violation of the Constitution of Virginia.

III. The said act is in conflict with the Constitution of the United States, and especially the Fourteenth Amendment thereof.

Under assignment No. I, the complainants set forth that the evidence was in the highest degree conflicting, and that, not only was an issue properly awarded in the first instance, but that it would have been error not to award such issue.

Further, that having submitted certain issues to the determination of a jury, the court should have abided by the verdict found upon those issues.

In support of these contentions, various Virginia precedents are cited.

[1] It is true that in cases of exceptional difficulty and conflict in testimony, it is error for the court to fail to order an issue out of chancery, on its own motion, and as a general proposition, when an issue is properly ordered, it is the practice, unless good cause appears for the contrary course, for the chancellor to abide by the verdict.

"The object of an issue * * * is to satisfy the conscience of the chancellor in a doubtful case." *Stevens v. Duckett*, 107 Va. 17, 57 S. E. 601. "But an issue is not directed merely because the evidence is contradictory." 107 Va. 22, 57 S. E. 603.

[2] The propriety of ordering an issue is determined by the application of sound legal discretion to the circumstances of the situation.

"Awarding of an issue out of chancery rests in sound discretion, subject to review on appeal. A mistake in its exercise is a just ground of appeal. * * * The * * * fact that there was an issue was directed and tried, and a verdict rendered for the plaintiff, affords no reason why the court should not reverse the decree, if the order directing the issue was improperly granted." 107 Va. 23, 57 S. E. 604.

To justify the order for an issue out of chancery, "the conflict of the evidence" must be "so great and its weight so nearly evenly balanced that the court is unable to determine on which side the preponderance is." 107 Va. 20, 57 S. E. 603.

"It does not follow that an issue is necessary and proper in every case where the evidence happens to be conflicting. If this was the rule, the chief time of the chancery courts would be occupied with trials before juries, or in considering their verdicts. The circuit courts and

the judges of this court are constantly called upon to decide questions of fact upon testimony of a very conflicting character." 107 Va. 22, 57 S. E. 608.

"Directing an issue * * * is not * * * a mere arbitrary discretion. * * * Such discretion must be exercised upon sound principles of reason and justice. A mistake in its exercise is a just ground of appeal, and the appellate court will judge whether such discretion has been soundly exercised in a given case." *Miller v. Wills*, 95 Va. 350, 28 S. E. 342.

See, also, to same effect, *Catron v. Norton Hardware Co.*, 123 Va. 386, 96 S. E. 853.

In the case of *Stevens v. Duckett*, supra, the trial court awarded an issue out of chancery upon the basis of an affidavit filed by the appellee, in which it was stated that the issue to be determined would be rendered doubtful by conflicting evidence of the opposing party, and that he believed that an issue out of chancery should be directed; and also a joint affidavit by counsel for the appellee, saying that they had read the affidavit of their client; that they were fully acquainted with the points in issue, and knew that the evidence would be conflicting, and that in their opinion it would be proper to award an issue out of chancery. This court set aside the order of the trial court, and in that connection used the following language:

"We are of opinion that the circuit court, in directing the issue in this case, acted upon wholly insufficient affidavits, and failed to exercise the discretion contemplated by law in such matters. * * * The decrees complained of must be set aside." 107 Va. 23-24, 57 S. E. 604.

Also on pages 21, 22 of 107 Va., on page 603 of 57 S. E., we find the following:

"In the case before us, the affidavits of the appellee and his counsel are mere opinions that in their judgment the evidence of the opposing party would be conflicting, and an issue out of chancery proper. * * * The Legislature, by the express language of the statute, reposed in the court the exercise of discretion in determining when there should be an issue out of chancery, and it could hardly have intended, in the same breath, to require the court to surrender its judgment and discretion and transfer the decision of that question to a party to the litigation, or his counsel.

"We are of opinion that it was not intended by the statute [section 3381, Va. Code 1904] to change the firmly established rule of law, that the chancellor was to properly exercise his discretion 'on sound principles of reason and justice;' * * * Any other interpretation of the statute would * * * make the whole matter of directing an issue one of right and not of discretion on the part of the chancellor."

[3] In the instant case the petitioners, *Blanche Bunkley* and her husband, made application for an issue by a petition sworn to by *Blanche Bunkley*. This petition re-

cited that a bill in equity had been filed against them, and that the complainant had filed an application for a temporary injunction, accompanied by the affidavits of one *Eason* and of other witnesses, which complainant alleged supported the allegations of the bill. Petitioners stated in said petition that they would—

"introduce a large number of witnesses who would contradict the witnesses of the complainant, and that there would result a great conflict in the testimony to be offered by the parties to the suit, presenting issues of fact which are necessary to be determined, out of a mass of conflicting testimony, in order to arrive at a correct decision of the case. That, therefore, it was eminently proper that the court should enter an order directing an issue out of chancery to be tried by a jury, and the court was asked to award such an order."

[4] The case in judgment is plainly ruled by the case of *Stevens v. Duckett*, supra. If it was error in the trial court to order an issue upon the affidavit filed in that case, and it was so held, then it is manifest that upon a like affidavit in the pending case the court erred in directing an issue. This case should therefore be considered on the merits as if no issue had been awarded, and the conclusions reached by the chancellor tested by the evidence. This evidence was chiefly oral. It is true that the same is conflicting, not an uncommon thing when one party affirms and the other denies, but the conflict is not of the usual character as when witnesses, present at the same time, give varying and contradictory accounts of the things that they have seen, or heard, or have had the opportunity to see, or hear. In the main the witnesses in the instant case were never present together. The witnesses for the commonwealth testify as to what they saw, or heard, in the establishment of the defendants. If credence is given to them, their testimony is undoubtedly ample to establish the allegations of the bill. The witnesses for the defense, save in a few instances, were present on other occasions. Some took their meals there, others both lodged and took their meals in the building; still others were casual visitors. One and all, they saw nothing amiss in the conduct of the proprietress or of the waitresses, white or black, tending to establish the charge that the place was operated for immoral purposes. But it will be noted that this testimony of conduct at other times and on other occasions does not directly contravene the testimony of the witnesses for the complainant, who speak of particular acts and specific conduct occurring in their presence of a lewd and immoral character, indicative of the real nature of the establishment. It is true that it may be argued that if this alleged eating and lodging house was really a house of ill fame, used for the purposes of lewdness, as-

signation, and prostitution, some of the witnesses for the defense would have observed evidences of the same, particularly when one or more of the witnesses state that they would not have boarded or lodged at the house if they had had any reason to believe that it was in part a bawdyhouse. To this extent the evidence is conflicting, though not, as stated *supra*, in the usual fashion.

In passing upon the evidence as a whole, there are certain features of the case to be noted which are established by undoubted and uncontradicted evidence, indeed they are derived in part from the mouth of Blanche Bunkley, alias Wilson. She was an old hand in the detestable business of turning the frailties of her own sex and the lust of men into pecuniary profit. The following is taken from her testimony:

"Q. What was your occupation on Twenty-Fourth street?

"A. I ran a house of ill fame.

"Q. What was your business there [referring to a house on Twenty-Third street]?

"A. The same as I was doing on Twenty-Fourth street.

"Q. That is, you ran a house of ill fame there?

"A. Yes, sir."

The establishment under attack in the instant case was located in the restricted district of the city, and soldiers were forbidden to visit the same, under pain of court-martial. This section was the "red light district" of the city, up to June 18, 1916, at which time, to quote the witness, Blanche Bunkley, the proprietors of bawdyhouses were notified by the police that they would have to "stop that line of business." She alleges that she stopped. Generally speaking, this was a colored neighborhood, and there was a colored dance hall near the house in question. There were four or five white girls, alleged waitresses, in the eating house conducted by Mrs. Bunkley. These were the girls referred to by the witnesses for the complainant. Four of these young women were examined, and found to be suffering from venereal diseases. Another woman who worked for appellants, a Mrs. Pollis, was taken to the detention camp. The foregoing facts are not challenged.

There were various witnesses for the complainant, male and female. One of them, a Mrs. McGowan, an investigator for the War Department, investigated Mrs. Bunkley's café. She testifies positively to conversations with the latter, establishing the real character of the café, and to conduct by the white girls equally conclusive on this point. The conversations grew out of the rôle assumed by the witness, of a member of the underworld seeking employment. According to the witness she learned from the proprietress the rates charged for an individual act of fornication,

and the proportion in which the proceeds thus derived were divided. Further, she saw some of the girls giving money received from men for sexual acts to Mrs. Bunkley. All of this was denied by the latter. Eason and Shuey, also agents of the federal government, testify in most emphatic fashion as to the conduct of the alleged waitresses on their visits to the Bunkley café. If these witnesses are to be believed (and there is nothing to discredit them save the fact that they were in a distasteful but necessary rôle, if the laws against houses of this character are to be enforced), the infamous character of the Bunkley establishment is fully established. Hough, a former soldier and sailor, with honorable discharges, and at the time a member of the police force of the city of Newport News on special duty, also investigated Mrs. Bunkley's café, and, testifying from personal observation, fully confirms the testimony of the other witnesses as to the immoral behavior and lewd practices of the white inmates of this establishment. The trial court heard the testimony of the witnesses, save one, the witness Eason, whose deposition was taken a short time before his departure for his home in Oklahoma. He balanced the positive testimony of the witnesses for the commonwealth against the positive and negative testimony of the witnesses for the defendants. He heard the testimony of the defendant, Mrs. Bunkley, and of her husband (who married her while she was conducting a house of ill fame), in contradiction of the testimony of Mrs. McGowan and others, and from his opportunities of hearing and seeing the witnesses was in a position of peculiar advantage to make a fair appraisal of the relative value of the evidence submitted. In view of this evidence as a whole, he concluded that the charges of complainant's bill were established. With that conclusion we are not disposed to disagree.

"The decree of a trial court is entitled to great respect, and is generally presumed to be correct." *Catron v. Norton Hardware Co.*, 123 Va. 387, 96 S. E. 853.

[5] Indeed, when a trial court hears a case, and reaches a conclusion upon oral testimony, that conclusion is substantially entitled to the same credit as the verdict of a jury.

[6] This was not a case of such conflict of testimony that it was error in the court not to order an issue out of chancery on its own motion. Having reached the conclusion that the issue was improvidently awarded, it becomes, of course, unnecessary for us to consider whether the trial court was justified in setting aside the verdict of the jury, and entering judgment on the evidence, though we do not mean to intimate that if this case had to be considered in that aspect

the conclusion reached by the court would not be supported by the evidence.

The second assignment of error is that the statute in question is unconstitutional, on the ground that it embraces more than one object, in contravention of section 52 of the Constitution of this state, providing that "no law shall embrace more than one object, which shall be expressed in its title."

This section has been the occasion of numerous decisions by this court. The title to the act in question is:

"An act to abate and enjoin houses of lewdness, assignation, and prostitution; to declare the same to be nuisances; to enjoin the person or persons who conduct or maintain the same and the owner or agent of any building used for such purpose."

[7] The particular defect assigned is that the provision of forfeiture contained in the act is not embraced in the title.

In *Lucchesi v. Commonwealth*, 122 Va. 872-881, 94 S. E. 925, 927, this court held that—

"Although a statute refers to many things of a diverse nature, the title will be sufficient if the subordinate provisions of the statute may be fairly regarded as in furtherance of and as facilitating the accomplishment of the general object expressed in the title," and that "the constitutional inhibition was not intended to hinder remedial legislation, nor to prevent the incorporation in a single act of the entire statutory law upon one general subject."

[8] The following cases are also in point:

"The Constitution is to be liberally construed in determining whether an act is broader than its title; and the act is to be upheld if practicable." *Ellinger v. Commonwealth*, 102 Va. 100, 45 S. E. 807; *District Road Board v. Spilman*, 117 Va. 201, 84 S. E. 103. "If there is a fair doubt that the single subject, object and purpose of a statute is sufficiently expressed in the title, * * * such doubt should be determined in favor of the [validity of the] statute." *Commonwealth v. O. & O. Ry. Co.*, 118 Va. 261, 87 S. E. 622.

See, also, *City of Richmond v. Pace*, 127 Va. 274, 103 S. E. 647.

The title of the act is, in part, "to abate houses of lewdness," etc. The provision of forfeiture is punishment inflicted upon persons conducting houses of lewdness, and is cognate to and an appropriate part of abatement.

Assignment of error No. II is not considered to be well taken.

The final assignment is that the act in question is in conflict with the Constitution of the United States, and especially the Fourteenth Amendment thereof, and, as argued in the petition, with sections 11 and 58 of the Constitution of Virginia, these provisions in the two Constitutions relating to due process of law, and the taking or damag-

ing of private property for public use without just compensation.

[9, 10] The provisions as to taking or damaging private property have no relation to a forfeiture of property imposed upon an owner who has been convicted of using the same for unlawful and immoral purposes. Nor is due process of law lacking in the case in judgment. The owner has had due process of law when he has been impleaded on a specific charge, the punishment of which, in part, is forfeiture, and has been afforded the opportunity to make his defense.

In a case arising under the statutes of the state of New York, which provided that nets, set or maintained in the waters of the state in violation of the statutes of the state for the protection of fish, might be summarily destroyed by any person, and no action for damages should lie against any person for, or on account of, such seizure or destruction, the Supreme Court of the United States declared that this provision was a lawful exercise of the police power of the state, and did not deprive the citizen of his property without due process of law.

Further, the court said:

"Nor is a person whose property is seized under the act in question without his legal remedy. If in fact his property has been used in violation of the act, he has no just reason to complain; if not, he may replevy his nets from the officer. * * * or if they have been destroyed, may have his action for their value." *Lawton v. Steele*, 152 U. S. 183, 185, 142, 14 Sup. Ct. 499, 503 (38 L. Ed. 885).

The act of the Legislature under consideration provides that whoever knowingly erects, uses, or maintains a building for the purposes of lewdness, assignation, or prostitution is guilty of a nuisance, and the building and ground so used, and the furniture and fixtures, are also declared to be a nuisance, and shall be abated as provided. The court is authorized, once the acts forbidden are established, to order the sale of the fixtures, and to decree the effectual closing of the building or place against its use for any purpose for one year, unless sooner released.

[11] The authority of the state to enact this statute under the police power is too plain to require the citation of authorities.

The punishments inflicted by the act, supra, are appropriate, and are far short of the total destruction of the real estate. They are reasonably calculated to deter evil-minded persons from pursuing the practices which the act denounces, and should be sustained.

Various authorities are cited by appellants in support of the last assignment of error, in particular the case of *Bristol*, etc., Co. v. *Bristol*, 97 Va. 304, 33 S. E. 588, 75 Am. St. Rep. 783. This latter case deals with an ordinance of the city of Bristol, and with the extent of the judicial power in connection with the abatement of a building as a nuis-

ance. Neither this nor the other cases cited are in point on the situation presented in the case in judgment. This is a proceeding under a statute passed by the state in the valid exercise of the police power. The action taken by the trial court upon ascertainment that the defendants had committed the acts denounced by the statute was pursuant to the express authority afforded by that statute.

We find no error in this record, and the decree of the corporation court of the city of Newport News is affirmed.

Affirmed.

(130 Va. 392)

JUDY et al. v. DOYLE.

(Supreme Court of Appeals of Virginia.
June 18, 1921.)

1. Municipal corporations \S 706(4)—Testimony as to custom of transporting mower blades inadmissible on issue of negligence in parking truck with protruding blades.

In an action for injuries to a bicycle rider, who ran into the sharp edges of mowing machine blades projecting from defendant's truck, in riding between truck and automobile parked next to truck along side of street, in which it was claimed that defendant was negligent in parking truck with open blades protruding toward other automobile parked in close proximity, but in which there was no issue as to whether the placing of the blades in the truck so as to protrude therefrom was in itself negligence, testimony that it was the custom of careful and prudent farmers in the community to transport mower blades to their farms in such manner held inadmissible; such testimony having no bearing on question of whether parking of truck in such manner was negligence.

2. Municipal corporations \S 705(6)—Driver, who parked truck with sharp mower blades protruding toward automobile parked in close proximity, held negligent.

Driver of truck with sharp edges of mower blades projecting therefrom, who parked truck so that the blades extended toward car parked next to truck, leaving a very narrow passage between truck and such car, so as to endanger persons passing between the truck and such automobile, and who left truck unattended, without wrapping burlap or other material around the protruding blades, or inclosing them between boards, held negligent.

3. Municipal corporations \S 705(2) — Driver of vehicle must drive to the right on meeting another vehicle.

The driver of a vehicle, meeting another vehicle, must seasonably drive to the right-hand side.

4. Municipal corporations \S 705(6) — Truck driver, negligently parking truck with sharp blades projecting, liable for injuries to bicycle rider, though not anticipating accident.

Driver of truck, with sharp edges of mower blades projecting therefrom, who parked truck

so that the blades extended toward car parked next to truck, leaving a very narrow passage between truck and such car, so as to endanger persons passing between the truck and such automobile, and who left truck unattended, without wrapping burlap or other material around the protruding blades, or inclosing them between boards, held liable for injuries to a bicycle rider, who ran into and was cut by blades in attempting to ride between truck and such automobile to save himself from a collision, though the truck driver, in so parking truck, did not anticipate his negligence in so doing would result in such accident.

5. Negligence \S 59—Precise injury need not have been anticipated.

One who is negligent is liable for all the consequences which naturally flow from the negligent act, viewing the case retrospectively, regardless of whether they could have been reasonably anticipated; it being sufficient if he ought to have anticipated that the accident was likely to result in injuries to others.

6. Municipal corporations \S 705(10)—Bicycle rider held not contributorily negligent in riding between parked automobiles to avoid collision.

A bicycle rider, who rode into a narrow passage between truck and other automobile parked along sidewalk to avoid being caught between two automobiles approaching him and automobile driving behind and in same direction as bicycle, and who was injured by the open mowing machine blades projecting from truck, held not contributorily negligent, precluding recovery, in action for truck driver's negligence in so parking truck.

7. Municipal corporations \S 706(6) — Truck driver's negligence in parking truck with sharp mower blades projecting therefrom, as proximate cause of injury, held for jury.

In an action for injuries to bicycle rider, who ran into open mowing machine blades projecting from parked truck in attempting to ride between truck and other parked automobile, to avoid collision with automobiles approaching him from opposite direction, the question of whether truck driver's negligence in so parking automobile was the proximate cause of the injury held for the jury.

8. Negligence \S 136(25) — Proximate cause for jury.

It is the province of the court to determine in the first instance whether or not the facts offered in evidence to prove injury are too remote from the defendant's negligence to constitute an element of the plaintiff's recovery, and where the court is unable to ascertain such remoteness, the question of proximate cause is ordinarily for the jury, to be determined as a fact in view of the circumstances.

9. Negligence \S 119(6)—Plaintiff's testimony alone considered on question of contributory negligence, where defendant failed to give statutory notice.

Where defendants failed to give the notice relating to the defense of contributory negligence required by Code 1919, \S 6092, the court properly limited the evidence on the issue of

contributory negligence to that introduced by the plaintiff.

10. Appeal and error \S 1004(1)—Verdict not disturbed as excessive, unless prejudice or mistake is shown.

Appellate court will not disturb the verdict, unless the damages are so excessive as to warrant the conclusion that the jury must have been influenced by partiality or prejudice, or have been misled by some mistake in view of the merits of the case.

11. Damages \S 132(8)—\$7,542.85 verdict for injuries to arm, permanently distorting hand, held not so excessive as to warrant appellate court's interference.

Verdict for \$7,542.85 for injuries to 12 year old boy's arm, resulting in a permanently maimed and distorted hand and in the boy's being physically incapacitated for usefulness at least 60 per cent., held not so excessive as to warrant interference by appellate court.

Error to Corporation Court of Fredericksburg.

Action by John M. Doyle, Jr., by his next friend, against A. H. Judy and another. Judgment for plaintiff, and defendants bring error. Affirmed.

F. M. Chichester and A. T. Embrey, both of Fredericksburg, for plaintiffs in error.

Wm. W. Butzner and C. O'Connor Goolrick, both of Fredericksburg, for defendant in error.

SAUNDERS, J. This action was brought by the defendant in error, an infant under the age of 12 years, suing by his next friend, against the plaintiffs in error, to recover damages for an injury to the right arm of the plaintiff, alleged to be due to the negligence of the defendants.

The trial resulted in a verdict for the plaintiff for \$7,542.85, upon which the judgment under review was rendered. The pertinent facts, and the circumstances under which the injury complained of was suffered, are as follows:

The appellants, A. H. Judy and W. G. Keckler (defendants in the trial court), operated a farm in Stafford county, under a partnership arrangement. In the discharge of certain duties in connection with the farming operations, W. G. Keckler came to Fredericksburg, on August 23, 1919, in a Ford auto-truck. While in town, he purchased for the use of the farm three mowing machine blades, which he placed in the body of the truck. Two of these blades were 65 inches long, and the third one 77 inches long.

A mowing machine blade, according to the description given, is a piece of tough steel from 65 to 77 inches, or more, in length, about five-sixteenths of an inch thick, and seven-eighths of an inch wide. In this strip holes are drilled, and sections riveted thereon.

These sections have one blunt end, are about 3 inches wide at the base, and are in the shape of the following figure:

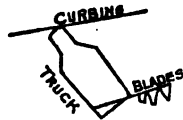
The edges of the sections are beveled, and ground very sharp. Ordinarily about 24 of these sections are riveted on a 6-foot blade.



"At the end of the blade that is constructed to fit into the pitman is a ball, part of the ball and socket joint; the socket being on the end of the pitman." This end of the blade is called the knuckle end.

According to the testimony, the defendant Keckler placed these blades in his truck body, piled the one on the other, with the sharp edges of the sections exposed. The knuckle ends were in the forward left-hand corner of the body, and the other ends in the rear right-hand corner; "the blades being thus diagonally across the said body, and projecting from the rear." The extent of this projection is stated in varying terms. Averaging these statements, it may be said with substantial accuracy that the blades projected from 18 to 20 inches beyond the tail end of the truck body. The box constituting the rear end of the truck was 54 inches long, 34 inches wide, and 5 inches deep; the bottom of this body being 33 inches from the ground, and projecting backward over the rear axle 28 inches. Having loaded the loose blades upon his truck in the fashion described, Keckler proceeded by various streets to Caroline street, also called Main street, and the principal street of the city. He proceeded southward along this street to about the middle of the block, and parked his car at an angle of about 45 degrees to the curb line, with his front wheels against the curb. The relative location to the curbing of the truck and of the projecting blade ends, with their sharp cutting edges facing the street, are given in the following figure, which is merely illustrative, and not undertaken to be drawn to scale:

The truck was parked between two cars, "quite a large one being on the upper side of the truck, which, to one coming down the street, obscured in part the view of the truck." There was very little space between the truck and the car next down the street, and about 3 feet between it and the car next above, and up the street. These cars were parked at about the same angle as the Ford truck.



On the left side of Caroline street—that is, the east side—and opposite from and slightly below the place where the truck was parked, was a pile of brick and other debris in the street. A Ford sedan was parked near this rubbish heap, and extending into the street further than it should have done. This rubbish heap and sedan so obtruded upon the

street that when cars were parked on the opposing side, as was the case at the time of the accident, the street was reduced to a mere alleyway for a short distance, so much narrowed, indeed, that in this "throttle" two cars could not pass.

Having parked his car as described supra, Mr. Keckler left the same unattended, and went off to purchase a pair of shoes. Coming, now, to the immediate circumstances of the accident, and the conduct of the plaintiff, it appears that the latter was riding a bicycle slowly and carefully down Main, or Caroline, street. Behind the boy was a motor car, also going down Main street. In front of the boy, coming up Main street, and approaching the "throttle," were two motor cars. The front car stopped in, or just at the mouth of, the "throttle." This action caused the second car to turn slightly to the left (or west) side of the street, and as it continued to move forward, it completely closed the narrow passage left for moving cars. Thus the boy was caught between the cars in front, and the one approaching in his rear. In his search for safety he swerved to the right, riding close to the cars parked on that side of the street. When he came to the opening between the defendant's truck and the car north of it, he headed in for the sidewalk, ran into the projecting blades, and was badly cut in the right arm. Dr. A. J. Wilson, a veterinary surgeon, who saw the accident, describes it, and the attendant circumstances, as follows:

"I was looking at the time up Main street for some reason, when this boy came riding down the street on a bicycle, and it appears the way was blocked, so that the boy could not get through, and I saw him turn in, go towards the sidewalk with his bicycle, and strike these blades. * * *

"Q. What caused young Doyle to turn in towards the car with the blades in it?

"A. The street was blocked; he couldn't help himself; it was the only salvation he had; he thought there was an opening he could get through to the sidewalk. The street was blocked with another team, or an automobile, I couldn't say which. * * *

"Q. And you say he turned to the right to avoid the approaching car?

"A. Yes, sir. * * *

"Q. Did you see the boy when he turned in to escape this jam?

"A. Yes, sir.

"Q. At what speed?

"A. Not very fast, just creeping, moseying along. * * *

"Q. How far was the car from him—that is, the car going in the opposite direction—when he turned in?

"A. Right about behind me—might have been down Main a little; it was right close to me.

"Q. How many car lengths from him?

"A. About one car length. * * *

"Q. Tell the jury the exact position of the boy and his wheel at the time he was cut.

"A. He turned in, these blades sticking out

in this way (indicating) extending behind the car, and came in contact with the blades when he turned, and of course, sticking that way the impaction with these blades severed the arteries in the boy's arm. * * *

"Q. From what you saw, please state whether or not young Doyle lost control of his machine before he struck the blades.

"A. I don't think so."

Henry Satterwhite, another eyewitness of the accident, testifies in part as follows:

"Q. Just before he came in contact with the blades, in which direction was he looking, and what did he appear to be looking at?

"A. At the cars that were coming towards him, and down Main street.

"Q. And then what did he do?

"A. He got up close to the car; he was pretty close to the cars that were parked on the right-hand side of Main street.

"Q. What did he do just before he came in contact with the blades?

"A. He must have put on his brakes; he slid down and lurched into the car. * * *

"Q. Did he lose control of his wheel, as far as you were able to observe?

"A. I don't think he did. He stopped it because he was in a close place. I am sure he did not lose control of his wheel, because when he stopped his wheel he lurched to the right side, and went to put his feet down and catch himself.

"Q. And it was then he came in contact with the blades?

"A. Yes, sir.

"Cross-Examination.

"Q. Could the little man have seen these blades, if he had been observant?

"A. I don't think anybody would have noticed them, if they had been in the place he was in.

"Q. What was that?

"A. Because, when you are in close, you are not looking on the right-hand side; you are looking out at what is in front, and trying to get out of the way.

"Q. His attention, then, seems to have been occupied with the oncoming vehicle, and not with the truck?

"A. No, sir; I do not think he could have paid any attention to the standing truck with the car coming right towards him.

"Q. When his wheel stopped, you say it kind of turned to the right?

"A. It lurched to the right.

"Q. That is, the whole wheel would have fallen to the ground, if he had not been on it?

"A. It would have fallen; but, when anybody goes to stop a wheel, they always lurch to the right, and put their foot down and catch themselves."

Dr. C. Mason Smith, describing the injuries suffered by the plaintiff, states that the large artery in the arm, called the brachial artery, and all the veins in the front of the arm, and the nerves, were severed; also the biceps muscle and tendon. In the opinion of Dr. S. L. Scott, a witness for the plaintiff,

the boy is incapacitated for physical usefulness, conservatively speaking, 60 per cent.

The boy's right forearm is smaller than the left, the hand and fingers of that arm are smaller, the arm itself a little crooked, and the second, third, fourth, and fifth fingers of the hand are contracted.

The defendants filed six bills of exceptions in the progress of the trial. The first three exceptions related to certain testimony offered by the defendants and excluded by the court.

This testimony undertook to establish—"the usual manner in Virginia, and in the Fredericksburg community, in which careful and prudent farmers transport mower blades from the retail stores to their farms, and that the method of transportation adopted by the defendants with the blades in question was similar."

Apart from other objections that might be made to this testimony, it was plainly irrelevant.

[1] The issue between the parties in the instant case was not whether for the purpose of continuous transport through the streets of Fredericksburg, or along the highways of the county, the mower blades were packed in a reasonably sufficient and prudent fashion, but whether the defendant failed to use ordinary care when he parked his car with the open and protruding blades, as described, and left the same unattended. Conceding that the defendants could have fully proved that when the truck was in motion, the exposed and protruding blades were not a menace or source of danger to other travelers on the streets or highways, such evidence would in no wise have aided the solution of the precise issue presented in the instant case. There was no error in the action of the trial court excluding this testimony.

A further contention of the defendants is:

That the "defendants' truck had the right to be where it was, and in the manner in which it was," and that, this being so, the "defendants were not liable, whether the injury complained of was the result of pure accident, or the result of contributory negligence on the part of the plaintiff, or of both of these causes combined."

[2] Undoubtedly the defendants enjoyed the right to park their car on the street, and for the extent of time allowed by law, they were entitled to the use of the space so occupied. But they had no right to occupy measurably the space between their truck, and the next car above it, with a vicious and dangerous implement liable to inflict injuries upon others exercising ordinary care in their use of the streets.

[3-5] Under the conditions of modern traffic, the streets of a city are used by many forms of motor and other vehicles, including bicycles. Pursuant to the law of the road,

the driver of a vehicle, meeting another vehicle, must seasonably drive to the right hand. The rider of a bicycle, when threading his way along a congested street, filled with other speeding vehicles of a far more massive and pretentious character, must often seek safety by pursuing the very course followed by the plaintiff in the instant case, namely, by turning into the curb at the first opening which presents itself. Under such circumstances, he should not be unexpectedly confronted, in his quest for safety, with the sharp and serrated edges of exposed and dangerous implements. Ordinary prudence would suggest to the owner of a car that, if he proposed to park the same under the conditions appearing in this case and leave it unattended, he should at least wrap in burlap, or other material, the dangerous implements which he carried, or inclose them between boards in the fashion described by one of the witnesses. Doubtless the defendant, when he parked his car, did not anticipate the concurrence of circumstances which resulted in the injuries suffered by the plaintiff; but if this act of his was a negligent one, and in our judgment it was, the defendant's liability does not depend upon his ability to foresee the ensuing circumstances in precise detail. The rule of liability in cases of the character of the one in judgment was announced in *N. & W. Rwy. Co. v. Whitehurst*, 125 Va. 263, 99 S. E. 569, in the following terms:

"The 'forceableness,' or reasonable anticipation, of the consequences of a wrongful or negligent act, is not the measure of liability of the guilty party, though it may be determinative of the question of his negligence. When once it has been determined that the act is wrongful or negligent, the guilty party is liable for all of the consequences which naturally flow therefrom, whether they were reasonably to have been anticipated or not, and, in determining whether or not the consequences do naturally flow from the wrongful act or neglect, the case should be viewed retrospectively; that is, * * * looking at the consequences, were they so improbable, or unlikely to occur, that it would not be fair and just to charge a reasonably prudent man with them? If not, he is liable.

"This is the test of liability; but, when liability has been established, the extent is to be measured by the natural consequences of the negligent or wrongful act. The precise injury need not have been anticipated. It is enough if the act is such that the party ought to have anticipated that it was liable to result in injury to others."

See, also, to the same effect, the case of *Tripp v. City of Norfolk*, 129 Va. —, 106 S. E. 360, and the cases therein cited.

The question presented in this case is whether the defendants used reasonable care and skill in the exercise of the lawful right to occupy the street. Certainly, upon the facts presented, reasonably fair-minded

men, to say the least, might differ over the question of the exercise of reasonable care on the part of the defendant in parking and leaving his truck with the mowing blades exposed in the manner depicted by the evidence. The court remitted to the jury under a proper instruction the determination of three questions:

First, whether the defendants, in respect of parking and leaving their truck under the circumstances disclosed, failed to use ordinary care.

Second, if the jury considered that the defendants did fail in this respect, whether such failure on their part was the proximate cause of the plaintiff's injury.

Third, whether the injury sustained by the plaintiff, was sustained on his part while exercising such a degree of care and caution as under the circumstances might reasonably be expected from one of his age and intelligence.

[6] The jury found for the plaintiff on all of these issues, and there is no ground apparent for disturbing their verdict. With respect to contributory negligence, and the degree of care and prudence to be expected of a boy of the plaintiff's age and intelligence, the jury was fully instructed. The evidence clearly shows that young Doyle was accustomed to drive motor vehicles, knew how to ride a bicycle, and was acquainted with the life and dangers of the streets of a city. It is positively established by the testimony of the eyewitnesses to the accident that the boy was proceeding at this time in the most careful and judicious manner, and that his unexpected collision with the mowing blades was in no wise due to recklessness or failure to exercise ordinary care and prudence. At the time that he turned into the curb, the plaintiff was confronted with a situation likely to occur to a bicycle rider at any time on a street crowded with traffic, and particularly likely to occur on a street narrowed, as Main street was at the place of the accident, by cars parked on both sides of the thoroughfare, supplemented by a large rubbish heap. Under such circumstances, the child might have lost his head; but the testimony shows that he did not, but proceeded with care and circumspection. Apart from the finding of the jury, we are of opinion from the evidence that the plaintiff was not guilty of contributory negligence.

[7] The contention of the defendants that their initial negligence was not the proximate cause of the plaintiff's injury, but that this injury was directly traceable to the independent act of one Shelton, is not supported by the law, or the facts of this case. Two cars were approaching the boy. The one in front stopped. Thereupon Shelton, who was driving the second car, turned to the left and entered the "throttle," or narrow passageway between the rubbish pile and

the Ford sedan on the east side of the street and the truck and the other cars on the opposing side, thus making it necessary for the boy to steer to the right, and enter the space above the truck. It is true that the mower blades were not occupying the alleyway, or "throttle"; but they were occupying in part a portion of the street which the rider of the bicycle was entitled to use for the purposes of safety, when confronted with the situation presented in the instant case, arising from the use of a congested street by vehicles moving in opposite directions. It is to be expected, and to be prepared for, that in a line of moving vehicles some one vehicle may unexpectedly stop. The drivers of other vehicles must be prepared to act according to the circumstances in which each one finds himself. Shelton, in the exercise of ordinary care, turned to the left when the vehicle in front stopped. This was the proper thing to do. The plaintiff, in the exercise of the same care, turned into an apparently open space, seeking the curb, and intending to stop until Shelton's car had passed. On his way to the curb, proceeding slowly, he ran into the exposed mower blades.

[8] It is the province of the court to determine in the first instance whether or not the facts offered in evidence, tending to prove an injury to a plaintiff, are too remote from the defendant's act of negligence to constitute an element of the plaintiff's recovery. *Fowlkes v. Southern R. R. Co.*, 96 Va. 742, 32 S. E. 464.

But the trial court found itself unable to make this ascertainment of remoteness, and instructed the jury to determine from the evidence whether the defendants failed to exercise ordinary care, and whether this failure, if it took place, was the proximate cause of the plaintiff's injury. This action of the court, as heretofore noted, was proper, under the circumstances, and in no wise to the prejudice of the defendants. "The true rule is that what is the proximate cause of an injury is ordinarily a question for the jury. It is not a question of science or of legal knowledge. It is to be determined as a fact, in view of the circumstances of fact attending it." *Railway Co. v. Kellogg*, 94 U. S. 469, 24 L. Ed. 256. The outstanding facts of this case are, first, the failure of the defendants to use reasonable skill and care in the exercise of the lawful right to occupy the street; second, the resulting injury to the plaintiff, through no fault of his, while lawfully using the same thoroughfare.

[9] Defendants assign as error the failure of the court to give instructions A, B, F, and G, asked for on their part. In view of the principles and conclusions heretofore announced, A and G were properly refused, since in substance they directed the jury to find for the defendants upon the theory that, on the facts established by the evidence, the

defendants as a matter of law were not liable for the injuries suffered by the plaintiff. Instruction B was modified, and given for the defendants as instruction J. This modification consisted in adding, after the words "all the circumstances of this case," the words "as disclosed from the plaintiff's testimony." This addition was proper, as the defendants had failed to give the notice relating to the defense of contributory negligence required by section 6092 of the Code. Instruction F was modified in the same manner as instruction B, and given for the defendants as instruction L.

The instructions given by the court covered all the necessary features of the case, and fully and accurately presented the law to which the parties were respectively entitled. Neither in the instructions given, nor in the instructions refused, do we find error.

[10, 11] Defendants' final assignment of error is that the verdict was excessive and on that ground should have been set aside. The boy was severely injured, and is left with a maimed and distorted hand. In the judgment of one physician, he is "physically incapacitated for usefulness at least 60 per cent." There is hope of some relief from his present condition by an operation, but the success of that operation is entirely problematical. There is no evidence that the jury was moved by passion, gross error, or improper motives to the prejudice of the defendants. As this court said in *Southern Railroad Co. v. Smith*, 107 Va. 553, 560, 59 S. E. 372, 375:

"There is no rule of law fixing the measure of damages in such cases, and it cannot be reached by any process of computation. It is, therefore, the established rule, settled by numerous decisions extending from *Farish & Co. v. Reigle*, 11 Gratt. 697, 62 Am. Dec. 686, to * * * *N. & W. R. R. Co. v. Carr*, 106 Va. 508, 56 S. E. 276, that this court will not disturb the verdict of the jury, unless the damages are so excessive as to warrant the belief that the jury must have been influenced by partiality or prejudice, or have been misled by some mistaken view of the merits of the case."

It is not considered that the facts of the instant case justify such a conclusion.

We find no error in the action of the trial court, and the judgment complained of is affirmed.

Affirmed.

(130 Va. 464)

NORTH SHORE IMPROVEMENT CO. v. NEW YORK, P. & N. R. CO. et al.

(Supreme Court of Appeals of Virginia. June 16, 1921.)

1. Customs and usages §17—Custom cannot change express contract.

Where a bill of lading provided for delivery of a car at a particular crossing in Nor-

folk, a general custom on the part of the carrier to tender delivery of cars consigned to Norfolk in Port Norfolk is not binding or admissible in evidence, for custom can never override the express provisions of the contract.

2. Carriers §100(1)—Where bill of lading calls for delivery at particular crossing, demurrage cannot be charged until delivery is so made at variance with custom.

Though it was the custom of carriers to tender delivery of cars consigned to Norfolk at Port Norfolk, yet where a bill of lading called for a delivery at a particular siding in Norfolk, the custom cannot modify the written contract of the parties, and until delivery is made at such siding demurrage cannot be charged.

3. Appeal and error §1175(2)—Judgment, incorrect in law, may be reversed by appellate court.

Where an action was tried on an agreed statement of facts, but judgment was incorrectly rendered for defendant, the appellate court may, pursuant to Code 1919, § 6365, reverse the judgment for defendant, and render judgment for plaintiff.

Error to Law and Chancery Court of City of Norfolk.

Action by the North Shore Improvement Company against the New York, Philadelphia & Norfolk Railroad Company and Walker D. Hines, Director General of Railroads. There was a judgment for defendants, and plaintiff brings error. Reversed, and judgment rendered for plaintiff.

Baird & White and R. Clarence Dozier, all of Norfolk, for plaintiff in error.

Willcox, Cooke & Willcox, of Norfolk, for defendants in error.

BURKS, J. This is an action against the New York, Philadelphia & Norfolk Railroad Company and Walker D. Hines, Director General of Railroads, to recover the value of a carload of cement and the freight paid thereon, which cement the defendants failed and refused to deliver to the plaintiff, consignee, after it had paid the freight thereon. Neither party requiring a jury, the case was tried by the court on an agreed statement of facts, and the court rendered judgment for the defendants. To that judgment the plaintiff excepted, and the case is here on a writ of error awarded by one of the judges of this court.

The facts agreed, as far as they need be stated, are as follows:

"The car in question was shipped in accordance with the terms of the bill of lading offered in evidence by the plaintiff. Upon its arrival in Norfolk notice was given to the plaintiff of that fact and of the amount of freight due thereon. Subsequently the plaintiff paid the freight and obtained the receipt therefor offered in evidence. Later in the day upon which this payment was made, the plaintiff was notified that there was demurrage due on the car,

which had accrued prior to the payment of freight, and was told that this demurrage would have to be paid before it could obtain possession of the car. The plaintiff thereupon refused to pay any demurrage charges because the car had not been delivered to Colley Avenue siding, the place mentioned in the bill of lading. The car was thereupon regularly stored and disposed of.

"It is further agreed that the car was never delivered or tendered at the Colley Avenue siding, or any other place except Port Norfolk, Norfolk county, Va., that being the place which it had been the custom of the railroad for a number of years to tender cars consigned to Norfolk. It is agreed that the president of the plaintiff company would testify that his company had only been doing business in Norfolk about 18 months, and had no knowledge of the custom in question. That the custom is to hold cars at Port Norfolk, notify the consignee that they are held there subject to its orders, and upon the payment of all proper charges, to deliver according to the orders of the consignee; * * * that the liability in this case, if any, is upon the Director General, and that the Colley Avenue siding is not owned by the New York, Philadelphia & Norfolk Railroad, but was at the time in question under the control of the Director General."

The bill of lading referred to shows the shipment of the cement from Coplay, Pa., over the Lehigh Valley, New York, Philadelphia & Norfolk, and Norfolk & Western Railroads to North Shore Improvement Company, Colley Avenue siding, Norfolk, Va. The receipt offered in evidence is dated February 6, 1919, and is for \$118.50 freight, and \$3.56 war tax. The receipt is on a printed form, apparently intended to give notice of the arrival of goods and other information. Stamped on the face of it is the date January 30, 1919, and, "This car is held at Port Norfolk, subject to orders of consignee," and, "This car will earn demurrage from 7 a. m. Feb. 1, 1919, as follows," stating the amounts.

The agreed statement of facts shows that the plaintiff had notice of the arrival of the car and the amount of freight due thereon. It does not appear how this notice was given, or that the plaintiff had any notice of when the demurrage would begin, or that any had already accrued, or that the printed receipt was ever seen by any officer or agent of the plaintiff until the freight was paid February 6, 1919. It affirmatively appears that "later in the day upon which this payment was made the plaintiff was notified that there was demurrage due on the car, which had accrued prior to the payment of the freight, and was told that this demurrage would have to be paid before it could obtain possession of the car," and that the plaintiff refused to pay the demurrage because the car had not been delivered to the Colley Avenue siding. It thus fairly appears that at the time the freight was paid the plaintiff had no actual notice of any demand upon it for demurrage. Nor could the tariff filed with the Interstate

Commerce Commission give constructive notice of demurrage charges if the car had not yet reached its destination.

[1] The statement of facts shows that—

"It has been the custom of the railroad for a number of years to tender at Port Norfolk cars consigned to Norfolk."

But the car in question was not consigned to Norfolk, but to a designated siding in Norfolk. Furthermore, there is no sufficient evidence that this usage of the company, designated "custom," was so general as to charge the plaintiff with knowledge thereof, and it does not appear that he had actual notice. The existence of the usage, however, if known to the plaintiff, would not override the express provisions of a contract in conflict therewith. Contracts not contrary to a trade usage, and which are silent on the subject of the usage, are deemed to have been made with reference to such usage, because such is the presumed intention of the parties, provided the parties have actual or imputed knowledge of the usage. But if the contract deals with the subject of the usage and conflicts therewith, the contract prevails. Thus, if I contract for the construction of a brick wall at so much per thousand, saying nothing as to how the count is to be made, and there is a trade usage to estimate the number of bricks by allowing so many per cubic foot, I will be bound by that usage if I know of it, or if it was so general and universal that I ought to have known of it, but if I contract for the wall at so much per thousand, actual count, the trade usage is eliminated, and the contract fixes the method of ascertaining the number of bricks to be paid for. *Richmond v. Barry*, 109 Va. 274, 63 S. E. 1074. So here it is immaterial how general and universal the usage may have been as to cars consigned to Norfolk, or what knowledge the plaintiff may have had thereof, the usage is eliminated as a part of the agreement of the parties, because the contract of the parties (the bill of lading) called for delivery of the car at a particular siding in the city of Norfolk. The contract is in conflict with the usage, if otherwise applicable, and overrides it.

"Proof of usage can only be received to show the intention or understanding of the parties in the absence of a special agreement, or to explain the terms of a written contract. * * * In all cases where evidence of usage is received, the rule must be taken with this qualification, that the evidence be not repugnant to or inconsistent with the contract." *Tilley v. County of Cook*, 103 U. S. 155, 162 (28 L. Ed. 374). "No usage can be incorporated into a contract which is inconsistent with the terms of the contract." *Orient M. Ins. Co. v. Wright*, 1 Wall. 456, 17 L. Ed. 505.

In speaking of a written contract, expressed in clear and unambiguous language, this court has said:

"Extraneous evidence of a custom which alters or varies the terms of such a contract is, upon familiar principles, inadmissible." *Sutherland v. Gibson*, 117 Va. 844, 845, 86 S. E. 108.

To the same effect, see *Straus v. Fahed*, 117 Va. 633, 85 S. E. 969; *Charles Syer & Co. v. Lester*, 116 Va. 541, 82 S. E. 122. In *Dixon v. Dunham*, 14 Ill. 324, 326, it is said:

"No usage or custom can be admitted to vary or control the express terms of a contract, but they may be admitted to determine that, which by the contract is left undetermined. The parties, by the contract, may abrogate any custom, no matter how ancient or uniform, but such custom cannot abrogate the terms of a contract. Whenever there is a conflict, the contract must control."

Many other cases could be added to the same effect.

[2] Counsel for the defendant in error, in their brief, correctly state the case when they say:

"There is only one real question in this case: Had the car reached its destination for the purpose of demurrage when it arrived at Port Norfolk? The defendant relies only on its custom to support its contention in this case."

We have already indicated plainly our answer to the question propounded and the reasons therefor, as applied to the facts of this case.

In *Scovern v. Chicago, etc., R. Co.*, 189 Ill. App. 126 (1914), the bill of lading called for delivery of cars at "Morgan street team tracks Chicago, Illinois." The carrier transported the cars to Chicago, and placed them on a "holding and inspection track" on its line at Western avenue in said city. The consignee refused to accept delivery at Western avenue, and asked that the cars be placed on the Morgan street team tracks. The carrier insisted that the Western avenue "holding and inspection tracks" was the usual place of delivery intended by the contract of the parties; that by the rules and custom of the carrier, which were well known to the plaintiff, Western avenue was the place of delivery for all cars consigned to the Morgan street team tracks, and that the Western avenue tracks was the place of delivery fixed by the bill of lading, which, in addition to the designation of the "Morgan street team tracks" as the place of delivery, also contained the provision that the carrier was to carry the car "to its usual place of delivery at said destination." The court, however, took a different view, and held that where the bill of lading designates a certain side track in a city as the destination of a shipment, the delivery must be at the side track designated, and the fact that the bill of lading also contains a provision for carriage "to its usual place of delivery at said destination," and that under the rules and general customs of the company cars were

delivered at a certain "holding and inspection track" two miles distant from the siding designated does not authorize the introduction of evidence of such custom for the purpose of establishing a destination other than that named in the bill of lading. Furthermore, that a clause in a bill of lading providing for carriage "to its usual place of delivery at said destination" does not give the carrier the right by its rules and custom to change the place of destination specifically named in the bill of lading, even though the holder of the bill of lading had knowledge of the carrier's rules and custom in that respect.

In *Texas, etc., R. Co. v. Driskill* (1910) 61 Tex. Civ. App. 310, 128 S. W. 466, the holding of the court is well stated in the syllabus as follows:

"Where a railroad company contracts to deliver a car of lumber to the consignee in a specified part of a city, a tender of the lumber to the consignee at its station in the city is not a compliance with its undertaking, and its failure to deliver in the part of the city specified is a breach of its contract, so that a sale of the lumber for charges claimed to be due thereon was a conversion thereof, which made it liable to the shipper for its value."

In this case a rehearing was asked by both plaintiff and defendant, but was refused in separate opinions.

In *New York, etc., R. Co. v. Porter* (1915) 220 Mass. 547, 108 N. E. 499, there was a consignment of coal to the private tracks of the consignee, which were under the exclusive control of the carrier. The carrier refused to make such delivery until the freight was paid, and subsequently charged demurrage. The court held that—

"Where a shipment of coal was consigned for delivery to a coal dealer on a private track, which was located on the land owned by the dealer, but under exclusive control of the carrier, the carrier was not entitled to payment of freight or to demurrage until the cars had been delivered on that track."

In the course of the opinion of Judge Loring it is said:

"In our opinion the question is whether the plaintiff was entitled to the freight before it had completed the transportation. It is plain that it was not. The case comes within the elementary proposition that in the absence of a special stipulation a man is not entitled to his pay until he has finished his job. See, for example, *Adams v. Clark*, 9 Cush. 215, 216, 217, 57 Am. Dec. 41."

In *Lee v. Erie R. Co.*, 173 App. Div. 75, 77, 158 N. Y. Supp. 730, 732, it was said:

"It was a part of the implied contract duty of the defendant to place this car on the plaintiff's private track, and until it did so it had not performed its contract, and no freight or demurrage charges, although previously earned, were collectable. The contract of transporta-

tion by a common carrier includes placing the cars conveniently for loading and unloading. The incidental consignee can require the car to be placed at a convenient point for unloading and a reasonable opportunity therefor. When the consignee, as in this case, has his own track, and requires a car to be placed thereon for unloading, it is the duty of the transportation company to comply with his requirement. This was not done in the present case, nor was the car ever in a position where it could be conveniently unloaded. In *New York, etc., R. Co. v. General Electric Co.*, 187 App. Div. 728, at page 732, 153 N. Y. Supp. 478, at page 482, it was said by this court, speaking through Mr. Justice Woodward: "We believe it may be laid down broadly that transportation by railroad of carload lots, under present day conditions, requires a convenient placing of the car for loading, and an equally convenient placing of the car for unloading, and that the mere question of whether the tracks are upon the property of the shipper or upon the right of way of the transportation company is of no consequence upon this point. Primarily, it is the duty of the transportation company to afford sidings, and a convenient place of loading or unloading, and a proper placing of the cars. If the shipper furnishes the sidings, it does not relieve the transportation company of the duty of conveniently placing the cars."

The only cases cited for the defendant in error are not applicable to the facts of the present case. In *Swan v. Railroad*, 106 Tenn. 229, 61 S. W. 57, it does not appear that any particular place of delivery was specified in the bill of lading, other than the city of Nashville. The consignee insisted on delivery on a siding over which the carrier had no control, as the usual place of delivery on such shipments, and refused to pay freight or demurrage unless and until such delivery was made. The consignee was of doubtful solvency, and the court said:

"The defendant company could not be required to part with the possession and control of the property until its legitimate charges were paid, and to have placed it on the plaintiff's premises, where he could unload it as he saw proper and when he pleased, was virtually to part with possession, and to surrender its lien for freight and other charges"

—and this it was under no obligation to do. No such question is involved in the instant case, as the agreed facts state that the delivery siding "was at the time in question under the control of the Director General," who was the carrier.

In *Citizens' Bank v. Norfolk & W. R. Co.*, 115 Va. 45, 78 S. E. 568, the point of destination of cars of coal was Lambert's Point, and it was held that, when the cars reached

the Lambert's Point terminals, where such cars were usually to await the arrival of the ship which was to take on the coal, they had reached their destination, although such terminals covered a distance of six miles. Furthermore, the shipment was a foreign shipment, controlled by the rules of the Interstate Commerce Commission, which made the terminal yards aforesaid the destination and provided for the demurrage charge.

In *Berwind-White Coal Mining Co. v. Chicago, etc., R. Co.*, 235 U. S. 371, 35 Sup. Ct. 131, 59 L. Ed. 275, a mere memorandum opinion was rendered. The facts were not very fully given. The shipments involved were of carloads of coal from West Virginia to Chicago, there to be reconsigned. They were not shipped to any particular point in Chicago, and the fact that they were there to be reconsigned would seem to indicate that they were to be placed at such point as was usual for such reconsignment. They were so placed. The memorandum opinion says:

"The facts are these: The storage tracks of the railroad for cars billed to Chicago for reconsignment were at Hammond, Ind., a considerable distance from the terminals of the company nearer the center of the city, but were convenient to the belt line by which cars could be transferred to any desired new destination, and the holding on such tracks of cars consigned as were those in question was in accordance with a practice which had existed for more than 20 years. Under these circumstances the contention is so wholly wanting in foundation as in fact to be frivolous."

[3] This decision rendered in 1914 affirms the Appellate Court, First District, of the state of Illinois, which is the same court that rendered the decision in 1914, in *Scovern v. Chicago, etc., R. Co.*, supra. We find nothing in the *Berwind-White Case* that in any way contravenes our holding in the case at bar. By the "facts agreed" it is conceded that the car never reached the destination called for in the bill of lading, and under the law the defendant in error had no right to charge demurrage thereon. The judgment of the trial court must therefore be set aside because the law applicable to the "facts agreed" is in favor of the plaintiff in error, and this court, in pursuance of section 6365 of the Code, will render final judgment in favor of the North Shore Improvement Company (plaintiff in error) against Walker D. Hines, Director General of Railroads of the United States (defendant in error) for the sum of \$786.65, with interest thereon at 6 per cent. per annum from March 1, 1919, until payment, and for the costs.

Reversed.

(130 Va. 245)

(108 S.E.)

W. S. FORBES & CO. v. SOUTHERN COTTON OIL CO.

(Supreme Court of Appeals of Virginia. June 16, 1921.)

1. Appeal and error ⇨843(4)—Propriety of sustaining demurrer to original declarations not reviewable, question being moot.

Where plaintiff under Code 1919, § 6116, excepted to the sustaining of demurrers to the original declaration, the matter will not be reviewed, the question being moot as plaintiff filed an amended declaration and did not stand on the original.

2. Sales ⇨81(1)—Time held of essence of contract.

Where a sale contract fixes a particular time for the delivery of cotton seed oil, the price of which is fluctuating, time is considered of the essence of the contract, and failure to perform within the time limited ordinarily constitutes a breach.

3. Evidence ⇨129(6) Evidence that in previous contract the seller waived strict performance inadmissible.

Where a contract required the buyer of cotton seed oil to furnish cars within stipulated time, evidence that in case of a previous contract the seller waived delay is not admissible; it not appearing that there was an increase in the market price, as in case of the latter contract.

4. Trial ⇨59(2)—The order of examination of witnesses rests chiefly in discretion of trial court.

The order of the examination of witnesses rests chiefly in the discretion of the trial court.

5. Appeal and error ⇨1058(2)—Refusal to permit witness to answer question not error, where question is subsequently allowed.

Where the same question was later allowed, the action of the trial court in first refusing to permit the witness to answer question not error.

6. Customs and usages ⇨17—Where contract expressly fixed time for performance, it cannot be varied by custom.

Where a contract for the sale of cotton seed oil expressly fixed the time for performance, it cannot be varied by an alleged custom of the seller that in event of the buyer's failure to furnish cars within the time limited, the delay would be waived.

7. Jury ⇨11(5)—Provisions of federal Constitution as to jury trial do not apply to state.

Const. U. S. Amend. 7, declaring that in suits at common law where the value in controversy shall exceed \$20, the right of trial by jury shall be preserved, does not apply to state courts, but is applicable only to the federal court.

8. Jury ⇨9—Jury trial cannot be taken away by implication.

The right to jury trial cannot be taken away by implication.

9. Constitutional law ⇨48—Statute should not be declared unconstitutional unless plainly so.

A statute should not be declared unconstitutional, unless so plainly unconstitutional as to leave no doubt.

10. Jury ⇨13(3)—Constitutional guaranty of jury trial in suit between man and man does not apply to chancery cases.

While Const. 1902, § 11, declares that in controversies respecting property and in suits between man and man, trial by jury is preferable to any other, and ought to be held sacred, jury trial is not proper in a chancery case; the word "suit" as used in the section being used in the same sense as the word "controversies," and not including chancery proceedings.

11. Trial ⇨176—By demurrer to evidence the whole case is taken away from the jury.

By demurrer to the evidence, which is a well-established practice, the whole case is taken away from the jury, and referred to the court for decision.

12. New trial ⇨164—On setting aside verdict, trial court is not bound to grant judgment to unsuccessful party.

Under Code 1919, § 6251, declaring that when the verdict of a jury in a civil action is set aside by the trial court on the ground that it is contrary to the evidence or without evidence to support it, a new trial shall not be granted if there is sufficient evidence before the court to enable it to decide the case, the trial court, on setting aside a verdict of the jury, is not required to render judgment for the party against whom verdict was rendered.

13. Jury ⇨34(3)—Provision, that on setting aside verdict for insufficiency of evidence trial court shall decide the cause, not a denial of jury trial.

While Const. 1902, § 11, declares that in all controversies respecting property and in suits between man and man trial by jury is preferable and ought to be held sacred, yet in view of the practice of demurring to the evidence, and of the fact that, unless evidence raising the controversy is presented, there is no scope for the jury's function, Code 1919, § 6251, declaring that, when the verdict of a jury in a civil action is set aside by the trial court upon the ground that it is contrary to the evidence, etc., a new trial shall not be granted if there is sufficient evidence for the court to decide the case upon its merits, but such final judgment shall be entered as to the court shall seem right and proper, does not work a denial of the right to jury trial.

14. Statutes ⇨225—If two statutes can stand together, they should be so construed.

If two statutes can stand together they should be so construed.

15. New trial ⇨164—Provision that in event verdict is set aside as unsupported by evidence trial court shall render judgment does not conflict with provision forbidding peremptory instructions.

Code 1919, § 6008, forbidding peremptory instructions directing verdict, is not in conflict with section 6251, declaring that, if verdict be

set aside as contrary to the evidence, etc., the trial court shall render judgment, for the first section is intended to prevent errors by the court in the heat of trial, while the latter allows the court to act after deliberation.

16. Appeal and error \Rightarrow 882(17)—Party cannot complain of finding in accordance with its view.

Where defendant insisted that the contract was made with reference to the rules of an association, and an instruction on that issue was given at its instance, it cannot complain of a finding in accordance with that view.

17. Sales \Rightarrow 181(1)—Buyer has the burden of showing that he furnished tank cars within the time limited.

Where the contract for sale of cotton seed oil required the buyer to furnish tank cars within time limited, the buyer, on suing for breach, has the burden of showing that he furnished the cars within the time limited.

18. Sales \Rightarrow 181(11)—Evidence insufficient to show that buyer of cotton seed oil delivered tanks to the seller within time.

Where a contract for the sale of cotton seed oil required buyer to furnish tanks within time limited, evidence held, in an action by the buyer for the seller's breach, insufficient to show that the buyer furnished tanks within time.

Appeal from Circuit Court of City of Richmond.

Assumpsit by W. S. Forbes & Co. against the Southern Cotton Oil Company. A verdict for plaintiff was set aside, and judgment entered for defendant, and plaintiff appeals. Affirmed.

S. S. P. Patteson, of Richmond, for appellant.

Coke & Pickrell and R. W. Carrington, all of Richmond, for appellee.

BURKS, J. This is an action of assumpsit brought by the plaintiff in error, a corporation (plaintiff below), against the defendant in error (defendant below), to recover damages for failure to deliver according to contract two tanks of crude cotton seed oil. There was a verdict for the plaintiff for \$800, which the trial court set aside and entered judgment for the defendant pursuant to section 6251 of the Code. The plaintiff excepted, and the case is brought here on a writ of error to that judgment.

[1] The plaintiff filed an original and also an amended declaration, to which the trial court sustained a demurrer, and the plaintiff by leave of court filed a second amended declaration. A demurrer to the last declaration was overruled, and the case was tried on the general issue of nonassumpsit. The plaintiff was permitted to prove its whole case under the second amended declaration, but, having excepted to the ruling of the trial court sustaining the demurrer to the original and

first amended declarations, as provided by section 6116 of the Code, it insists that we shall pass upon the sufficiency of the original and amended declarations. If there was error in sustaining the demurrer thereto it was harmless, and the question presented is moot. The statute was not intended to apply to such a case. This court does not undertake to correct harmless errors.

The contract which is the subject of litigation was made by brief telegrams of offers by the defendant, which were accepted by the plaintiff, and is substantially as follows: On March 6, 1917, the defendant agreed to sell to the plaintiff two tanks of basis prime crude cotton seed oil, at 90 cents a gallon, f. o. b. North Carolina Mills, delivery to be made last half of March in tanks to be furnished by the plaintiffs. The defendant had a number of such oil mills and was to notify the plaintiffs at which of its mills it would make delivery.

On March 16, 1917, the defendant wrote the plaintiff from Savannah, Ga., as follows:

"Referring to your purchase of March 6th of two tanks basis prime crude cotton seed oil at 90¢ per gallon f. o. b. North Carolina Mills, calling for last half March shipment.

"Please forward immediately one tank each to the Southern Cotton Oil Co. mills located at Fayetteville, and Wilson, N. C., furnishing Mr. E. B. Borden, Jr., D. M. the Southern Cotton Oil Co., Goldsboro, N. C., with full shipping instructions furnishing copy of your advices to the undersigned.

"Yours truly,

"C. W. Bridger, Traffic Department."

It is not positively shown when this letter was received, though the plaintiff admits it might have been received as early as March 18. On March 21, the plaintiff replied as follows:

"Answering your letter of the 16th, we will arrange to send the two empty tanks, south, the first of next week, we will send them to the points mentioned, Fayetteville and Wilson supplying full shipping instructions to Goldsboro, and copy of our advices to you at Savannah."

The tank cars were not delivered to the defendant for the reception of the oil during the last half of March. One of them was shipped from Richmond March 30, but did not reach its destination till April 2. The other was shipped from Richmond April 2 and reached its destination April 5. The plaintiff relies upon a trade usage and also upon the manner of doing business between the parties operating under former contracts as an excuse for not making prompt delivery of the tanks, and offered evidence to show a well-established usage of trade in that business not to require delivery of the tanks on the exact date called for in the contract, but simply to require the date to be approximated, also to show prior dealings between

the same parties in the performance of similar contracts in which approximate dates of delivery and reshipment of tank cars had been accepted as performance of the contract. These facts were sought to be established by the testimony of W. G. Hockaday, the plaintiff's sales manager and purchasing agent. But the questions put to the witness were objected to on the ground that the plaintiff was seeking to prove, "not a custom of trade, or custom of this particular trade, but he wants to take the preceding dealings to modify the express written terms of this contract." Upon this contention the trial court ruled:

"If there is a general custom of the trade, well known and acted upon by all parties, and that custom is pleaded, then you can prove that custom as a well-known custom in the trade, and it becomes part and parcel of every contract; but the mere fact that there were dealings or other contracts by which these other contracts were allowed to be changed cannot come in this case."

[2, 3] The trial court, not being satisfied that the testimony of the witness was of such character as ought to be allowed to go to the jury, sent the jury out, and permitted the witness to be examined and cross-examined at length to ascertain the facts on these points, and, having ascertained the extent of his knowledge, excluded his evidence on these questions. The testimony of the witness did not establish any trade usage on the subject that could affect the express contract of the parties, nor did it show any prior dealings that could affect such contract. While the witness testified that the plaintiff had been dealing with the defendant for the purchase of cotton seed oil for several years prior to the present controversy, his examination disclosed only two other contracts between them for the purchase of cotton seed oil, one in which the contract called for the sale and delivery in first half of February preceding the contract in suit of two tanks in which the tanks were not delivered till February 16 and 19, but were accepted and filled by the defendant. The other for sale and delivery of three tanks at a price stated "subject to market changes" in the first half of April immediately following the March contract here in litigation. Only one of these contracts was prior to the contract in suit, and that was for delivery the first half of February. The fact that the plaintiff was not held to the exact date of delivery under the February contract gave it no right to expect or demand a similar indulgence on the March contract. The circumstances surrounding the two contracts may have been entirely different. Indeed, the record shows that the contract in suit was entered into on March 6, 1917, and that between that date and March 31 there was an advance of from 5 to 10 cents a gallon in the oil. No such

facts are shown as to the February delivery. In contracts of this nature, time is of the essence of the contract, and failure to perform within the time limited by the contract, as a rule, constitutes a breach. *Bowes v. Shand*, 2 App. Cas. 455, 463; *Norrington v. Wright*, 115 U. S. 188, 6 Sup. Ct. 12, 29 L. Ed. 366; *Cleveland Rolling Mill v. Rhodes*, 121 U. S. 255, 7 Sup. Ct. 882, 30 L. Ed. 920; *Norfolk Hosiery Co. v. Aetna, etc., Co.*, 124 Va. 221, 235, 98 S. E. 43. The trial court committed no error in excluding the testimony.

[4, 5] Exception was taken to the ruling of the trial court in refusing to permit a witness to answer a question, but the same question was put to the same witness at a later stage, and he was permitted to answer it. The error, if any, was harmless. The order of the examination of witnesses lies chiefly in the discretion of the trial court. *Robertson's Ex'r v. Atlantic Coast Realty Co.*, 129 Va. —, 106 S. E. 521.

[6] Exception was also taken to the action of the trial court in refusing to permit the plaintiff to ask its only witness several questions relating to prior dealings between the plaintiff and the defendant with reference to the sale and purchase of crude cotton seed oil. As hereinbefore stated, the court permitted the witness to be examined and cross-examined at length, out of the presence of the jury, and thereby learned that he could not testify as to any usage of trade in the business that could affect the contract, and that as to contracts between the parties to this action he testified as to only two other contracts, one before and the other after the one here in litigation, and that they were separate and distinct contracts, with no other relation to each other except that they were between the same parties, for the sale of crude cotton seed oil, and deliveries were for the last half or first half of a month. Under these circumstances, the trial court refused to permit the questions to be answered. In this there was no error. As to how far a trade usage may affect an express contract, see *North Shore Imp. Co. v. New York, &c., R. Co.*, 108 S. E. 11, decided today.

The chief complaint of the plaintiff in error is of the action of the trial court in setting aside the verdict in favor of the plaintiff on the ground that it was contrary to the evidence or without evidence to support it, and in entering judgment for the defendant, as provided in such case by section 6251 of the Code. The plaintiff in error insists that there was evidence to support the verdict, and that the court erred in setting it aside, but that if the verdict was properly set aside a new trial should have been awarded because section 6251 is unconstitutional, in that it deprived the plaintiff of a trial by jury. The plaintiff in error further insists that if section 6251 is held to be constitutional, the trial court erred in not ren-

dering judgment for the full amount claimed by the plaintiff, instead of a judgment for the defendant. The validity of section 6251 is the storm center of the contention of the plaintiff in error and will be first disposed of.

[7-13] It is claimed that section 6251, which is copied in the margin,¹ denied to the plaintiff a trial by jury, which is forbidden by section 11 of the Constitution, which declares that—

"In controversies respecting property, and in suits between man and man, trial by jury is preferable to any other, and ought to be held sacred; but the General Assembly may limit the number of jurors for civil cases. * * *

The earlier Constitutions used the phrase "the ancient trial by jury," but the word "ancient" was stricken out by the Constitution of 1869, and has not since appeared. The provision for a jury of less than 12 was first inserted in the Constitution of 1902. These changes indicate certain departures from the "ancient" common law.

The provision has seldom been before this court for interpretation. In *Watson v. Alexander*, 1 Wash. (1 Va.) 340, 356, it is said:

"The Constitution declares 'that trial by jury is preferable to all others, and ought to be held sacred.' To go no farther, it may be affirmed that this mode of trial is never to be taken away by implication, or without positive words in an act of assembly. Laws for this purpose sometimes give the court an express power to proceed, without the solemnity of a jury; most usually to proceed upon motion in a summary way, by which the same thing is understood."

In *Burke v. Levy's Ex'rs*, 1 Rand. (22 Va.) 1, on a motion for award of execution on a forthcoming bond, it was held that where non est factum is pleaded the court may enter judgment without the intervention of a jury, or it may impanel a jury at its discretion. It was said that—

"Although that court might have called in a jury to decide the points submitted by the plea, it was not compellable to do so."

The holding is based upon the fact that the proceeding was "by action in a summary way," and *Watson v. Alexander*, supra, is cited as authority. In *Salling v. McKinney*, 1 Leigh (28 Va.) 42, 19 Am. Dec. 722, the

question of the right to a trial by jury does not appear to have been raised, nor is it referred to in any of the opinions delivered, but the reporter (Mr. Benjamin Watkins Leigh) in his report of the case, says:

"This was a motion made in the circuit court of Scott county by McKinney, late high sheriff of that county, against Salling, his deputy, for the amount of a judgment which the commonwealth had recovered against McKinney in the general court on account of taxes collected by Salling, which he had failed to pay into the treasury. Salling pleaded several pleas in bar, on which issues were joined, and these issues were tried by a jury; but the jury, not agreeing, were discharged, and the cause continued to another term, when the court, dispensing with a jury [see *Burke v. Levy*, 1 Rand. 1], heard the whole case and gave judgment against Salling for \$541.20, with interest from November 12, 1822 till paid, and costs, spreading all the facts proved in the case upon the record. From this judgment Salling appealed to this court."

The judgment of the trial court was affirmed.

In *Cecil v. Early*, 10 Grat. (51 Va.) 198, 202, the court, speaking of issues of fact raised in a proceeding by motion, says:

"The court may itself try the issues, although of fact, or call in a jury for that purpose, at its discretion. *Burke, Adm'r. v. Leigh's Ex'r*, 1 Rand. 1; 1 Rob. Pr. 600."

The right to proceed without a jury in this summary way seems not to have been doubted, and is not referred to in the opinion.

In 1 Rob. Prac. (old) 600, referred to in the opinion, the following comment is made by that distinguished author:

"The trial by jury is never to be taken away by implication, or without positive words in an act of assembly. But laws sometimes give the court an express power to proceed without the solemnity of a jury; and the same thing is understood when the power is given the court to proceed upon motion, in a summary way. *Pendleton, President, in Watson, etc., v. Alexander*, 1 Wash. 358. Where jurisdiction is given by motion in a summary way, and the defendants pleaded non est factum, the court may call in a jury to decide the points submitted by the plea, but is not compellable to do so. *Burke's Adm'r v. Levy's Ex'rs*, 1 Rand. 1."

The seventh amendment of the Constitution of the United States provides that—

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

But this amendment is restricted to federal courts, and has no application to procedure in the state courts. *Brown v. New Jersey*, 175 U. S. 172, 20 Sup. Ct. 77, 44 L.

¹ "When the verdict of a jury in a civil action is set aside by a trial court upon the ground that it is contrary to the evidence, or without evidence to support it, a new trial shall not be granted if there is sufficient evidence before the court to enable it to decide the case upon its merits, but such final judgment shall be entered as to the court shall seem right and proper. If necessary to assess damages, which have not been assessed, the court may impanel a jury at its bar to make such assessment, and then enter such final judgment. Nothing in this section contained shall be construed to give to trial courts any greater power over verdicts than they now have under existing rules of procedure, nor to impair the right to move for a new trial on the ground of after-discovered evidence."

Ed. 119; Ches. & O. R. Co. v. Carnahan, 118 Va. 46, 86 S. E. 863, and cases cited.

We are thus left free to decide the question of the validity of the statute, unhindered by any prior binding authority. The statute is a new and important one, and demands careful consideration. There are many cases bearing collaterally on the question, but they cannot all be considered in an opinion of reasonable length. The statute was proposed by the revisors of the Code of 1919, and enacted by the Legislature. The revisors were carefully selected with reference to the work to be submitted to them, and it is to be presumed that they gave the statute their careful consideration, and, in drafting it and submitting it to the Legislature, they gave their deliberate judgment as to its constitutional validity. To this must be added the judgment of the Legislature in adopting it. In a peculiar sense, therefore, this court ought not to pronounce the section unconstitutional unless it is plainly so—so plainly as to leave no doubt on the subject. *City of Roanoke v. Elliott*, 123 Va. 393, 96 S. E. 819; *Strawberry Hill v. Starbuck*, 124 Va. 71, 97 S. E. 362.

The latter part of the section declares:

"Nothing in this section contained shall be construed to give to trial courts any greater power over verdicts than they now have under existing rules of procedure, nor to impair the right to move for a new trial on the ground of after-discovered evidence."

What powers did the court then have over verdicts? The rule in this state has been so repeatedly announced that we cannot, within reasonable limits, do more than refer to a few of the decisions.

In *Jackson's Adm'r v. Wickham*, 112 Va. 123, 131, 70 S. E. 539, 540, it is said:

"The issue of fact thus sharply drawn was fairly submitted to the jury, and by them resolved in favor of the plaintiff. No rule is better settled by the decisions of this court than that, where a case has been properly submitted to a jury and a verdict fairly rendered, it ought not to be set aside, unless manifest injustice has been done, or unless the verdict is plainly not warranted by the evidence.

"The doctrine is clearly stated by Judge Burks in *Blair and Hoge v. Wilson*, 28 Grat. 165, as follows: 'Every reasonable presumption should be made in support of a verdict of a jury fairly rendered, and, according to the long-established, well-settled rule of this court, such a verdict cannot be set aside as against the evidence, unless there is a plain deviation—unless the evidence is plainly insufficient to warrant the finding.'

"In *Morien v. Norfolk & Atlantic Terminal Co.*, 102 Va. 622, 40 S. E. 907 (which is strikingly similar to the case in judgment), the court said: 'In such case the preponderance of evidence cannot influence the action of the court in considering a motion for a new trial. The jury may discard the preponderance of evidence as unworthy of credence, and accept

the evidence of a single witness upon which to base their verdict, and upon well-settled principles the verdict cannot be disturbed if the evidence of that witness is sufficient, standing alone, to sustain it. Nor is interference with a verdict authorized where the court merely doubts its correctness, or would itself have found a different verdict. The admissibility of evidence is with the court, but its weight is wholly with the jury.'

"Applying these principles to the case in judgment, it is clear that the trial court erred in setting aside the first verdict."

In *Bashford v. Rosenbaum Hardware Co.*, 120 Va. 1, 90 S. E. 625, the judgment of the trial court was reversed because it had improperly set aside the verdict of the jury in a personal injury case where the question of the contributory negligence of the plaintiff was involved, the court holding that—

"Whether a plaintiff in an action to recover damages for personal injuries has been guilty of contributory negligence is a question for the jury under proper instructions from the court, and their finding will not be disturbed where the evidence is conflicting, or is such that reasonable men might fairly differ as to whether there was such negligence or not. Every reasonable inference should be made in favor of a verdict fairly rendered, under proper instructions from the court, in such a case, and it should not be set aside unless the evidence is plainly insufficient to support it."

In *Palmer v. Showalter*, 126 Va. 306, 101 S. E. 136, it was held that—

This court "will sustain a verdict, although it was set aside by the trial judge, unless it can perceive that there has been a plain deviation from right and justice, and that the jury have found a verdict against the law, or against the evidence."

These cases are but typical. Many more could be added. They manifest the great respect that is accorded the verdict of a jury fairly rendered. It is not sufficient that the judge, if on the jury, would have rendered a different verdict. It is not sufficient that there is a great preponderance of the evidence against it. If there is conflict of testimony on a material point, or if reasonably fair-minded men may differ as to the conclusions of fact to be drawn from the evidence, or if the conclusion is dependent upon the weight to be given the testimony, in all such cases the verdict of the jury is final and conclusive, and cannot be disturbed, either by the trial court or by this court; or if improperly set aside by the trial court, it will be reinstated by this court. But with all the respect that is justly due to the verdict of a jury, and which is freely accorded to it, if there has been "a plain deviation from right and justice," even a court of law will not make itself a party to such a wrong by entering up judgment on it. The initial step of the trial court, that of set-

ting aside the verdict, can only be taken either where there is no evidence at all to support the verdict, or else the verdict is plainly contrary to the evidence, and does not come within the rule above stated. This initial step must be taken, under the conditions stated, before the trial court can enter such judgment as to it shall seem right and proper. Such was the state of the law when this statute was proposed and enacted.

It would seem that a litigant who cannot produce sufficient evidence to prevent this initial step ought not to be granted further indulgence to produce additional evidence when the judgment of the law is against him on the case which he has been given the fullest opportunity to present. He is not cut off if he can bring himself within the rule relating to after-discovered evidence.

Assuming that this initial step has been properly taken, that the verdict has been rightly set aside, has the Legislature the power to authorize the trial court to enter up such judgment as is right and proper? Is it obliged to authorize another trial by jury? Does the Constitution guarantee a jury trial in all "suits between man and man?" Must a jury pass upon questions of law as well as of fact? No such claim can be made. We must look to the law as it existed when the Constitution was adopted and as it has been uniformly construed since that time. We think we may also safely assume that it was the substance of "trial by jury" that our forefathers sought to preserve, and not its mere form. The province of the jury is to settle questions of fact, and when the facts are ascertained the law determines the rights of the parties. This law is announced by the court or judge.

"Every judgment is the conclusion of a syllogism of which the law is the major (unexpressed) and the fact the minor premise. Such being understood to be the law—and such being the fact *ideo consideratum est*, and then follows the judgment as the conclusion." Tucker's Pl. p. 19.

It is the method of ascertaining the fact that is intended to be preserved by the Constitution, but if the litigant offers no evidence of the fact which is essential to the maintenance of his pleading, or offers so little in opposition to that of his adversary that a verdict in accordance with that little would be a manifest injustice to his adversary, in other words, if the litigant has offered no facts upon which a jury would be warranted in finding a verdict in his favor, then he has not presented a controversy respecting property or a suit between man and man that entitles him to the jury trial guaranteed by the Constitution. It is the function of a pleading to state facts, not law; and of evidence to support the facts alleged in the pleading. If no such evidence is offered, or none that would warrant a jury

of fair-minded men in finding a verdict in accordance therewith, then the rights of the parties become a question of law, and there is no controversy to be determined by a jury, and the constitutional guaranty does not apply. The word "suit" is not always used in a strictly technical sense. Technically the word "suit," is sometimes restricted to litigation in a court of equity, and the word "action" is applied to litigation at law. As used in the Constitution, the word "suit" is manifestly used in much the same sense as the word "controversies" in the preceding part of the same sentence. It seems inconceivable that the framers of the Constitution should guarantee a jury trial in a "suit between man and man," when there was no controversy between them. In such a case no right is in jeopardy which would need such protection, and we can see no good reason why the court should not pronounce the judgment of the law upon the case as it stands. The relevancy and admissibility of the evidence, and whether or not what is offered is of sufficient probative value to go to the jury, are questions for the court, and not for the jury. So, also, under the well-settled rule in this state, it is for the court to say, subject to review on a writ of error, when a verdict does "manifest injustice" or is "plainly not warranted by the evidence." Jackson's *Adm'r v. Wickham*, *supra*.

That nothing but a question of law is involved where the facts are admitted or established is made manifest from the use of a demurrer. If all of the facts of a case are stated in a declaration, the defendant by his demurrer to the declaration says, admitting all of your statements to be true, you have not stated a case in which the law permits you to recover. No fact is in dispute, but the law is against you. Here is a trial in a suit between man and man, but without the intervention of a jury, because there is no "controversy" for a jury to determine, and yet the judgment upon that state of facts is final. It is the law's conclusion upon the facts stated. So also on a demurrer to the evidence. Here a case for recovery has been stated in the pleadings, but the proof is deficient. The demurrant says, admitting the truth of all of your evidence, and of everything which your evidence even tends to prove, and all proper inferences therefrom, you have not, as a matter of law, proved a case which entitles you to recover. Here, indeed, is a trial on the merits, and a final judgment entered as the law's conclusion upon the admitted facts, without the intervention of a jury. No jury is had simply because there are no facts to be ascertained. Every element of "a suit between man and man" is present, but, the facts being admitted, there is no "controversy" between them. There is no function to be discharged by a jury.

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There is much to be said on both sides of the question submitted to our consideration, but the evolutions of society are constantly calling for new applications of principles. The principles do not change, but their application is ever changing. Nowhere is this more evident than in the application of the principles of the common law. The same is true to some extent of constitutional provisions. The substance, the substantial right guaranteed, is fixed and permanent, but its application may be varied from time to time as the needs of civilized society require. Sometimes these changes are wrought by changes in the language of the Constitution itself, as is illustrated by striking out the word "ancient" in the clause "ancient trial by jury," appearing in the earlier Constitutions, or by providing for a jury of less than the common-law jury of 12, as provided for the first time in our present Constitution. At other times there is an apparent change by construction. But in fact there is no change, only an application of the principle of the provision to a new state of facts. This is illustrated in the case of *Pillow v. Southwest Imp. Co.*, 92 Va. 144, 23 S. E. 32, 53 Am. St. Rep. 804, and *Lake Bowling Alley v. Richmond*, 116 Va. 429, 82 S. E. 97. The constitutional guaranty of trial by jury had existed since 1776, but the Legislature, by an act of assembly, dispensed with it in certain cases, and a new Constitution was thereafter adopted containing the same guaranty, and it was held that the guaranty did not apply because the procedure warranted by the act existed when the new Constitution was adopted, and was not taken away by it.

The constitutional provision is not to be frittered away, but it is the principle that is thus sacred and permanent, and not the mere language in which it is couched. The principle here involved is the right to a jury trial wherever disputed facts are involved in proceedings at law between man and man. There must be a controversy over facts. If there are no controverted facts, the law determines the rights of the parties. There is no need for a jury, and neither the language nor spirit of the Constitution guarantees a jury trial.

The constitutional guaranty of a jury trial is by no means universal in its application. Although the word "suit" is used in the Constitution, it is conceded everywhere that the provision has no application to suits in chancery as they existed at the time of the adoption of the Constitution, as the chancery courts exercised their functions without the intervention of juries at that time, and the guaranty extended only to such cases as were triable by jury at the date of adoption. *Pillow v. Southwest Imp. Co.*, 92 Va. 144, 23 S. E. 32, 53 Am. St. Rep.

804; *Davis v. Settle*, 48 W. Va. 17, 26 S. E. 557.

Demurrer to the evidence is a well-established practice in this state, and in constant general use. By this method of procedure the whole case is taken away from the jury, and referred to the court for decision.

In *Reed & McCormick v. Gold*, 102 Va. 37, 51, 45 S. E. 868, 873, it is said:

"The right to demur to the evidence has come down to us as part of common-law procedure along with the right of trial by jury; indeed, if there were no trial by jury, there would be no demurrers to evidence. Where the Legislature has designed to prohibit demurrers to evidence, it has done so in explicit terms, and section 2897 of the Code [section 5781, Code 1919], provides that, in an action for insulting words, 'no demurrer shall preclude the jury from passing thereon.'"

In *Lynchburg Milling Co. v. Bank*, 109 Va. 639, 64 S. E. 980, there was an active controversy over funds in the hands of a garnishee, and a jury was impaneled to ascertain whether the fund was liable to the plaintiff's debt. At the conclusion of the plaintiff's evidence, the garnishee demurred to the evidence. The plaintiff denied the right of the garnishee so to demur. The court said:

"The plaintiff insists that it had an absolute right to a trial by jury under the statute of which it was deprived by the court's action in requiring it to join in the demurrer. But that assignment is founded on a misconception of the office of a demurrer to evidence. It does not invade the province of the jury as triers of disputed facts. But, assuming that the evidence demurred to is true, the court is called on to determine whether such evidence as a matter of law warrants a judgment for the demurree. In other words, it is a supervisory power over jury trials invoked and exercised by the courts whose duty it is to decide questions of law arising upon undisputed facts.

"In 6 Ency. of Pleading and Practice, 439, it is said: 'There is nothing in this practice which is in contravention of jury trial'—citing *Hopkins v. Nashville*, etc., Ry. Co., 96 Tenn. 409, 34 S. W. 1029, 32 L. R. A. 354.

"That case contains an exhaustive review of the authorities, and shows that the practice obtains in about one-half of the states of the Union, while in the United States courts and the courts of other states much more drastic methods prevail, such as directing verdicts and ordering nonsuits. The practice has come down to us from the common law, and is too thoroughly embedded in our jurisprudence to admit of serious question."

In *Meade v. Meade*, 111 Va. 451, 69 S. E. 330, the trial was of an issue *devisavit vel non*, and the statute declared that in such case "a trial by jury shall be ordered." The statute, being a valid enactment, was as binding on the courts as the constitutional provision. The defendants demurred to the

evidence, which the plaintiffs claimed they had no right to do. The court said:

"It is the well-settled policy of our jurisprudence that in all civil cases juries are triers of the facts, while the law is determined by the court. It would require very clear and positive enactment to show that the Legislature had changed the power of tribunals administering the law, by depriving courts of their judicial authority and intrusting the juries with such functions. There is nothing in section 2544 to justify the contention that the Legislature has inaugurated such a policy. If the contention of appellants was sound, then a jury trying an issue of *devisavit vel non* would be judges of the law and facts, while the court would be stripped of its power, and would preside as a mere moderator for the purpose of preserving order during the progress of the trial. Such an anomalous state of affairs cannot receive our approval. It is imbedded in our jurisprudence that the law of the case must emanate from the court. * * *

"It can be stated in general terms that sustaining a demurrer to evidence is not in violation of a statute providing that the issue shall be tried by a jury, where the evidence is conceded to be true, and all legitimate inferences therefrom are admitted. *Hopkins v. Nashville Ry. Co.*, 96 Tenn. 409, 34 S. W. 1029, 32 L. R. A. 354."

The court, after quoting from the two previous cases hereinbefore cited, adds:

"That a demurrer to the evidence, or the more modern practice of directing the verdict, is admissible upon the trial of an issue of *devisavit vel non*, see *Stuart v. Lyons*, 54 W. Va. 665, 47 S. E. 442; *Broach v. Sing*, 57 Miss. 115; *Wagner v. Zeigler*, 44 Ohio St. 59, 4 N. E. 705; *Purdy v. Hall*, 134 Ill. 303, 25 N. E. 645.

"In the case last cited the court says: 'With reference to the statutory proceeding to contest by bill in chancery the validity of a will, it is expressly stated in the statute (Rev. St. 1874, c. 148, § 7), that the issue shall be tried by a jury; and it follows that, in regard to the action of the court in taking the case from the jury and directing a verdict against the contestant, the same rule must be applied that obtains in respect to trials in suits at law. The rule in actions at law is that when the evidence given at the trial, with all the inferences that could justifiably be drawn from it, is so insufficient to support a verdict for the plaintiff that such a verdict, if returned, must be set aside, the court is not bound to submit the case to the jury, but may direct a verdict for the defendant.'"

The reason why a demurrer to the evidence was allowed was because the facts were all ascertained. There were no disputed facts, and hence nothing for a jury to try. When the facts are ascertained the rights of the parties arising thereon present a question of law to be determined by the court. The same principle would seem to apply wherever the facts are definitely ascertained, regardless of the mode of procedure. The common-law method of procedure on a de-

murrer to the evidence was deemed cumbersome in some of the states, and fell into disuse, and then was substituted what was regarded as the more expeditious way of directing a verdict, which has not been regarded as infringing upon the constitutional guaranty of trial by jury. This practice was not adopted in this state to any extent, but instead we simplified and retained the common-law demurrer to the evidence. For difference in the two modes of procedure on a demurrer to the evidence, see *Burks' Pl. & Pr. § 257*.

A case may also be taken from the jury without infringing the constitutional guaranty by a special verdict. Here the jury simply find the facts and refer the question of the legal rights of the parties to the court. The same result follows in what is termed a "case agreed" or a "special case" or "a general verdict subject to a special case." The two proceedings are similar in many respects and yet different. *Burks' Pl. & Pr. § 298*, and cases cited. The jury have the right to render a special verdict if they choose, but are not compellable to do so. 22 *Ency. Pl. & Pr. 1013*.

It will be observed that each of the illustrations given is an instance of common-law procedure in which the rights of the parties are ascertained by the court, and that where the facts have once been admitted or ascertained, nothing is left but a question of law to be decided by the court. As said by Whittle, J., delivering the opinion of the court in *Lynchburg Milling Co. v. Bank*, supra, discussing the demurrer to the evidence:

"It does not invade the province of the jury as triers of *disputed facts*, but, assuming that the evidence demurred to is true, the court is called on to determine whether such evidence, as a matter of law, warrants a judgment for the demurree. In other words, it is a supervisory power over jury trials, invoked and exercised by the courts whose duty it is to decide questions of law arising upon undisputed facts." (*Italics supplied.*)

Again, under eminent domain proceedings, our homes may be invaded or even taken by those to whom the Legislature has delegated the power, and there may be a serious "controversy" as to the amount of damages to be paid, and yet it has been held that we cannot demand a jury trial as a constitutional right. In *Lake Bowling Alley v. Richmond*, 116 Va. 429, 435, 82 S. E. 91, 99, where assessors (not a jury) were authorized to assess the damages resulting from lowering the grade of a street, it was said:

"Special assessment statutes are not amenable to objection on the ground that they deprive the landowner of his right to have a jury to ascertain what will be a just compensation for the land proposed to be taken (or damaged) for a public highway, unless the Constitution in terms requires that such compensation shall be so assessed. And there is no

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such requirement in the Constitution of Virginia. It is true that for many years prior to April 30, 1874, the statutes of the state provided for a jury of ad quod damnum, composed of 12 qualified jurors of the vicinage, to make these assessments. But the Legislature of that year amended the former statute and substituted a commission in place of the jury to make the assessment. Acts 1874, p. 468. Since that enactment the Constitution of 1902 has been adopted, and the convention, with knowledge of the fact that the Legislature has substituted a commission for the jury of ad quod damnum in assessment cases, manifested no disposition to restore the former law. This circumstance affords persuasive evidence that the convention did not disapprove of the change wrought by the amendment referred to." *Pillow v. Southwest Imp. Co.*, 92 Va. 144; *Davis v. Settle*, 43 W. Va. 17.

"Under the act of 1908, as we have seen, the landowner has an appeal of right from the award of the assessor of damages to the corporation or hustings court of the city, where the matter is heard de novo, and in that way his rights are adequately safeguarded."

See, also, *Wilburn v. Raines*, 111 Va. 334, 68 S. E. 993; *Pillow v. Southwest Imp. Co.*, supra; *Davis v. Settle*, supra.

The practice of granting peremptory instructions directing a verdict never obtained to any considerable extent in this state, though it was said that where no other verdict could have been properly rendered, the error, if any, was harmless, and the judgment rendered thereon would not be reversed. *Hargrave's Adm'r v. Shaw Land Co.*, 111 Va. 84, 68 S. E. 278, Ann. Cas. 1912A, 151. The right to grant such instructions was in terms forbidden in 1912. Acts 1912, c. 27, p. 52; Code, § 6003. The practice, however, is common and usual in many of the states and in the federal courts, and it has not been regarded as a violation of constitutional guaranty of a jury trial. As we have seen, while it was not the practice in this state before it was forbidden, it was harmless error if the facts were such that no other verdict could have been properly found. It did not violate the constitutional guaranty of a jury trial.

Thus far we have examined only Virginia authorities, with the result that it appears that, where there are no disputed facts, but only questions of law to be decided upon undisputed facts, there is no violation of the constitutional guaranty of trial by jury. When we look elsewhere, we find the discussion of the subject well-nigh exhausted in the majority and minority opinions in *Slocum v. New York Life Ins. Co.*, 228 U. S. 364, 33 Sup. Ct. 523, 57 L. Ed. 879, Ann. Cas. 1914D, 1029. There the question arose upon a Pennsylvania statute quite similar in substance to the Virginia statute, and the question was whether the statute, as applied in the federal courts, was in conflict with the seventh amendment of the Constitution of the United States, which declares that—

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

The court, by a vote of five to four, held that the Pennsylvania statute was in conflict with said amendment. Mr. Justice Hughes delivered a dissenting opinion, which was concurred in by Justices Holmes, Lurton, and Pitney. The Pennsylvania court, in a long line of decisions, had held that the act did not conflict with the Constitution of that state guaranteeing a trial by jury. Under these circumstances, we have no inclination to depart from our former decisions bearing on the question, which, so far as they go, are in harmony with the views expressed by Mr. Justice Hughes in his dissenting opinion. The proposition that the entry of an involuntary nonsuit, or the direction of a verdict, does not conflict with the constitutional provision for a jury trial is so well settled that Mr. Hughes does not take the trouble to cite any authority for it, but for convenient reference we give the holding of the Supreme Court in two cases:

"Where the trial judge is satisfied upon the evidence that the plaintiff is not entitled to recover, and that a verdict, if rendered for plaintiff, must be set aside, the court may instruct the jury to find for the defendant, and in such case no constitutional question arises; but, if the court errs as matter of law in so doing, the remedy lies in a review in the appellate court." *Treat Mfg. Co. v. Standard Steel & I. Co.*, 157 U. S. 674, 15 Sup. Ct. 718, 39 L. Ed. 853. "The granting by the trial court of a nonsuit for want of sufficient evidence to warrant a verdict for the plaintiff is no infringement of the constitutional right of trial by jury." *Coughran v. Bigelow*, 164 U. S. 301, 17 Sup. Ct. 117, 41 L. Ed. 442.

No brief analysis of the opinion would do it justice, and it is too lengthy to quote. It cites with approval a number of Pennsylvania decisions and decisions of federal courts in that state upholding the constitutional validity of the Pennsylvania statute. Among them, *Fisher v. Scharadin*, 186 Pa. 568, 40 Atl. 1093; *Carstairs v. Bonding & T. Co.*, 54 C. C. A. 85, 116 Fed. 449; *Smith v. Jones*, 104 C. C. A. 329, 331, 181 Fed. 819, 823. The opinion of Mr. Justice Hughes is rested chiefly on the ground that the province of the jury is to decide questions of fact, not questions of law; that when no facts are shown which would warrant a jury in finding a verdict in favor of the party asking it, it is the duty of the court to enter judgment for the adverse party; that it is only the duty of settling disputed facts which is protected by the constitutional provision; that the Constitution only seeks to protect the substantial right, not mere forms of

procedure; that demurrers to the evidence, compulsory nonsuits, and directed verdicts are all recognized as legitimate methods of taking a case from the jury; and that if a trial judge may lawfully direct what verdict a jury shall render, it is less objectionable to reserve his decision until after the verdict is rendered, and then in a proper case enter judgment for the adverse party, as this method "permits the judge to give a decisive law question on which the case turns a more careful examination than he could do in the stress of a trial. It seems to be admitted that if the trial judge had directed the jury what verdict to find, and they had found that verdict, a judgment entered thereon would have been free from constitutional objection. Having this in mind, Mr. Justice Hughes concludes his discussion as follows:

"It is said, however, that a new trial affords opportunity to a plaintiff to better his case by presenting evidence which may not have been available before. But we are not dealing with an application for a new trial upon the ground of newly discovered evidence, or with the principles controlling an application of that sort. We are concerned with the question whether a party has a constitutional right to another trial, simply because the trial court erred in its determination of a question of law which was decisive of the case-made. Had the trial court done what this court says it should have done, it would have directed a verdict for the defendant, and if the jury, simply following the instruction of the trial court, had so found, final judgment would have been entered, and no new trial would now be granted. Still the jury would not have passed upon any question of fact, but would simply have obeyed the judge. The opportunity to better the case on a second trial would probably be as welcome, but it would not be accorded. I am unable to see any basis for a constitutional distinction which raises a constitutional right to another trial in the one case and not in the other.

"Of course, in any case, where there are questions of fact for the jury, the court cannot undertake to decide them unless a jury trial is waived. But it would seem to be an entire misapprehension to say that trial by jury, in its constitutional aspect, requires the submission to the jury of evidence which presents no question for their decision, and that, although there be no facts for the jury to pass upon, still the judgment which follows as matter of law can be arrived at only through a verdict. This is to create a constitutional right out of the practice of taking verdicts by direction. The ancient method of challenging the sufficiency of the evidence by demurrer, and thereupon either discharging the jury altogether or assessing the damages conditionally to await the decision of the demurrer (*Darrose v. Newbott*, Cro. Car. 143), reveals the function of court and jury in a clearer light, and shows that the idea that the judgment upon a trial where there is no evidence to sustain a finding by the jury can be reached only through a verdict could not have been entertained at the time the Constitution was adopted."

We have found no satisfactory answer to this view of the case. The object of the statute is to put an end to litigation, to obviate repeated trials and the delay and expense of litigation, and to remove the temptation to perjury by patching up the weak places disclosed at a former trial, not by after-discovered evidence, but by the same witnesses relied upon at the former trial.

It was argued before us that the power given to the trial judge to enter such final judgment as to him should seem right and proper was a substitution of the opinion of the judge for that of the jury. This power does not come into operation until after the verdict has been rightly set aside, and when it does come into operation it is not an arbitrary power, but is subject to review on a writ of error. The judgment is not the determination of any question of fact, but is simply the conclusion of law upon the facts as they appear. The meaning of the statute is that, having rightly set aside the verdict "because contrary to the evidence or without evidence to support it," the trial court shall enter such final judgment as ought to be entered, or as the law requires upon the evidence before it. This does not mean necessarily a judgment in favor of the adverse party. It may be in favor of the party obtaining the verdict, but for a different amount from that found by the jury. Compare *Gunn v. Union R. Co.*, 27 R. L. 320, 62 Atl. 118, 2 L. R. A. (N. S.) 362.

For the reasons hereinbefore stated, we are of opinion that a trial court is without power to set aside the verdict of a jury except upon the conditions hereinbefore set forth, and that when such verdict is properly set aside, the power to enter a final judgment conferred upon the court by section 6251 of the Code is not the power to determine any disputed fact in a controversy touching property or a suit between man and man, and is not forbidden by the Constitution of this state. Section 6251 of the Code is, in the judgment of this court, wise in its conception, valid in its enactment, and useful in its application.

[14, 15] It was also argued before us that the statute under consideration is in conflict with section 6003, forbidding peremptory instructions directing a verdict. If the two sections can stand together, they must. *Black, Interp. Laws*, p. 363. We find no difficulty in harmonizing them. In the stress of the trial, when the evidence is all in, and the jury are waiting for the instructions of the court, and all of the other business of the court is suspended, the judge, who is to instruct as to the law of the case, has no time to examine authorities and weigh and consider them, it may be on important questions of first impression, and the Legislature might well say that he should not at this stage of the case practically decide it on the merits by giving a peremptory in-

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struction directing what verdict should be found. But these reasons do not apply after the verdict has been rendered, and when the motion to set it aside has been made, the judge may then take what time he needs for the examination and consideration of authorities, but more especially he can deliberately review and consider the whole evidence in the cause and determine whether or not the duty rests upon him to set aside the verdict of the jury. Compare *Dalmas v. Kemble*, 215 Pa. 410, 64 Atl. 559. If, however, we were of opinion that the two sections could not stand together, we should be compelled to uphold the validity of section 6251 as the later of the two acts in the point of enactment; section 6003 having been simply carried into the Code from the Acts of 1912.

In referring to the revision of 1887, Riely, J., speaking for the court in *Gaines' Adm'r v. Marye*, 94 Va. 225, 227, 26 S. E. 511, said:

"The Code is a revision of the statute law of the state as it existed at the time of the revision. It was adopted by the Legislature as one act, and all its parts took effect equally and simultaneously. Notwithstanding the fact that the Code is a revision of the statute law, if its various sections are harmonious and their meaning plain, resort cannot be had in construing them to the original statutes to see if any error was committed in the revision. Where harmonious, and their meaning clear, they speak for themselves, and must be interpreted and given effect as revised. If, however, there is a substantial doubt as to their meaning, the law which was the subject of the revision may be looked to in ascertaining their meaning. If they are inconsistent and cannot stand together, the original statutes, and the respective dates of their enactment, may be examined to see what was the last expression of the will of the Legislature on the subject. And this last expression of the legislative will, when ascertained, if it be embodied in the revision, must prevail in construing inconsistent and repugnant parts of the law as revised. *Winn's Adm'r v. Jones*, 6 Leigh [33 Va.] 74; and *U. S. v. Bowen*, 100 U. S. 508."

To the same effect, see *Black, Interp. Laws*, pp. 363, 364, and the following cases cited in support of the text: *Gibbons v. Brittenum*, 56 Miss. 232; *State v. Heidorn*, 74 Mo. 410; *Mobile, etc., R. Co. v. Malone*, 46 Ala. 391.

[16] It remains to be determined whether or not the trial court erred in setting aside the verdict because contrary to the evidence, or without evidence to support it. This depends upon whether or not the contract "was made in reference to the rules" of the Interstate Cotton Seed Crusher's Association, of which both plaintiff and defendant were members, so that they became a part of the contract of the parties, and, if so, whether the plaintiff delivered the tanks, or either of them, to the railroad company "in such

time that under the ordinary course of transportation they should reach the seller before the expiration of contract time." As to one of the cars the jury found in favor of the plaintiff on both questions. The defendant insisted that the contract was made with reference to said rules, and an instruction upon the subject was given to the jury at its instance, and it cannot now complain of a finding in accord with that view. Upon the other question, that is, whether the tanks or either of them were delivered in time, the burden of proof was upon the plaintiff, and a majority of the court are of the opinion that the evidence relied on is insufficient to show this essential fact, and hence conclude that the trial court committed no error in setting aside the verdict and entering judgment for the defendant.

Affirmed.

(151 Ga. 721)

GULF REFINING CO. et al. v. MILLER
(two cases). (Nos. 2164, 2165.)

(Supreme Court of Georgia. July 15, 1921.)

(Syllabus by the Court.)

I. Appeal and error \S 1031(1) — Certiorari \S 36 — Courts \S 189(14), 190(1) — Evidence \S 10(1) — Judgment \S 415 — City court of Pelham without authority to grant new trial; certiorari is exclusive remedy for correction of errors; verdict illegal, when jurors did not disclose disqualification, but question not open on certiorari; illegal verdict set aside in equity, in absence of other remedy; judicial notice taken that town is distinct from county site; injury presumed from disqualification of jurors.

The city court of Pelham, created by the act approved August 22, 1906 (Acts 1905, p. 325), is not a city court within the meaning of the Constitution of this state, which authorizes certain city courts to grant new trials; nor has the city court of Pelham inherent power to grant new trials.

(a) The act creating the court fixes certiorari to the superior court as the exclusive remedy for correcting errors committed on the trial of cases in that court.

(b) If on the call of a case (an action for unliquidated damages based on tort) the judge, on request of the attorneys for the defendant, inquired of the jurors as to relationship to the parties, and two of the jurors, who were disqualified by reason of relationship to the plaintiff, failed to report such relationship, and were accepted as jurors, and participated in rendering a verdict against the defendants, and the relationship was not known or discovered by the defendants or their sole attorney until after verdict, the verdict would be illegal; but, as no ruling was made at the trial holding the jurors competent, their disqualification could not be inquired into by petition for certiorari.

(c) The acceptance of disqualified jurors, under circumstances and in an action of the char-

acter stated above, amounts to such a mistake as will authorize a court of equity to set aside the verdict rendered in the city court of Pelham, and order a new trial.

2. Action \S 57(1)—Petition for certiorari not consolidated with petition to set verdict of city court aside for mistake.

Relatively to errors committed on the trial of a case in the city court of Pelham, there is an adequate remedy at law by petition for certiorari; and where such a petition is pending before the judge of the superior court, the petitioner cannot have an order consolidating that case with a petition to set aside, on equitable grounds, the verdict rendered in the city court.

3. Other grounds of demurrer.

Except as indicated in the second note, none of the grounds of demurrer were meritorious.

4. Appeal and error \S 114—Judgment \S 459—Jury \S 110(1)—Refusal of interlocutory injunction not error, when evidence conflicting; judgment affirmed, with directions to hear application for injunction again; defendant cannot complain of jurors' disqualification, when known before verdict, and not complained of.

At the interlocutory hearing for injunction there was evidence on one side tending to show that the defendants and their sole attorney did not know of the disqualification of the jurors until after the verdict. There was evidence on the other side tending to show that the defendants were informed of the relationship while the case was under consideration by the jury and before verdict. Under this conflict of the evidence, the judge did not err in refusing the injunction.

(a) But as it is probable that the judgment of the court was based on an erroneous view of the law, as indicated by its dismissal of the petition on demurrer, the judgment refusing the injunction will be affirmed, with direction that the court again hear the petition for injunction in the light of the rulings above made.

George, J., dissenting in part.

Error from Superior Court, Mitchell County; W. M. Harrell, Judge.

Suit by the Gulf Refining Company and others against Sanford Miller. A temporary injunction was refused, and the petition thereafter dismissed on demurrer, and plaintiffs bring error. Judgment sustaining demurrer reversed in part and affirmed in part. Judgment refusing injunction affirmed, with directions.

Sanford Miller instituted in the city court of Pelham an action for damages against the Gulf Refining Company, a corporation, and J. F. Jones, the agent in charge of the local business of the corporation. The action was founded on alleged negligence of the defendant in selling to the plaintiff gasoline on his application to buy kerosene. It was alleged that, after procuring the gasoline, the plain-

tiff filled his lamp under the belief that it was kerosene, and when he undertook to light the lamp an explosion occurred, and the plaintiff was burned, thereby sustaining painful and serious personal injury. On the trial before a jury, a verdict was returned in favor of the plaintiff for the sum of \$12,190.-07. The defendants made a motion for a new trial, which the trial judge refused to entertain, on the ground that the city court of Pelham did not have jurisdiction to grant a new trial. Thereafter, and within the time prescribed by law, the defendants presented to the judge of the superior court a petition for certiorari.

While the petition for certiorari was pending, the same defendants instituted an equitable action in the superior court against Sanford Miller, alleging all that is stated above, and among other things the following in substance: When the case was called for trial in the city court of Pelham, the defendants (plaintiffs in this equitable suit) requested the court to "purge the jury as to disqualification," which was done. "The list thus obtained and put upon defendants, petitioners herein, contained the names" of two persons who had qualified as jurors in the case, and the persons so qualifying were accepted, and both served as jurors and participated in rendering the verdict. After the verdict had been rendered and judgment of the court entered thereon, petitioners learned that the two jurors above mentioned were disqualified on account of relationship as "third cousins" of the wife of the plaintiff in the damage suit, a fact concerning which neither of the plaintiffs in the equity suit nor their counsel had any knowledge or information prior to the judgment of the court. The attack upon the verdict on account of disqualification of the jurors could not be raised by certiorari, because it did not involve any ruling or error of law committed on the trial, and it could not be raised by motion for new trial, because the city court of Pelham was a statutory court, and did not have jurisdiction inherently, under the laws or Constitution of the state, to grant new trials; it being provided in the act creating the court that the exclusive method of appealing from any finding or judgment of the court is by certiorari to the superior court.

Under the circumstances the only way to obtain an adjudication of the alleged disqualification of the jurors is by petition to a court of equity; and unless the court of equity takes jurisdiction, the petitioners, without fault on their part, will be deprived of a substantial right of having their case passed upon by an impartial jury. As exhibits the petitioners set forth copies of the record in the application for certiorari and in the motion for new trial, and finally allege generally that they have a valid and meri-

torious defense to the suit filed against them in the city court. The prayers were that the court of equity take jurisdiction, and that the petition for certiorari be consolidated with the case, and that a new trial be granted, and that the defendant be restrained and enjoined from enforcing the judgment in the city court. At an interlocutory hearing the judge refused to grant a temporary injunction, and subsequently during the appearance term rendered a judgment sustaining the general and special demurrers on each and every ground taken. The plaintiffs filed separate bills of exceptions to the judgment refusing to grant an interlocutory injunction and to the judgment sustaining the demurrers and dismissing the petition, properly assigning error on the judgment in each instance.

W. Carroll Latimer, of Atlanta, and E. E. Cox, of Camilla, for plaintiffs in error.

J. J. Hill and O. B. McElvey, both of Pelham, and H. H. Merry, of Thomasville, for defendant in error.

ATKINSON, J. [1] 1. The city court of Pelham was created by special act of the Legislature (Acts 1905, p. 325) in the town of Pelham, in the county of Mitchell, and given limited civil and criminal jurisdiction over "all that portion of Mitchell county embraced in the 1194th district, G. M., of said county." The judge is given authority to hear and determine all civil cases of which the court had jurisdiction; but any party in a civil case is entitled to a trial by a jury, upon entering a demand therefor in writing by himself or his attorney on or before the call of the docket of the court to which the case was made returnable. Where a jury trial is demanded, lists of the names of 18 jurors are required to be furnished, and each side is allowed 3 peremptory challenges, thus leaving 12 jurors to try the case. Judicial cognizance is taken of the fact that the town of Pelham is a town separate and distinct from Camilla, which is the county site of the county and not included in the 1194th district, being the territory over which the city court of Pelham has jurisdiction.

The city court of Pelham thus established, though called a "city court," is not such a court, within the contemplation of the Constitution of this state, as has inherent power to grant new trials. *Welborne v. State*, 114 Ga. 793, 40 S. E. 857. In section 86 of the act it is expressly declared that—

"From said city court of Pelham there shall be no appeal, but all errors committed by the said city court of Pelham or the judge thereof, in judgments or rulings, or otherwise in the handling of cases * * * may be corrected by writ of certiorari, returnable to the superior court of Mitchell county."

It thus appears that the city court of Pelham was without inherent power under the

Constitution to grant new trials, and the express provision for correcting errors committed in the court was restricted to the remedy of certiorari to the superior court. The last-mentioned remedy will apply to any error of law committed by the judge, but could not apply to correct such a mistake as allowing disqualified jurors to serve on the jury, where the disqualification was unknown to the court, the parties, or their attorneys, after due diligence and without fault of the party or his attorney; no issue ever having been presented as to the qualifications of the jurors and no ruling made by the court. If the city court of Pelham could entertain a motion in arrest of judgment, it could not grant such a motion on account of a mistake of the above character, because the mistake does not appear on the face of the record.

Under the circumstances there is no provision of law for attacking the verdict on the ground of the disqualification of the jurors, and without the aid of equity an injured party would be remediless. Civil Code, § 4584, declares:

"The judgment of a court of competent jurisdiction may be set aside by a decree, for fraud, accident, or mistake, or the acts of the adverse party unmixed with the negligence or fault of the petitioner."

In *Wade v. Watson*, 133 Ga. 608, 66 S. E. 922, it was held:

"The superior court, in the exercise of its equity jurisdiction, upon appropriate pleadings, has power to set aside a judgment of the Supreme Court which was obtained by fraud practiced upon the court in the procurement of the judgment by means of an entry of acknowledgment of service placed on the bill of exceptions by some one other than the defendant in error or his counsel, and without authority or consent of either of them."

The question there under consideration involved the setting aside, by a court of equity, of the judgment of another court of competent jurisdiction, on account of fraud. In the course of the opinion the case of *Kohn v. Lovett*, 43 Ga. 179, was cited and applied. After quoting from that decision it was said:

"The ruling cited is relevant to the present case principally because it holds that equity may interfere to prevent the enforcement of the judgment of another court, and even a judgment of the Supreme Court, where it appears that it was obtained by mistake unmixed with laches on the part of the party injuriously affected thereby. When it is considered that the power to correct on account of mistake also involves the power to correct on account of fraud, the ruling quoted leaves no room for further discussion upon the proposition that it is in the power of the superior court, in the exercise of its equity jurisdiction and upon sufficient equitable pleading, to set aside a judgment of the Supreme Court on account of fraud

which resulted in the procurement of the judgment."

The allegations of the petition make a typical case for equitable relief on the ground of mistake. The defendants in the damage suit requested the judge to purge the jury. There was compliance with this request on the part of the judge; and that the jurors were allowed to serve without their disqualifications being ascertained before verdict was on its facts a mistake upon the part of everybody, and certainly upon the part of the court and the defendants and their attorneys. If the disqualification was known to the jurors or the plaintiff and concealed by them, their fraud in concealing it, coupled with the mistake of the defendants in innocently allowing them to serve, would be ground for equitable relief, just the same as if their disqualification as jurors had been overlooked by mistake of all the parties. The action was for unliquidated damages, and the defendants were entitled to a qualified jury to fix the amount of damages that should be awarded, as well as to determine the defendants' liability for such damages. As the jurors were disqualified and served on the jury, injury will be presumed. *Georgia Railroad v. Cole*, 73 Ga. 713. The petition set forth a cause of action, in so far as it undertook to set aside the verdict rendered in the city court of Pelham, and it was erroneous to sustain the demurrer in its entirety.

[2] 2. As to all the alleged errors committed at the trial, the defendant had an adequate remedy at law by petition for certiorari; and the demurrer was properly sustained as to so much of the petition as sought by consolidation to draw the petition for certiorari into the equitable cause.

[3] 3. In the light of what is said in the first division, there was no merit in any other grounds of demurrer.

[4] 4. At the interlocutory hearing for injunction the evidence was conflicting as to the time at which the defendants were informed of the disqualification of the jurors. The evidence in behalf of the defendants in the damage suit was to the effect that neither they nor their sole attorney at law learned of the disqualification until after the verdict was returned. There was evidence for the plaintiff in the damage suit to the effect that the defendants were informed of the disqualification of the jurors after the case was submitted to the jury and before a verdict had been returned. If the defendants had knowledge of the disqualification, it was their duty to complain before the verdict was returned, if they desired to do so. If they did not complain, and took the chance of a verdict being in their favor, they would not be heard afterwards to complain of the disqualification of the jurors. *Georgia Railroad v. Cole*, supra; *Miller v. State*, 139 Ga. 718,

78 S. E. 181. The matter of settling the conflict of evidence as to the time when these defendants learned of the disqualification of the jurors was a question on interlocutory hearing, for determination by the trial judge, and his discretion in refusing the injunction will not be disturbed. As the judge sustained the demurrer to the petition, and in view of the language of the order refusing the injunction, it is probable that he was of the opinion at the interlocutory hearing that the petition did not state a cause of action, and based his decision in refusing an injunction on that erroneous understanding of the law, while, if he had been of the opinion that it stated a cause of action, he would not have refused the injunction on account of the conflict of evidence above mentioned. Under the circumstances, while affirming the judgment refusing the injunction, direction is given that the judge again hear the application for injunction, in the light of what is said in this opinion.

On the bill of exceptions assigning error on the judgment sustaining the demurrer, the judgment is reversed in part and affirmed in part. On the judgment on the bill of exceptions assigning error on the judgment refusing an interlocutory injunction, the judgment is affirmed, with direction. All the Justices concur, except

GEORGE, J. I dissent from the ruling in the second headnote, upon the ground that the case is within the general rule that equity, having assumed jurisdiction for one purpose, will take jurisdiction for all purposes. The judgment on demurrer should, as I think, be reversed generally.

(151 Ga. 727,

GULF REFINING CO. et al. v. MILLER.
(No. 2166.)

(Supreme Court of Georgia. July 15, 1921.)

(Syllabus by the Court.)

Courts \Rightarrow 217.—Writ of error in case originating in city court held within jurisdiction of Court of Appeals.

The writ of error in this case complains of a judgment rendered by the judge of the superior court, refusing to sanction a petition for certiorari to review and correct a verdict and judgment rendered in the city court of Pelham, in an action for unliquidated damages on account of personal injuries founded on tort. The action does not involve any constitutional question, and is not otherwise of such character as, under the amendment to the Constitution as proposed by the act of 1916 (Acts 1916, p. 19) and ratified at a general election, would confer on the Supreme Court jurisdiction of the writ of error. The Court of Appeals has jurisdiction of the writ of error, and the case will be transferred to that court for decision.

Error from Superior Court, Mitchell County; W. M. Harrell, Judge.

Suit by Sanford Miller against the Gulf Refining Company and others. Judgment for plaintiff, petition for certiorari refused by the superior court, and defendants bring error. Case transferred to the Court of Appeals.

W. Carroll Latimer, of Atlanta, and E. E. Cox, of Camilla, for plaintiffs in error.

J. J. Hill, of Pelham, and H. H. Merry, of Thomasville, for defendant in error.

ATKINSON, J. Petition for certiorari refused. All the Justices concur.

(151 Ga. 743)

RUFFIN v. STATE. (No. 2593.)

(Supreme Court of Georgia. July 15, 1921.)

(Syllabus by Editorial Staff.)

Courts \S 217—Proceeding held one for change of venue, and reviewable by Court of Appeals.

A proceeding by an indicted person to require the clerk of the superior court to transmit the indictment to the Superior Court of another county, to which previous indictments claimed to involve the same transaction had been transferred on change of venue, was a case involving only a change of venue, and a writ of error to review the denial of the petition was within the jurisdiction of the Court of Appeals, and not of the Supreme Court, under the constitutional amendment of 1916 (see Acts 1916, p. 19), where no constitutional or other question conferring jurisdiction on the Supreme Court was raised.

Error from Superior Court, Chatham County; P. W. Meldrim, Judge.

Criminal prosecution by the State against Joe Ruffin. A petition to direct the clerk to transmit the indictment to the superior court of another county was denied, and defendant brings error. Case transferred to the Court of Appeals.

Archibald Blackshear, of Augusta, and Lawrence & Abrahams, of Savannah, for plaintiff in error.

Thos. L. Hill, of Savannah, and A. S. Anderson, Sol. Gen., of Millen, for the State.

HILL, J. This case came on to be heard in Chatham superior court, on the petition

of Joe Ruffin, praying that the clerk of the superior court of Jenkins county be directed to transmit to the superior court of Chatham county an indictment found by the grand jury of Jenkins county on March 15, 1921, charging the petitioner with the offense of murder, in order that appropriate action might be had on the indictment by the superior court of Chatham county, and that, pending consideration of the petition, the petitioner be remanded to the custody of the sheriff of Chatham county. It was alleged in the petition that the petitioner had been indicted by the grand jury of Jenkins county on March 15, 1921, for the murder of one Edmund Scott in said county on April 13, 1919; that the indictment so found charged the petitioner with the same criminal act as that charged against him in two previous indictments found by the grand jury of Jenkins county at the September term, 1919, on which indictments he had been fully acquitted upon his trial in the superior court of Chatham county, a change of venue from Jenkins county to Chatham county having been granted, and that, by reason of the acquittal on the two previous indictments which involved the same transaction, as charged by the indictment found on March 15, 1921, Jenkins superior court had no jurisdiction to try him upon the last indictment, but that the superior court of Chatham county did have jurisdiction. Upon consideration of the petition the judge of the superior court of Chatham county rendered the following judgment:

"I am of opinion that I have no power or jurisdiction to pass on the issues involved; the power or jurisdiction being vested in the superior court of Jenkins county, and the judge thereof. Order is denied."

To this judgment the petitioner excepted.

Properly construed, this is a case involving a change of venue, of which class of cases, since the constitutional amendment of 1916 (Acts 1916, p. 19), the Court of Appeals, and not this court, has jurisdiction. *Scoggins v. State*, 24 Ga. App. 677, 678, 102 S. E. 39. No constitutional or other question is raised by the record which would confer jurisdiction on the Supreme Court; and it is therefore transferred to the Court of Appeals.

All the Justices concur.

(151 Ga. 745)

RUFFIN v. STATE. (No. 2605.)

(Supreme Court of Georgia. July 15, 1921.)

*(Syllabus by the Court.)***Courts —217—Judgment on petition for change of venue not reviewable by Supreme Court.**

The judgment sought to be reviewed in this case is one rendered on a petition which, in substance, was for the change of venue in a criminal case. Since the ratification of the constitutional amendment of November 7, 1916 (see Acts 1916, p. 19), fixing the jurisdiction of the Supreme Court and the Court of Appeals, the latter court, and not the Supreme Court, has jurisdiction to review the judgment in such case; and therefore it is transferred to the Court of Appeals. *Ruffin v. State*, 108 S. E. 29, this day decided.

Error from Superior Court, Jenkins County; H. B. Strange, Judge.

Criminal prosecution by the State against Joe Ruffin. A change of venue was denied, and defendant brings error. Case transferred to Court of Appeals.

Archibald Blackshear, of Augusta, and Lawrence & Abrahams, of Savannah, for plaintiff in error.

A. S. Anderson, Sol. Gen., of Millen, for the State.

FISH, C. J. Case transferred to Court of Appeals. All the Justices concur.

(151 Ga. 735)

CHENEY et al. v. RAGAN et al. DANIEL et al. v. JENKINS et al. BOARD OF COM'RS OF CALHOUN COUNTY et al. v. DOZIER et al. (Nos. 2546, 2575, 2587.)

(Supreme Court of Georgia. July 15, 1921.)

(Syllabus by the Court.)

Counties —35(1, 3)—Order for election on removal of county site should not specify proposed new site; election invalid when place specified; declaration of result of invalid election will be enjoined in equity.

Where an election is held upon the issue as to whether there shall be a change or removal of the county site of a named county in this state, the petition for the election should be for an election for the removal of the county site, and the order calling the election should show that it is one for the removal of the actual county site, without specifying a particular place to which it shall be removed, so as to leave to the qualified voters free choice between the place where the county site is actually located and any other place in the county. And where the order for the election specifies the place to which the proposed removal shall be made, so as to make the contest between the actual county site and a particular design-

ated place, and an election is held under such order, the election is invalid.

(a) A court of equity will intervene, upon petition filed in time, by writ of injunction to prevent the declaration of the result of such election.

(b) The court erred in refusing to dismiss the petition for mandamus, and in granting the mandamus.

(c) The court did not err in granting the injunction against the issuance of county warrants to managers of the election in question, and in restraining payment of the same.

Error from Superior Court, Calhoun County; R. C. Bell, Judge.

Suit for injunction by C. W. Cheney and others against K. McK. Ragan and others; application of C. J. Jenkins and others for writ of mandamus against Harper Daniel and others; and suit by Sallie Dozier and others against the Board of Commissioners, etc., of Calhoun County, and others. Judgment for defendants in the first case, for the relators in the second case, and for the petitioners in the third case, and the unsuccessful parties bring error. Judgment in the first two cases reversed, and judgment in the third case affirmed.

Cheney and others filed their petition seeking an injunction which would restrain the defendants from holding a special election involving the removal of the courthouse from Morgan, Calhoun county, Ga., to the town of Edison, in that county, and from consolidating the returns for that special election; petitioners contending that the proceedings preliminary to the election were void for the reasons pointed out in the petition, that the petitions calling for the election under the statute were themselves illegal, and that the proposed election itself should be declared void. The court upon the hearing of the case refused an injunction, and the plaintiffs excepted upon numerous grounds.

In the second case above stated Jenkins and others sought a mandamus absolute, to require the managers at the same election to consolidate the votes cast at the election, and to declare the result. A demurrer to this petition was overruled, and to this order the defendants excepted. They filed a joint answer assigning various grounds in support of their contention that a mandamus absolute could not properly be granted against them; and the relators demurred to this answer, on general grounds. This demurrer was sustained, and the respondents excepted. No question of fact being involved in the case, the court entered a final judgment granting a mandamus absolute. Error is assigned upon this judgment.

In the third case above stated a petition was filed seeking to enjoin the board of commissioners of roads and revenues of Calhoun

county from issuing a county warrant or warrants to any of the superintendents of the election already referred to for holding and conducting said election, which was alleged to be illegal and void, and to enjoin the Bank of Leary, the county depository (the office of the treasurer of the county having been abolished), from paying out of the county funds any warrant or order that might be issued to the superintendents of the election. The petitioners in all of the cases were citizens and taxpayers of Calhoun county.

These three cases were argued together, and each of them brings under review the principal question involved; that is, whether the special election under consideration was illegal and void.

In No. 2546:

J. H. Dorsey, of Morgan, Glessner & Collins, of Blakeley, and W. I. Geer, of Colquitt, for plaintiffs in error.

Little, Powell, Smith & Goldstein, of Atlanta, A. L. Miller and E. L. Smith, both of Edison, J. M. Cowart and B. W. Fortson, both of Arlington, and Pottle & Hofmayer, of Albany, for defendants in error.

In No. 2575:

J. H. Dorsey, of Morgan, W. I. Geer, of Colquitt, and Glessner & Collins, of Blakeley, for plaintiffs in error.

A. L. Miller and E. L. Smith, both of Edison, Pottle & Hofmayer, of Albany, and B. W. Fortson and J. M. Cowart, both of Arlington, for defendants in error.

In No. 2587:

B. W. Fortson, of Arlington, Pottle & Hofmayer, of Albany, and Little, Powell, Smith & Goldstein, of Atlanta, for plaintiffs in error.

J. H. Dorsey, of Morgan, Glessner & Collins, of Blakeley, and W. I. Geer, of Colquitt, for defendants in error.

BECK, P. J. (after stating the facts as above). As these cases were argued together, they are decided together, as each of them involves one question which is the principal question in each of the cases; and, where any one of the three cases involves a distinct question that must be decided, that will be indicated by special reference to the case in which the question is raised.

1. The legality of the election to determine whether there should be a removal of the courthouse of Calhoun county or not is brought in question in each of these three cases. Certain subsidiary questions are also raised, the greater part of which it is not necessary to decide, in view of the conclusion we have reached as to the main question—that is, the legality of the election. And the determination of that question involves, in the first place, a construction of sections 486 and 488 of the Civil Code, which relate

to the change of county sites and the indorsement on the ballots cast in the election held for that purpose. Section 486 relates to the petition that shall be made to the ordinary for the removal or change of the county site, the order to be granted by the ordinary and the notice thereof, and the persons qualified to vote in such election, and the period at which such elections may or may not occur. Section 488 is in the following language:

"At said election all voters in favor of removal, and to what place, shall indorse on their ballots 'For removal,' and those who are opposed to removal shall indorse on their ballots 'Against removal,' and if two thirds of the votes cast at said election are in favor of removal to any one particular place, the General Assembly next convening after said election may provide for the removal of said county site by appropriate legislation."

And a construction of this latter section is made necessary by one of the principal questions raised in these cases; and that is whether an election called by an order granted by the ordinary, in which order it is recited that an election is called for the determination of the question as to the removal or change in the county site from the actual county site to a named town, and in which it is further recited that all voters in favor of removal of the county site shall have indorsed on their ballots "For removal of the county site to Edison, Georgia," and those voters who are opposed to the removal shall indorse on their ballots "Against removal," was a valid election upon the question of the change or removal of the county site. After a careful consideration of all the provisions and terms of section 488, the conclusion forces itself upon us that an election held in pursuance of the order referred to was not a valid, legal election. In section 488 it is declared that at an election for the purpose of changing the county site all voters thereat in favor of the removal shall indorse on their ballots "For removal," and to what place. The language of the statute prescribing the indorsement on the ballots is somewhat confused, as is readily seen by reading section 488; but by transposing the expression "and to what place" so that it shall follow the clause containing the words "For removal" the express declaration of the statute is made plain, and lays down the rule that the voters in favor of the removal must indorse on their ballots "For removal" and "to what place" the removal shall be made. And this is the construction given to the section of the Code in the case of *Wells v. Ragsdale*, 102 Ga. 53, 29 S. E. 165, where it is said:

"The meaning and intention of this provision of the act is not complied with by a simple indorsement upon the ballot of the voter 'For removal.' It must go further, and express the wishes of the voter as to the place to which the county site shall be removed; and, unless

such expression is made, such vote cannot be counted for removal."

And that it was not the intention that the choice of the voters at such election should be limited to one particular place is shown by the further provision in this section that—

"If two-thirds of the votes cast at said election are in favor of removal to any one particular place, the General Assembly next convening after said election may provide for the removal of said county-site by appropriate legislation."

Counsel representing the defendants in the first case insist that, even if it was the purpose of the Legislature, in elections like this, to submit merely the question of the removal of the existing county site, without limiting the choice of the voters between that place and some designated place, as was done in the present instance, nevertheless a call for an election to determine whether there should be a removal of the existing county site to a place designated in the order is not invalid, as the voters would be at liberty to indorse upon their ballots the place to which the county site should be removed. We cannot agree with this contention. We think it is clear that it was the intention of the General Assembly, in elections like this, that those voters who were in favor of a removal should have free choice between the actual county site and the one to which they desired a change to be made. They have the right under the statute to express an unrestricted choice, and the call of an election in which they should have the right to express this choice should not be misleading. The duty should not be imposed upon the voter to construe the statute conferring the right to make a choice and decide that he had a right to make a choice not indicated in the order calling the election. In *State ex rel. v. County Commissioners*, 22 Fla. 29, it is said:

"It is clear that the election prayed for and ordered, and given notice of, was one as to whether Sanderson should continue to be the county site, or the county site should be changed or removed to McClenny. The statute provides that the place receiving a majority of the number of votes cast at such election shall be the county site 'for ten years.' The purpose of the statute is that when an election is held under it the several voters of the county shall have the right to vote for any place in the county they may respectively deem the best place for the county site. The election to be ordered is 'for the location of the county site' of the county, and not merely whether it shall be removed to a named particular place or remain where it is. No such limited issue is to be submitted to the people. It is not contemplated that any voter shall be restricted either by the petitioning voters, or by the county commissioners, to voting for one of any two or more particular places, and any election in

which such restriction is made is entirely contrary to the spirit and purpose of the act. It is clear that no election has been ordered which called for an expression from the voters of Baker county of their choice as to which, of all points, place, or localities in it, the county site should be changed to. It will not do to say that the voters could have voted for any place other than Sanderson or McClenny. No such election was called, and it cannot be assumed that it was understood by the electors to be any election other than as between Sanderson and McClenny. It is a fact that in the case of *Lanier v. Padgett*, 18 Fla. 842, an election was held, and Sumterville received a majority of the votes over Leesburg, the then existing county site, and no fraud was alleged in the election; yet, as the petition did not ask a change of location, the election was declared to be illegal, and this, too, although it appears that the order was for an election locating the county site as contemplated by the statute. In *State ex rel. v. County Commissioners*, 19 Fla. 531, it appears that a large vote was polled at this election. The doctrine of these cases is that the provisions of the act in question should be strictly observed. 19 Fla. 532, 533. When an election of this kind is to be held, fairness and a proper enforcement of the law require that nothing should be permitted so fully calculated to mislead the electors as to their rights or in such patent antagonism to the true spirit of the law."

And this reasoning of the court seems to us to be sound and conclusive. And hence we conclude that the election sought to be enjoined was not such an election as is contemplated and provided for in the statutes under consideration, relating to elections upon the issue as to whether there shall be a removal of a county site. The preliminary and essential steps to the holding of such an election in this case were not complied with, because the order for the election was not such as contemplated by the statute; and we can reach no other conclusion than that, so far as it affected the question of removal, the election was illegal and void.

2. And under the questions made by the pleadings we must now decide whether or not a court of equity would interfere by injunction to prevent the consolidation of the vote and the declaration of the result of the election. This court has more than once adverted to the general principle that a court of equity ordinarily will not interfere with the holding of an election, by virtue of the exercise of the political power, for the determination of issues and matters submitted to popular vote under the provisions of the Constitution and the laws passed in pursuance thereof. But there are exceptions to this general principle. The case of *Mayor, etc., of Americus v. Perry*, 114 Ga. 871, 40 S. E. 1004, 57 L. R. A. 230, was one in which an application was made by the chairman and members of the board of police commissioners of the municipality, and by citizens and taxpayers of the city on behalf of themselves

and other citizens and taxpayers, to enjoin the mayor and council of the municipality and others from carrying into effect certain ordinances adopted by the mayor and council, which, if void, had the effect of abolishing the board of police commissioners and the office of chief of police. One of the questions raised was whether a court of equity would intervene in such a case and enjoin an election under an ordinance which the petitioners claimed was invalid. The contention was made in the case by demurrer that a court of equity would not interfere in a matter of this character; and this court said:

"The ordinances, so far as they attempt to abolish the board of police commissioners and to deprive it of the powers which the charter conferred upon it, are ultra vires and void, and there is nothing in the petition to show that the board of police commissioners is either failing or refusing to exercise the powers confided to it by the General Assembly. On the other hand, it appears, not only from the petition, but from the answer itself, that the board is attempting to exercise those very powers and would exercise them but for the obstructions placed in its way by the mayor and council. Under such circumstances the mayor and council have no authority whatever to elect a police force, and the election of such officers would bring about the question as to whether the persons so elected were entitled to demand compensation from the city; and while, under the view we have taken of the case, such persons would have no right to receive compensation, the fact that they were elected and were attempting to discharge the duties of the offices for which they were chosen would result either in the money in the city treasury being illegally used in paying their claims, or in requiring the money of the municipality to be used in defeating their claims for compensation; and to prevent this any taxpayer would have a right to appeal to a court of equity to enjoin the mayor and council from proceeding further to do any act which would have the effect to bring about either result. The plaintiffs bring their petition, not only as members of the board of police commissioners, but also in their capacity of citizens and taxpayers; and in this latter capacity they are entitled to be heard, the case being one where the municipal authorities are going beyond their powers and doing acts which, if carried into effect, would either result in a misappropriation of public funds or entail upon the taxpayers of the city the expense of litigating with persons who might hold claims against the city under the invalid ordinances."

And in the case of Mayor etc., of Macon v. Hughes, 110 Ga. 795, 38 S. E. 247, it is said:

"It is contended that the court below was without jurisdiction to grant the injunction prayed for, for the reason that a court of equity will not enjoin the holding of an election, which is a political and ministerial function, and consequently not controllable by the courts. The general rule undoubtedly is that courts of equity will not interfere in matters of elections. To say that this rule is without exception seems to be purely arbitrary. Why

should not such an election as the one now under consideration be enjoined? It is not an election in which a public office is involved, the right to hold which may be easily and effectually tested by the writ of quo warranto, but it is an election to determine whether or not given territory shall be annexed to the city of Macon. The city authorities have no power to call the election, their ordinance attempting to do so is absolutely void, and any election held thereunder would be likewise void. Some of the petitioners are residents and taxpayers of the city of Macon, and they predicate their right to the injunction on the ground that illegal expenses will be incurred by reason of the election, of which expenses they will be required to bear their proportionate part. This was a sufficient ground for the granting of the injunction at their instance."

See, also, Wells v. Ragsdale, supra.

The present case under its facts should be excepted from the general rule that courts of equity will not interfere with elections. Nor are we concluded upon this point by the case of Vornberg v. Dunn, 143 Ga. 111, 84 S. E. 370. It is true that in that case it appeared that the election held was for a change of the county site to a designated place, and it was claimed that the voters were thereby prohibited from exercising their unrestricted choice as to the place of their preference. But the petition in the case was filed to enjoin the collection of a tax after the Legislature had acted in accordance with the provision of the Constitution and after it had enacted that the county site of Murray county be removed from Spring Place to Chatsworth; and the court did not decide in that case nor pass upon the question of whether or not the declaration of the result of the election should be enjoined, where the election was void and failed to comply with the statute in such cases provided. In the present case steps were taken to enjoin the declaration of the result of the election before that election became a part of or in any way interwoven with a legislative enactment; and in that respect it differs essentially and fundamentally from the case of Gaskins v. Dorsey, 150 Ga. 638, 104 S. E. 433. The decision in that case dealt with a petition for injunction which sought to restrain the publication of a certain proclamation by the Governor, authorizing the qualified voters of the state of Georgia to vote upon a certain proposal of the General Assembly of Georgia to amend the Constitution of the state so as to create a new county, and further to enjoin the Governor from placing upon the official ballots for the election to be held any provision for the ratification or rejection of the proposed amendment to the Constitution, and also to enjoin the Secretary of State from proclaiming the result of any election upon the ratification of the proposed amendment. And this court held that the trial court did not err in refusing to grant

the injunction, because, considering the steps necessarily taken in the course of legislation and submission of the proposed amendment to the people, an amendment to the Constitution is in its formative stages until the electorate of the state have cast their ballots thereon in a general election; that, while the amendment is in such formative state and in the course of progression from the proposal to the general election and ratification, it is analogous to ordinary legislation by the General Assembly, which is in its formative state or state of progression from the time of the introduction of a bill until it is finally passed by the requisite constitutional majority and has received the signature of the Governor; that the judicial power will not be exerted, by writ of error or otherwise, to stay the course of legislation while it is in process of enactment; and that this principle is applicable both to ordinary legislation and the analogous course of an amendment to the Constitution from the time of the introduction of the act proposing the amendment until the electors have acted. It will be readily seen that there is a fundamental difference between the case of *Gaskins v. Dorsey*, supra, and the present case. The election in the present case, while it might become the basis of action by the General Assembly, had in no way become a part of the legislative enactment, but the petitioners acted promptly and attacked the election in limine. And though the election was held at the time and places specified in the order, no injunction having been granted to restrain the election, the court should have granted the injunction prayed against the consolidation of the votes and the declaration of the result, and the refusal of the injunction to restrain the declaration of the result was error.

It necessarily follows from what we have said that the court should not have granted the mandamus requiring the superintendents of the election to declare the result.

Judgment reversed in the first two cases, and affirmed in the third.

All the Justices concur.

(151 Ga. 718)

GALES v. STOKELEY et al. (No. 2306.)

(Supreme Court of Georgia. July 14, 1921.)

(Syllabus by the Court.)

1. Trusts \S 77—Implied trust does not arise from contributions towards purchase price subsequent to conveyance.

A resulting or implied trust which arises solely from the payment of the purchase price of land is not created, unless the purchase money is paid either before or at the time of

the purchase. Trusts implied from the payment of the purchase money or a part thereof must result, if at all, at the time of the execution of the conveyance, where there is, in obtaining such conveyance, no fraud or concealment to the injury of the person paying such purchase money. *Hall v. Edwards*, 140 Ga. 765, 767, 79 S. E. 852, and authorities cited, and see *Houston v. Farley*, 146 Ga. 822, 824, 92 S. E. 635.

2. Petition properly dismissed.

Accordingly, under the facts alleged, the court did not err in sustaining the general demurrer and in dismissing the petition.

Error from Superior Court, Oglethorpe County: W. L. Hodges, Judge.

Suit by Betsy Gales against E. M. Stokeley and others. Judgment dismissing the petition, and plaintiff brings errors. Affirmed.

The petition makes substantially the following allegations: Prior to April 3, 1879, William A. Alexander contracted to purchase a certain tract of land, but because of advancing age and feeble health he was unable to perform the obligations of the contract. A parol agreement was made between Alexander and his children and stepchildren, whereby his children and stepchildren were to become substituted as purchasers and were to live upon and work the land and pay for the same with the proceeds of their labor, and were each to have an equal undivided interest. For convenience, title was to be taken in the name of the two stepsons, Howard and Jerry White, who were the only male members of the family that were of age. Under the arrangement these two were to have the management of the place. Pursuant to this agreement, a sum sufficient to discharge the purchase money was borrowed upon security of the land, and title to the same was taken in the name of the two stepsons of Alexander, on June 3, 1882. Pursuant to the above-mentioned agreement, the two stepsons and the children of Alexander (including petitioner) entered into possession of the land. On or about January 22, 1901, Jerry White sold his entire interest in the land to Howard White. Petitioner has lived continuously upon and been in possession of a portion of said land. Through the labor of herself, her children, and other persons under her control, and by the delivery to Howard and Jerry White of certain cotton, cotton seed, and corn, and the payment of certain sums of money, she contributed toward the payment of the purchase price at least \$100 per annum from the date of the above-mentioned agreement up to and including the year 1917. Through the sale of portions of property and the application of various amounts, which were largely the proceeds of contributions made by petitioner, payment of the purchase price was completed

shortly prior to the death of Howard White, which occurred in 1917. Howard White always admitted and recognized petitioner's interest in said property, and often stated to petitioner and others that he would make a legal provision which would protect the rights of petitioner and establish her interest in the property, and during his last illness he promised petitioner and stated to others that he would make a will which would adequately protect her rights, and would devise to her such portion of the property as would compensate her for the contributions made by her; but he died without having made this provision and without having accounted to petitioner for the contributions made by her. Petitioner is illiterate, and, being unable to read or write, she trusted fully Howard White to perform his obligations to her, and did not take from him any receipts, contracts, statements in writing, or other paper evidencing her interest in said land. There has been no administration upon his estate, but his widow and sole heir, Igenia White, has taken possession of all his property and has arranged to sell to Stokeley the property in which petitioner claims an interest. Stokeley has acted with knowledge of petitioner's rights in the premises, and a sale of said property would render the estate of White insolvent.

The prayers are for injunction to restrain the carrying out of the proposed sale or other change in the status of the property; for decree establishing the title of petitioner to one-eighth undivided interest in said land, and fixing the amount of the value of all contributions made and payments rendered by petitioner to Howard and Jerry White, and that the judgment therefor be declared to be a special lien against the property mentioned and all other property belonging to the estate of Howard White; that Howard White be declared to have been a trustee of all of said property for petitioner, subject to be discharged by the conveyance of a one-eighth undivided interest and the payment to her in money of the balance contributed by her over her proportionate share of the purchase price; that all of said property be sold, and distribution of the proceeds be made to petitioner in accordance with the equitable interests and priorities found and decreed in her favor, and to the other persons who may be found to have interests therein; for the appointment of receiver to preserve the status of the property; for general relief and process. There were other allegations and prayers relating to other parties, but these could not be material unless the petition set out a cause of action against Igenia White.

The petition was demurred to generally upon the grounds: (a) want of equity; (b) it fails to set forth a cause of action; (c) the

action set forth is based upon a stale demand, and petitioner's rights, if she ever had any, are barred by gross laches and long delay in asserting them; (d) the facts and circumstances alleged are insufficient in equity to raise or create an implied trust; (e) the petition seeks, by an alleged parol agreement, to ingraft upon an absolute and unconditional deed an express trust; (f) it does not appear how much or what part of the purchase price of said lands petitioner contributed in labor and money, and it is impossible for the court to determine what interest she would be entitled to recover; (g) it affirmatively appears that no part of the purchase price of the lands in question was paid or contributed by petitioner at the time of or before the execution of the deed from the original vendor to Howard and Jerry White, and that the said lands were not purchased or paid for with money, labor, or other things of value contributed by the plaintiff. The demurrer was sustained and the petition dismissed, because of which exception was taken by the plaintiff.

Phil W. Davis, Jr., of Lexington, for plaintiff in error.

W. W. Armistead, of Crawford, Hamilton McWhorter, Jr., of Lexington, and Tutt & Brown, of Elberton, for defendants in error.

GILBERT, J. Judgment affirmed. All the Justices concur.

(151 Ga. 690)

A. W. WATTERS & CO., Inc., v. O'NEILL
et al. (No. 2173.)

(Supreme Court of Georgia. July 18, 1921.)

(Syllabus by the Court.)

Bills and notes \S 534—Obligations to pay attorney's fees may be enforced in attachment proceedings; "return day."

The statutes prescribing procedure in attachment suits make provision for "a return day" within the meaning of the statute prescribing the conditions on which agreements to pay attorney's fees in addition to the stipulated principal and interest may be enforced; and such agreements may be enforced in an attachment suit under conditions specified in the statute.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Return Day.]

Certified Question from Court of Appeals.

Action between A. W. Watters & Co., Incorporated, and J. H. O'Neill and others. Judgment for the latter, and the former brought error to the Court of Appeals, which certified a question to the Supreme Court. Question answered in the affirmative.

The Court of Appeals certified to the Supreme Court the following question:

"In attachment proceedings to recover an indebtedness evidenced by promissory notes, is there a day which corresponds to the 'return day' as contemplated in section 4252 of the Civil Code of 1910? In other words, in such a suit, where the notes contained the usual stipulations for the recovery of attorney's fees and where the requirements of the above Code section as to notice have been complied with, and where the plaintiff in attachment is entitled to a common-law judgment in personam against the defendant (the attachment having been abandoned) for the principal and interest sued for, is he entitled also to recover attorney's fees?"

J. Mallory Hunt, of Atlanta, and L. H. Covington and Nathan Harris, both of Rome, for plaintiff in error.

Denny & Wright, of Rome, for defendants in error.

ATKINSON, J. Civil Code, § 4252, declares:

"Obligations to pay attorney's fees upon any note or other evidence of indebtedness, in addition to the rate of interest specified therein, are void, and no court shall enforce such agreement to pay attorney's fees, unless the debtor shall fail to pay such debt on or before the return day of the court to which suit is brought for the collection of the same: Provided, the holder of the obligation sued upon, his agent, or attorney notifies the defendant in writing, ten days before suit is brought, of his intention to bring suit, and also the term of the court to which suit will be brought."

While this statute denounces the promise to pay attorney's fees, it does so with the proviso that the obligor shall spare the obligee the necessity of further litigation by paying the amount of principal and interest due under the terms of the contract on or before the "return day" of the court to which suit is brought for the collection of same, if the holder of the obligation shall notify the defendant in writing, 10 days before suit is brought, of his intention to bring the suit and of the term of court to which the suit will be brought. "Suit," as employed in this statute, manifestly contemplates any form of action for recovery of the debt in a court having jurisdiction to render judgment on the demand where there is provision for "a return day." This court has recognized that a proceeding in court by statutory attachment is a suit. *Baker v. C. Aultman & Co.*, 107 Ga. 339, 33 S. E. 423, 73 Am. St. Rep. 132; *Fincher v. Stanley Electric Mfg. Co.*, 127 Ga. 362, 56 S. E. 440. In *Davenport v. Richards*, 138 Ga. 611, 75 S. E. 648, referring to the above-quoted section of the Code, it was said:

"It is clear that the obligation to pay the attorney's fees was void and could not be enforced, unless the debtor failed to pay the debt

'on or before the return day of the court' in which the proceedings to collect the same were brought. The expression 'return day,' as used in the statute, means the same as filing day, or the last day on which suits may be filed so as to be returnable to the next term. *Everett & Son v. First's Sons & Co.*, 126 Ga. 662, 55 S. E. 916. * * * Two things are necessary to negative the positive legislative declaration that an obligation to pay attorney's fees upon a note or other evidence of indebtedness is void, to wit: Notice by the holder of his intention to bring suit, and of the term of court to which the suit will be brought; and a failure upon the part of the debtor to pay the debt on or before the return day."

Under such construction it was held that the provision for attorney's fees could not be enforced in statutory proceedings for the foreclosure of a chattel mortgage, there being no provision in the statute for a "return day." The statute relating to foreclosure of chattel mortgages provides for issuance of an execution under which the property shall be levied on (Civil Code, § 3286) and sold, upon the filing with the clerk of court the mortgage or a copy thereof with an affidavit attached as prescribed. It will be perceived that this is a summary remedy, and that the *fi. fa.* is final process which may be levied immediately, without any provision for the holder of the note to give notice as prescribed in Civil Code, § 4252. The statutes providing for suits in attachment are quite different, as will be shown. There are several articles of the Code providing for suits in attachment. The first is in Civil Code, § 5055, which declares:

"Attachments may issue in the following cases: 1. When the debtor resides out of the state. 2. When he is actually removing, or about to remove, without the limits of the county. 3. When he absconds. 4. When he conceals himself. 5. When he resists legal arrest. 6. When he is causing his property to be removed beyond the limits of the state."

Succeeding sections provide how attachments based on such grounds are to be obtained, and procedure for the return and trial of attachment suits. In Civil Code, § 5063, it is declared that, when the amount shall exceed the sum of \$100, the attachment shall be made—

"Returnable to the next term of the superior or county court of the county where the defendant resides, or where he last resided; but if such superior court shall sit within twenty days, or such county court shall sit within fifteen days, next after issuing such attachment, it shall be made returnable to the next term of the court thereafter."

Similar provisions are made for the return of attachments to justices' court in cases where the debt does not exceed the sum of \$100, except that the limit of time is 10 days before the term to which the case is returnable. Article 3, which commences with

Civil Code, § 5083, relates to attachments for purchase money. It provides for the issuance of attachments:

"In all cases of sale of lands, where the vendor has not executed a deed of conveyance to the purchaser for the same, but has given bond for titles or other evidence of the contract, and the purchase money has not been paid, and the vendee shall become liable to attachment, attachment may issue against him at the instance of the vendor, upon complying with the provisions of this Code in relation to attachments."

(The attachment in the case to which the question propounded by the Court of Appeals relates was sued out under this section of the Code.)

In Civil Code, § 5084, provision is made for the issuance of the process of attachment in behalf of any creditor whose debt is created by the purchase of property generally. There is no provision in either section 5083 or section 5084, expressly stating when such attachment suits shall be made returnable; but, referring to those sections, it is said in Civil Code, § 5087, which is the last section in article 8:

"So much of this Code as regulates the proceedings in relation to remedy by attachment, as is not in conflict with the three preceding sections, shall apply to and control proceedings under this article."

This makes the language relating to "return" hereinbefore quoted from Civil Code, § 5063, applicable to such cases. Article 4, which commences with Civil Code, § 5088, refers to attachments against fraudulent debtors. Attachments under this law must also be returned as provided in Civil Code, § 5063, for it is declared in section 5092, referring to attachments against fraudulent debtors:

"Such attachments, when issued and served, shall be returned and disposed of as attachments are now returned and disposed of, and be subject to the same defenses, and may be taken out upon the affidavit of the agent or attorney of the creditor, if he can, by his own oath, make out a case which will satisfy said judge."

The attachments above referred to are in each instance merely mesne process, and never become final until after judgment. They are required to be returned to a court, and procedure is provided for a hearing and disposition of the case in court. As indicated above, the statute prescribes certain numbers of days which must intervene between the issuance of the attachment and the term of court to which it is made returnable, the number of days varying according to the character of the court to which the attachment is returnable, being 20 days when returnable to the superior court, 15 days when returnable to a county court, and 10 days when returnable to the justice's court. This

in effect provides for a "return day" as contemplated in Civil Code, § 4252, first hereinabove mentioned in regard to the enforcement of obligations to pay attorney's fees. The "return day" for an attachment suit, within the meaning of that statute as construed in *Davenport v. Richards*, 138 Ga. 611, 75 S. E. 648, is the last day within which the attachment could be issued, returnable to a given term of the court. While the statutes relating to procedure by attachment differ from Civil Code, § 5562, which relates to the bringing of ordinary suits, they are similar at least to the extent that in each provision is made for a "return day" for issue to be joined, for a full hearing for both parties on the validity and correctness of the claim, and that there is no final process in the case until after judgment. Such being the character of the statute relating to suits by attachment, an agreement expressed in a promissory note to pay attorney's fees in addition to the principal and interest stated in the note can be enforced in a suit by attachment under conditions as provided in Civil Code, § 4252. This sufficiently answers the question propounded by the Court of Appeals.

All the Justices concur.

(151 Ga. 632)

STARNES v. SANDERS. (No. 2438.)

(Supreme Court of Georgia. June 17, 1921.)

(Syllabus by the Court.)

1. Wills ~~§~~ 594—Provision in case of death of devisee without "bodily heirs" means children.

James D. Starnes brought suit to recover described land. His petition alleged that in 1906 he married Hattie Stephens, who died in 1909, leaving no children; that the plaintiff is her sole heir at law; that there has never been any administration upon her estate; and that she left no will. The petition further alleged that John R. Stephens, the grandfather of Hattie Stephens, devised the land in question to Hattie Stephens; the material parts of said will being as follows: Item 3: "I give, bequeath, and devise to my beloved wife, Susan Stephens, all of my property of every description, personal and real estate, money, notes, and accounts, to have and to hold, use, and enjoy the same with the income from the same for and during her natural life." Item 4 (in so far as material): "After the death of my said wife I give, bequeath, and devise * * * to my granddaughter, Hattie Stephens," the land in question. Item 7: "Upon the death of my said wife, I desire and direct that all of my personal property, including whatever money in her possession arising from the income from the same, shall be converted into cash, and equally divided among my grandchildren to wit: Savannah Stephens, John F. Stephens, and Hattie Stephens; it being understood that if

any of said grandchildren should die without bodily heirs, all the property devised to the one so dying under and by this will shall be equally divided between those that survive." John R. Stephens died in 1905, and Susan Stephens, the life tenant, died on or about December 1, 1918. *Held*:

"Bodily heirs," or words of similar import, are held to mean children. Civil Code 1910, § 3860; *Stanley v. Reeves*, 149 Ga. 151, 155, 90 S. E. 378.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Bodily Heirs.]

2. Wills §545(4) — Remainderman held to take absolute or defeasible fee dependent on surviving life tenant or dying without bodily heirs.

Under the will Hattie Stephens, wife of the plaintiff, took a remainder in fee, either absolute or defeasible, depending upon whether she survived the life tenant, at whose death the estate vested, or died "without bodily heirs" prior to that event.

3. Wills §634(8)—Heir of remainderman who survived testator, but died before life tenant, held to take nothing.

She survived the testator, but predeceased the life tenant, "without bodily heirs." Accordingly the court did not err in sustaining a general demurrer and dismissing the petition filed by the husband, seeking to recover the land as the sole heir of his wife. Compare *Nottingham v. McKelvey*, 149 Ga. 463, 100 S. E. 371.

Error from Superior Court, Cherokee County; D. W. Blair, Judge.

Action by J. D. Starnes against Susannah Sanders. Judgment for defendant, and plaintiff brings error. *Affirmed*.

Geo. F. Gober, of Atlanta, G. B. Walker, of Alpharetta, and H. B. Moss, of Marietta, for plaintiff in error.

J. P. Brooke, of Alpharetta, for defendant in error.

GILBERT, J. Judgment affirmed. All the Justices concur.

(151 Ga. 710)

MILLER v. STATE. (No. 2594.)

(Supreme Court of Georgia. July 13, 1921.)

(Syllabus by the Court.)

1. Criminal law §686(1, 2)—Refusal to permit defendant to reopen case to rebut testimony brought out on cross-examination of state's witness not abuse of discretion; trial judge has large discretion regarding reopening of case.

The court did not abuse its discretion in refusing to reopen the case and to admit evidence offered by the accused to show that the deceased was a man of violent character; this

evidence having been offered after the state and the defendant had closed and the state had offered evidence in rebuttal of the defendant's evidence, and not being in rebuttal of any new matter brought out by the state.

2. Criminal law §938(1)—Homicide §319

—Newly discovered evidence in murder case held not such as would probably produce different result; applications on ground of newly discovered evidence not favored.

In view of all of the facts appearing on the trial, this court is not reasonably convinced that on another trial there would probably be a different verdict because of the alleged newly discovered evidence.

3. Homicide §171(1) — Refusal to exclude evidence as to conduct of crowd following killing held not error.

Error is assigned on the refusal of the court to rule out the evidence of a witness for the state, as follows: "That a large crowd had gathered around the scene after the homicide had been committed, and tried to prevent movant from leaving the scene, together with officials of the street car company." The criticism was that "it did not illustrate any issue in the case." This ground of the motion does not show error.

4. Homicide §307(4)—Instruction held not to limit jury to consideration of crime of murder.

Error is assigned on the following instruction to the jury: "You are the judges of the law and the facts, and are to render a general verdict of guilty or not guilty." Movant complains that this charge was harmful to him, for the reason that "the charge in the indictment was that of murder, and limited the jury to the consideration of this crime alone; whereas, under the evidence and the law, the crime of voluntary manslaughter was involved." The court fully and fairly instructed the jury in regard to the law of voluntary manslaughter, and explained that under a certain state of facts, if believed by the jury, a verdict finding the defendant guilty of voluntary manslaughter would be authorized. The exception in this ground of the motion is therefore without merit.

5. Criminal law §922(1) — Instruction concerning duties of jurors and importance of jury trial held not ground for new trial.

Complaint is made that the court erred in a lengthy instruction to the jury regarding the manner of selecting jurors by jury commissioners; how they were drawn for service in the court; that they were not volunteers, but had been drafted for public service to their country as soldiers are drafted for their country's defense; that jury trial is the sheet anchor of American liberty, has stood the test and strain of a thousand years, and has come down to us from our Anglo-Saxon fathers across the seas; stressing the importance of honesty and uprightness in all relations of life, the duty resting upon them to measure up to these high principles, the sanctity of their oaths as to the questions that were propounded to them on the voir dire, and the oath administered upon being sworn to try the case, etc. The criticism is "that this portion of the charge was harmful

to him, because it was argumentative and calculated to unduly influence the minds of impartial jurors." While subject to some criticism, at least that it was not indispensable to the issues of the case, we cannot say that the charge contained any misstatements of the law, or untruths, or misconceptions in regard to the moral principles under discussion. We do not think it subject to the specific criticism made by movant, and therefore it will not require a reversal of the judgment refusing a new trial.

6. Instruction on reasonable fears held sufficient.

Several of the grounds of the motion for new trial complain of the instructions of the court in regard to the law of voluntary manslaughter. After a careful consideration of these grounds we are satisfied that they contain in substance a fair statement of the law on that subject, and that no error is shown. It would conserve no useful purpose to set out these grounds in full, since no new or novel question is raised. Suffice it to say that the chief criticism is that thereby the accused was deprived of his defense of justification, based on the ground of reasonable fears. The jury was fully instructed in regard to the law of reasonable fears, as provided in Pen. Code 1910, § 71.

7. Criminal law §761(9) — Instruction that certain facts were undisputed in murder case held not erroneous.

Movant insists that the court erred in instructing the jury as follows: "The fact that a pistol, held in the hands of the prisoner at the bar, aimed at and towards the deceased, from which bullets were shot, penetrating his body and causing a wound from which he soon thereafter died, is not in fair debate in this case. The pistol was held by him, and its trigger pulled by him, and the man is dead as a consequence." Under a fair construction of all of the evidence and the prisoner's statement, we think these facts are undisputed, and therefore the statement of them by the court was not error. Atkinson, J., dissents.

8. Other grounds of motion.

The remaining grounds of the motion are either expressly abandoned, or are without merit, and therefore show no cause for the grant of a new trial. The evidence authorized the verdict.

Atkinson, J., dissenting in part.

Error from Superior Court, Fulton County; H. C. Hammond, Judge.

G. G. Miller was convicted of murder, and he brings error. Affirmed.

Cobb & Foster, of Atlanta, for plaintiff in error.

Jno. A. Boykin, Sol. Gen., of Atlanta, R. A. Denny, Atty. Gen., and Graham Wright, Asst. Atty. Gen. for the State.

GILBERT, J. [1] 1. Evidence was introduced by the state for the purpose of showing the killing by the accused as alleged in the indictment, and the circumstances at-

tending the same, whereupon the state closed its case. The accused then offered evidence, and made his statement, contending that the same showed a justification for the killing. The state then introduced a witness, Manning, in rebuttal, and on cross-examination by counsel for the accused he testified as follows:

"I have known Bussey approximately four or five years. I know his general character for peacefulness and violence; he was always a peaceful boy. I never saw him in an argument in my life; he didn't drink whisky, that I know of; he wasn't drinking on this occasion, that I know of."

The state again closed its case; whereupon the accused called in his own behalf a witness, D. R. Sewell, and through his counsel propounded the following question:

"Do you know his [F. S. Bussey's] general reputation?"

The court refused to allow the witness to answer the question, making the following statement:

"The state has put in its case and closed. You put in your case and closed the evidence. It is true that I permitted you to ask the witnesses who were on the cross-examination, called in rebuttal, that question. This is a matter of general defense; there is nothing suggestive of rebuttal in it; and to bring in this question at the end of the case doesn't quite seem to be proper, and I'll not admit it."

Counsel for the accused then said:

"Our reply is that we hadn't an opportunity to ask this witness such a question."

Error is assigned on the refusal of the court to allow the witness to answer the question propounded, and in this assignment the following criticism is made:

"Movant insisting that the witness, if permitted to answer, would answer as follows: That 'the reputation of F. S. Bussey for violence was bad; that he was of violent temper, and frequently engaged in fussing and fighting.' Movant shows that this testimony was in rebuttal to that of the state's witness, W. L. Manning, who testified that he had known the said Bussey approximately four or five years, and that he knew his general character for peacefulness and violence, and that he was always a peaceful boy, and that the judge was then and there informed as to what the answer of the witness D. R. Sewell would be if he had allowed him to answer at all."

Assuming, without deciding, that this evidence would have been admissible if offered at the proper time, it was not reversible error to refuse to allow the evidence at the time and under the circumstances detailed above. It was not in response to any new fact brought out by the state in its rebuttal evidence. To permit the defendant, on cross-

examination of the state's witness introduced in rebuttal, to bring out new and independent facts not sought by the state, but in response to questions by counsel for the accused, and then to require a reopening of the case to allow defendant to rebut such evidence brought out by him, would be to put it within the power of the latter to arbitrarily prolong the case. Moreover, it would require the court to permit the state thereafter to again open its case for the introduction of further testimony, if obtainable, to meet the new issue thus raised. Had the state brought out in rebuttal new evidence material to the issue, this, of course, would entitle the defendant to an opportunity, if desired, to explain, contradict, or disprove it. It is a well-recognized principle that the trial judge has a large discretion in regard to reopening a case for the introduction of new evidence after both parties have closed their case. In this instance there was no abuse of discretion.

[2] 2. One ground of the motion for new trial was based on alleged newly discovered evidence. The affidavit of the newly found witness, in so far as material to the present consideration, is as follows:

"That on the evening of December 17, 1920, he boarded an Irwin street car at the corner of North Pryor and Houston streets at about 6 o'clock, his destination being the Atlanta Stove Works, which is situated on said car line at the corner of Irwin and Krog streets; that when said car reached the corner of Houston and Courtland streets it stopped; that there was an automobile parked on Houston street at the corner of Courtland, and there were several people congregated around this car; the motorman who was driving the car on which I was riding got off of his car, and went back to where the crowd around the automobile was standing. I heard the driver of the automobile, whom I afterwards learned was Bussey, order the motorman, whom I afterwards learned to be Miller, to go back to his car. Miller replied that he would go back when he got good and ready. I heard some man tell Bussey to go on and get in his car and go on away. Just as Bussey got one foot on the running board of his car, he turned to Miller and said, 'You God damn son of a bitch, I will get you yet.' With that Miller ran to Bussey, and they grappled. Bussey got Miller down over the radiator of his car. I saw Bussey throw a knife to the ground and reach into his hip pocket; when he did that Miller shot him twice. I left the car and went up to within 15 feet of the fight, and plainly heard what happened."

The only new fact is that the witness saw the deceased "throw a knife to the ground." Applications for new trials on account of newly discovered evidence are not favored by the courts. This well-known rule was forcefully and elaborately stated in the case of *Berry v. State*, 10 Ga. 512, 527. In the opinion the essential facts to be established are stated, and many authorities are cited.

The rule was restated in *Young v. State*, 56 Ga. 403, where, after stressing the necessity for great caution in the grant of new trials on the ground of newly discovered evidence, it was said:

"Courts are not obliged to grant a new trial for newly discovered evidence, unless they are reasonably convinced that on another trial there would probably be a different verdict."

These principles have been adhered to by this court without deviation. In order to weigh the importance of the newly discovered evidence it is necessary to consider the evidence and the statement of the accused had upon the trial. The evidence developed on the trial showed that a collision occurred between a street car and an automobile which Bussey, the deceased, was driving; and that when another street car, operated by the defendant as motorman, approached the scene of the collision, the defendant got off his car and went around one or two other street cars which were standing between his car and the street car which had collided with the automobile, for the purpose, as he claimed, of assisting in the investigation of the accident; and that the difficulty between the deceased and the defendant then arose, and the shooting followed. That the accused shot and killed Bussey is fully established by the evidence for the defendant, as well as that of the state. The defendant introduced more than one witness who swore to facts substantially in accord with the witnesses for the state, showing these facts beyond controversy. There was conflict only in regard to who brought on the difficulty. The witnesses for the state testified, in substance, that the defendant brought on the difficulty by using vile and profane epithets to the deceased, and when the deceased resented them the accused struck him with his fist, and when the deceased, without a weapon, had engaged the accused in the fight, the accused drew his pistol, which had been concealed on his person, and shot the deceased. The witnesses for the defendant in the main testified that the deceased brought on the difficulty by the use of vile and profane epithets to the accused, and when the accused retorted by similar expressions the deceased assaulted and beat the accused with his fist, and during the fight the accused drew his pistol and shot the deceased. The accused, in his statement, detailed the facts as similar to those stated by the witnesses introduced by him. He also said, among other things, as follows:

"Just as I got up there, this crew got his number; it was leaving, and I turned around, and just as I turned around Bussey came running up to me, cursing me, says, 'You get out from around here; get out.' He says, 'Well, you little consumptive you, I'll spill you all over the street,' and made a threatening motion towards his pocket, which I took to mean

that he was fixing to pull out a gun. Well, I put my hand in my overcoat pocket where I kept mine. Now, this car line, where I run on, goes through West Fair, Chestnut street, clean to Lee street, almost to West End avenue. There is nothing out there but negroes, and they have troubled we street car men—I never had any to amount to anything with any of these people—but going out Irwin street we go through a dense negro populated settlement, and I put this in my overcoat pocket, where I can get it; if a man has one where he can't get it, he might as well not have it, the way I always figured it. If you are going to have it, have it where you can get it. And when he begun to talk about making me sell out and run from him and one thing and another, I just kinder stood my ground. I didn't want him to have the satisfaction of running me away from up there. I went up there, perfectly legitimate work for me to go up there on. I thought the distance this car was from the automobile, he had went that distance since he had hit him, it would have been a bad accident."

Nowhere in the evidence, either for the state or for the accused, or in the statement of the accused, does it appear that the accused killed, or claimed to have killed, the deceased in defending himself against the use of a knife by the deceased, or the fear that the deceased would use a knife. It appears without contradiction that the deceased, in the presence of all, had emptied his front pant's pocket, and had assured the accused that he was unarmed, without even a pocket-knife, and asked him to fight it out in their shirt sleeves, without weapons, in a fair manner. The alleged newly discovered testimony shows, if anything, that the deceased intentionally discarded the knife and refused to use it. The accused interposed the defense that the deceased reached toward his hip-pocket, and, acting under the fears of a reasonable man that he was about to draw a pistol, he shot him in his own defense. After a careful consideration of all the facts adduced upon the trial, we are unable to see any reason for the grant of a new trial because of the alleged newly discovered evidence. If a new trial should be granted and the newly discovered evidence should be introduced, it would require a considerable strain of the imagination to conceive of a different verdict in the case on that ground. This is especially true when we consider that

part of the statement of the accused quoted above. It is established out of his own mouth that he habitually carried a pistol in the performance of his duty as a motorman on the trolley car where he was employed. Thus he establishes for himself that he belonged to that class of persons who believe it necessary for self-protection to daily carry upon his person a dangerous and deadly weapon in the handling of his passengers. He offered no explanation for this, save that his car traversed a "dense negro populated settlement," and "they have troubled we street car men." This amounts to no excuse whatever. If, on the contrary, it justifies a conductor or motorman on a street car to carry a pistol contrary to the law of the land, citizens otherwise law-abiding are likely to conclude that they must, in traveling on street cars, go armed for self-protection. Furthermore, according to his own words, as quoted above, and as showing his trend of mind, he says:

"I put this [the pistol] in my overcoat pocket, where I can get it; if a man has one where he can't get it, he might as well not have it, the way I always figured it. If you are going to have it, have it where you can get it."

For one entertaining these views nothing is more natural than for his mind unnecessarily and altogether too quickly to arrive at the conclusion that the other man is about to draw a weapon whenever his hand goes toward a pocket. The fact that the accused habitually was armed when on duty challenges the quality of his courage, and the claim that he killed under the fears of a reasonably courageous man. The absolute inadequacy and futility of such justification, standing alone, is shown by Chief Justice Warner in the case of *Malone v. State*, 49 Ga. 210, 218. There the killing of one who threw his hand to his hip pocket, and under the provocation of vile epithets, was denounced as murder. See, also, *Vernon v. State*, 146 Ga. 709, 715, 92 S. E. 76.

[3-8] 3. The third, fourth, fifth, sixth, seventh, and eighth headnotes do not require elaboration.

Judgment affirmed.

All the Justices concur, except ATKINSON, J., who dissents from the ruling in the seventh headnote.

(151 Ga. 728)

GREEN v. HALL et al. (No. 2260.)

(Supreme Court of Georgia. July 15, 1921.)

*(Syllabus by the Court.)***1. Appeal and error \S 327(4)—Not dismissed for failure to serve party having no interest.**

The motion to dismiss the writ of error, on the ground that two of the defendants in error were not served, is without merit, as one of them was served, and the other had no interest in the case.

2. Executors and administrators \S 76—Tenancy in common \S 33—Grantor of undivided interest in consideration of grantor's agreement to pay share of proceeds of sale has no lien or interest; court cannot order receiver to pay general claim of estate of which she is administrator.

The fact that a receiver in an equitable suit holds a fund decreed to belong to an estate which is represented in the case by an administrator will not authorize the court to order the receiver to pay out of such fund the claim of a general creditor of the estate, who has no lien of any character on the fund, nor any interest therein, either legal or equitable.

Error from Superior Court, Rabun County; J. B. Jones, Judge.

Suit by Henry Talmadge & Co. against W. J. Green and others, in which F. A. Green, administratrix, was made a party, and in which the defendant S. S. Hall, who filed no plea or answer was permitted to intervene after judgment. Judgment in favor of Hall, and the administratrix brings error. Reversed.

On April 1, 1903, W. J. Green and S. S. Hall purchased a described lot of land in Rabun county, and on April 3, gave their note to George L. Prentiss for \$4,500, which sum they borrowed from him to be used in paying for the land, and to secure the debt executed to him a mortgage on the premises. On the same day Green and Hall, for an expressed consideration of \$4,500, conveyed to Prentiss a one-third undivided interest in the land, subject to the mortgage. On February 4, 1904, a written agreement was executed between Green and Hall as follows:

"This agreement, made this the 4th day of February, 1904, between W. J. Green, of the county of Rabun, state of Georgia, party of the first part, and S. S. Hall, of the county of Rabun, state of Georgia, party of the second part, witnesseth: That the party of the first part, for and in consideration that the party of the second part shall execute to the party of the first part a deed to his one-third undivided interest in lot of land No. 44 in the First land district in said county and state, agrees:

"(1) That as soon as said lot No. 44 in said district and county, or any part thereof, may be sold, the proceeds shall be applied to pay off a certain mortgage note which George L.

Prentiss holds against W. J. Green and S. S. Hall for the sum of \$4,500.

"(2) After said note is fully paid off, the said party of the first part shall pay to the party of the second part, from the proceeds of said sale, one-third of the amount left after paying off said note, and one-third of all future amounts derived from said sale, until the party of the second part shall have received the amount of \$5,000, provided that in no event shall the party of the second part receive more than the said sum of \$5,000 from the proceeds of the said sale."

This agreement was signed under the hands and seals of the parties. On the same day Hall, for the expressed consideration of \$15,000, conveyed by warranty deed, subject to the Prentiss mortgage a one-third undivided interest in the land to Green. This deed recited:

"The grantee agreeing to satisfy said mortgage from the proceeds of the sale of said lot No. 44 and First district."

On June 13, 1910, Prentiss transferred the note and mortgage to Henry Talmadge & Co., and on February 27, 1911, Talmadge & Co. instituted statutory proceedings against Green and Hall to foreclose the mortgage. Green filed an answer setting up an equitable defense, in which he claimed, among other things, that in a settlement with Prentiss the latter had agreed to pay off the mortgage. Prentiss was thereupon made a party defendant. Hall filed no plea or answer. Green died pending the suit, and the administratrix of his estate, his widow, was made a party in his stead. On the trial, February 28, 1917, a verdict was rendered as follows:

"We, the jury, find for the plaintiff, Henry Talmadge & Co., against the defendant George L. Prentiss as indorser and transferee [transferor] of the note sued on, the sum of forty-five hundred (\$4,500) dollars principal, thirty-four hundred and thirty-four dollars and thirty-seven cents (\$3,434.37) interest to date, seven hundred and ninety-three dollars and forty-four cents (\$793.44) attorney's fees, with costs of suit. We further find that George L. Prentiss is the owner of one undivided one-half interest in the lands covered by the mortgage sought to be foreclosed in this suit, and that said mortgage be foreclosed against said undivided one-half interest. We further find that the estate of W. J. Green is the owner of one undivided one-half interest in said land, which is not subject to the lien of said mortgage. We further find that Charles A. Rafter has no interest in said land."

On the following day, and at the same term of the court, Hall presented his intervention, setting up the contract between him and Green, which is quoted above, alleging that no part of the sum of \$5,000 due him thereunder had been paid, and that—

"Inasmuch as all the parties as well as said property is now before the court in this case

for an equitable adjustment of the rights of all the parties, he therefore prays that his lien be set up in the formation of the decree in this case, and that his said lien for the sum of \$5,000 be decreed as a purchase-money lien against the administratrix of said W. J. Green, and against said property, to be paid out of the proceeds of a sale of said W. J. Green's interest, and for such other relief as he may be entitled to in the premises; and further, that this case be kept open until after said sale."

The court by order allowed the intervention and ordered that the case be kept open until after the sale of the property and the final adjudication of the rights of the parties. Mrs. Green, administratrix, excepted pendente lite to the order granted on the intervention. On May 23, 1918, a decree was entered in accordance with the verdict. By agreement of counsel for all parties a receiver was appointed to sell the entire property, the interest of both plaintiffs and of Green's estate. Mrs. Green, the administratrix of the estate of her husband, was appointed receiver. The property was sold by the receiver in November, 1919, for the sum of \$15,000, and she received the proceeds of the sale. In August, 1920, Hall's intervention came on for trial, and the case was by consent submitted to the court for decision without a jury. The judge rendered a judgment in favor of Hall for \$5,000, less some deductions for costs to be paid out of the sum of \$7,500, which was one-half of the proceeds of the sale belonging to the estate of Green. Mrs. Green, as administratrix, excepted to the judgment, and assigned error also upon her exceptions pendente lite.

Defendants in error moved in this court to dismiss the writ of error, on the ground that neither Prentiss nor Charles A. Rafter, both of whom were alleged to be substantial parties defendant, was served with the bill of exceptions, nor had they acknowledged service thereon.

R. E. A. Hamby, of Atlanta, and Thad L. Bynum, of Clayton, for plaintiff in error.

McMillan & Erwin, of Clarkesville, for defendants in error.

FISH, C. J. (after stating the facts as above). [1] 1. The motion to dismiss is without merit, as Prentiss, a nonresident, appears to have been served as provided in Civil Code 1910, § 6161. And it was decided in *Rafter v. Henry Talmadge & Co.*, 147 Ga. 407, 94 S. E. 229, that Rafter had no interest in the subject-matter of this litigation.

[2] 2. A vendor has no equitable lien for the purchase money of lands in this state. Civil Code 1910, § 3873. Hall, under the terms of the contract he had with Green, at the time he conveyed to the latter his one-third

interest in the land in question, had no lien, either at law or in equity, on the land or the proceeds of the sale thereof by Green. Nor did he have any interest or claim to the land, equitable or otherwise, nor in the proceeds of its sale. He conveyed his entire interest in the property to Green, with warranty of title, except as to the Prentiss mortgage, in consideration that Green was to pay him one-third of the proceeds of the sale of the land, provided the amount to be paid should not exceed \$5,000. Hall held merely a written obligation against the estate of Green, as evidenced by the contract. The court erred in adjudging that the receiver should pay to Hall the amount of his claim out of the fund in the hands of the receiver belonging to Green's estate. *Spence v. Solomons Co.*, 129 Ga. 31, 58 S. E. 463. See, also, *Atlanta & Carolina Ry. Co. v. Carolina Portland Cement Co.*, 140 Ga. 650, 79 S. E. 555; *Gartrell v. McCravey*, 144 Ga. 249, 86 S. E. 932. The administratrix of that estate was entitled to such fund, and the fact that she was the court's receiver did not deprive her of the right to have the fund awarded to her to be administered by her as administratrix. The matter stands exactly, in this respect, as if another had been the receiver, and she, as administratrix, were contending for the fund. Equity will not interfere with the regular administration of estates upon an application of any person interested therein or having a claim against it except where there is danger of loss or other injury to his interests. Civil Code 1910, § 4596.

Judgment reversed.

All the Justices concur.

(151 Ga. 618)

BARFIELD v. BIRRICK. (No. 2183.)

(Supreme Court of Georgia. June 17, 1921.)

(Syllabus by the Court.)

1. Ejectment \Rightarrow 81, 110—Issue arising on pleadings stated; not error to charge that question is one of boundary.

The issue in ejectment, or in statutory complaint for land, arising upon the declaration and plea of not guilty, is: Did the plaintiff at the date suit was commenced have a legal title to the premises, or to any estate or interest in them, or any part thereof, coupled with the then present right of entry as against the defendant? Nevertheless, where it appears that the plaintiff and the defendant are coterminal owners, and that both derive title from a common grantor, it is not erroneous for the court to instruct the jury that the question resolves itself into one of boundary, and to fail to instruct them that the plaintiff in order to recover must show title in himself to the premises.

2. Boundaries \S 37(5), 41, 46(1)—Unascertained or disputed boundary may be established by executed parol agreement; instruction not erroneous for failure to charge that boundary must be unascertained where evidence showed fact; evidence held to warrant finding that agreement was executed.

An unascertained or disputed boundary line between coterminous proprietors may be established by parol agreement, if the agreement be accompanied by actual possession to the agreed line, or is otherwise duly executed. The failure of the court to instruct the jury that the line must be unascertained or disputed is not error requiring the grant of a new trial, where, as in this case, the evidence shows unequivocally that the boundary line between the coterminous proprietors was in fact unascertained.

3. New trial \S 108(2)—Newly discovered evidence that boundary monument was placed pending suit held not to require new trial.

The alleged newly discovered evidence is not of such character as would likely produce a different result on another trial. The evidence authorized the verdict.

Error from Superior Court, Bibb County; H. A. Mathews, Judge.

Action by Joseph Birrick against H. L. Barfield. Judgment for plaintiff, and defendant brings error. Affirmed.

Thomas S. Felder, of Macon, for plaintiff in error.

L. D. Moore, of Macon, for defendant in error.

GEORGE, J. Joseph Birrick filed his suit against H. L. Barfield, to recover a strip of land, irregular in shape, running north and south along the western boundary of a tract owned by the plaintiff, as shown by a diagram attached to the petition. By an amendment the plaintiff described the land as a strip located between the line of an old wire fence built by C. M. Orr (one of the plaintiff's predecessors in title) and a new fence built by the defendant, and varying in width from a point to 22 feet, as shown by the diagram attached. On the trial of the case the jury found for the plaintiff "the premises in dispute." The defendant made a motion for new trial, which was overruled, and he excepted.

[1] 1. In addition to the usual general grounds—that is to say, that the verdict is contrary to the evidence and without evidence to support it, is decidedly and strongly against the weight of the evidence, and is contrary to law and the principles of equity and justice—the motion for new trial contains nine grounds. Eliminating for the moment the general grounds, three questions are raised. In two grounds of the motion exceptions are taken to certain charges of the court. In effect the court instructed the

jury that the controlling question in the case was the location of the boundary line between the lands owned by the plaintiff and the lands owned by the defendant in the suit. It is insisted that the controlling issue in the case was one of title, and that it was incumbent upon the plaintiff to show by preponderance of the evidence that he had legal title to the premises in dispute. In another ground of the motion error is assigned upon the court's failure to instruct the jury that before the plaintiff could recover he must show title in himself to the land. It is elementary that a plaintiff in ejectment, or in an action for land, must recover on the strength of his own title, and not on the weakness of that of his adversary. The issue is: Did the plaintiff at the date the suit was commenced have legal title to the premises or to any estate or interest in them, or any part thereof, coupled with the then present right of entry, as against the defendant. It is also settled that on the general issue the burden of proof rests upon the plaintiff. Civil Code, \S 5582; Fullbright v. Neely, 131 Ga. 342 (8), 62 S. E. 188; Taylor v. Meeks, 133 Ga. 385, 65 S. E. 850. These general principles are applicable in an action for land, though the particular question between the parties resolves itself, under the evidence, into one of boundary. Nevertheless we are of the opinion that the assignments of error indicated above are without merit, in view of the following: By the fourth item of Mrs. Lockett's will, probated and admitted to record in 1888, the testatrix devised her plantation to her two nephews, William D. and John W. Mims, "to be divided between my two nephews William D. and John W., so that each shall have an equal number of acres, the dividing line to begin at the gate that is between me and the Jas. T. Nisbet's woods near where the ginhouse formerly stood, and to run in a northerly direction below my spring and through the Bivins field to R. B. Bowman's line in such a way that each division of the place so divided shall contain the same number of acres," the half lying east of the dividing line to go to William D. Mims and the half lying west of said line to belong to John W. Mims. It appeared without dispute that William and John Mims agreed upon a dividing line, and that the same was surveyed and marked out by the county surveyor under their direction. In January, 1893, William sold his half to C. M. Orr and J. W. Cabaniss, and Orr built a wire fence the entire length of the line. John was then living on his half of the land and saw the fence being built, and himself testified that he thought the fence was on the line, that he knew it was at one end, and supposed it followed the line all the way. He further testified that upon the completion of the

fence he connected his fence, using the fence built by Orr as the line fence on the north side of his place, and that on the south side of the place he cultivated up to the fence on the west side and Orr cultivated up to the fence on the east side, and this continued from 10 to 12 years, during which time Mims and Orr recognized the fence as the dividing line between them. Orr and Cabaniss conveyed the land purchased from William Mims to the Exchange Bank; and the bank, through its receivers, conveyed the land to Wright in 1907, and Wright took possession in January, 1908. Wright conveyed to the plaintiff and surrendered possession in January, 1918. John Mims conveyed his portion of the land to Wright on December 20, 1912, the deed reciting that the land conveyed was bounded on the east "by land of C. M. Orr, or formerly C. M. Orr." Wright thus became the owner of both the William Mims and John Mims lands. Wright conveyed the John Mims tract to the plaintiff in error, Barfield, the deed reciting that the tract conveyed was bounded on the east "by lands formerly owned by C. M. Orr, but now owned by W. H. Wright." The grantor in this deed, Wright, testified that when he sold to Birrick he told him that the old wire fence (built by Orr) was the line. It will thus be seen that both the plaintiff and the defendant claim under the will of Mrs. Lockett, as common grantor. Mrs. Lockett devised the east half of her plantation to William D. Mims. Title to the east half of the land passed by mesne conveyances to the plaintiff. The west half of the plantation was devised to John W. Mims, and title to the west half passed by mesne conveyances to the defendant (plaintiff in error). It was therefore not erroneous to instruct the jury that the question for them to determine is: "What is the true dividing line between these two tracts of land?" (the charge excepted to). In view of the evidence in this case it is manifest that the failure of the court to instruct the jury that the plaintiff, in order to recover, must show title in himself, is not error requiring the grant of a new trial.

[2] 2. In four other grounds exceptions are taken to certain charges of the court relating to the establishment of a dividing line by coterminous landowners: (1) By parol agreement accompanied by possession to the agreed line, or otherwise duly executed; and (2) by acquiescence for seven years by acts or declarations of the owners of adjoining land, as provided in the Civil Code, § 3821. It is settled that an unascertained or disputed boundary line between coterminous proprietors may be established by parol agreement, if the agreement be accompanied by actual possession to the agreed line, or is otherwise duly executed. *Farr v. Woolfolk*, 118 Ga. 277, 280, 45 S. E. 230; *Osteen v. Wynn*, 131 Ga. 209 (3), 62 S. E.

37, 127 Am. St. Rep. 212; *Gornito v. Wilson*, 141 Ga. 597 (2), 81 S. E. 860. In effect the court instructed the jury that, if William D. Mims and John W. Mims agreed upon a dividing line, and if the line as agreed upon was surveyed, marked out, and recognized by them, the line thus established would be binding upon the parties and their subsequent grantees. It is insisted that the charge was error because the court failed to instruct the jury that the line must have been unsettled or disputed. Mrs. Lockett owned a single tract of land. By her will she devised the east half of the tract to William Mims and the west half to John Mims, and directed the manner of its division. It is true that there was no dispute concerning the will or its meaning. In *Shiver v. Hill*, 148 Ga. 616, 97 S. E. 676, the trial court instructed the jury that a parol agreement between coterminous landowners as to the boundary line between them would operate to establish a line, where the boundary line is "unascertained, unsettled, and not agreed to between the parties, and is disputed." The charge was held not to be error requiring the grant of a new trial. The writer dissented, regarding the dispute as a "false quantity." It appears that in the principle of law announced the court was not really in disagreement. The majority regarded a boundary line which was in fact uncertain or unascertained as in dispute, considering the words "uncertain," "unascertained," and "disputed" as practically synonymous, while the writer thought the language of the trial court in that case was misleading, inasmuch as the evidence showed that the owners of distinct portions of a single tract of land, by parol agreement, undertook to fix or establish an original dividing line between them. The true rule is clearly stated in the opinion of *Osteen v. Wynn*, supra, where it was said:

"Where there is room for controversy as to the location of a dividing line, the coterminous proprietors, independently of the cited Code section, may orally agree upon the line; and if the agreement is accompanied by possession to the agreed line, or is otherwise duly executed, such agreement will be valid and binding, and the line thus defined will thereafter control their deeds."

Inasmuch as the evidence in the record shows unequivocally that the dividing line between the east and west halves of the Lockett plantation was in fact unascertained, the failure of the court to instruct the jury that the parol agreement, if duly executed, would bind the parties provided the line was indefinite, uncertain, or disputed, is not error requiring the grant of a new trial.

Under the evidence in the record the jury was authorized to find, if indeed they were not required to find, that the parol agree-

ment was duly executed. See *Hart v. Carter*, 150 Ga. 289, 103 S. E. 457.

[3] 3. On the trial of the case the plaintiff testified that the north end of the line between his land and the land of the defendant was marked by an iron post. After verdict, the defendant, as he contends, discovered that the iron post had been "placed" by the plaintiff after the suit was begun, for the purpose of furnishing false evidence of the line between his land and that of the defendant. In the last two grounds of the motion a new trial is prayed because of this newly discovered evidence. Section 5961 of the Civil Code provides that—

"Any judgment, verdict, rule, or order of court, which may have been obtained or entered up, shall be set aside * * * if it shall appear that the same was entered up in consequence of corrupt or willful perjury," and "It shall be the duty of the court in which such verdict, judgment, rule, or order was obtained or entered up to cause the same to be set aside upon motion and notice to the adverse party; but it shall not be lawful for the said court to do so, unless the person charged with such perjury shall have been thereof duly convicted, and unless it shall appear to the said court that the said verdict, judgment, rule, or order could not have been obtained and entered up without the evidence of such perjured person."

It is not claimed that the plaintiff in this case has been convicted of perjury. The newly discovered evidence is cumulative and impeaching in character. The plaintiff's testimony was not essential to his case. On the controlling issues in the case other evidence is of such character as to practically demand a verdict for the plaintiff, and it cannot be said that the newly discovered evidence would likely produce a different result on another trial.

Judgment affirmed.

All the Justices concur.

(151 Ga. 708)

KUNKEL et al. v. TIPPINS. (No. 2577.)

(Supreme Court of Georgia. July 13, 1921.)

(*Syllabus by the Court.*)

1. Appeal and error \Leftrightarrow 523(2), 524—Affidavits and documents must be incorporated in bill of exceptions or attached as exhibits.

"Affidavits and documents introduced in evidence on the hearing before the trial judge must be incorporated in the bill of exceptions seeking to review his judgment, or attached thereto as exhibits, duly and properly identified, or be embraced in an approved brief of evidence and brought up as record. The mere filing of affidavits and documents in the office of the clerk of the court does not make them parts of

the record in the case." *Anderson v. Anderson*, 124 Ga. 147, 52 S. E. 161; *Scott v. Wage Earners' Loan, etc., Co.*, 147 Ga. 576, 94 S. E. 1021; *Weathers v. Paga Mining Co.*, 147 Ga. 463, 94 S. E. 579.

2. Appeal and error \Leftrightarrow 713(1)—Copies of affidavits and documents not part of record not considered.

"Where the questions made by the assignments of error in the bill of exception necessarily involve a consideration of the evidence, and none of the methods above indicated has been adopted, but copies of affidavits and documents have been sent up as parts of the record, they cannot be considered." *Anderson v. Anderson*, supra.

3. Appeal and error \Leftrightarrow 684(3)—Judgment not disturbed when evidence not authenticated.

The bill of exceptions assigns error on a judgment granting an interlocutory injunction, and recites that "said case was heard upon affidavits and three plats and one deed." The plaintiffs in error specified, "as material to a clear understanding of the errors complained of, the following parts of the record, to wit: "The petition, the temporary restraining order, answer of defendants, certain affidavits, deeds, plats, and map, certified copy of the minutes of the city of Manassas, and the judgment continuing in force the restraining order originally passed. The bill of exceptions did not otherwise refer to any evidence submitted at the hearing. The clerk transmitted copies of certain affidavits and other documentary evidence which were not made a part of the bill of exceptions by reference or exhibit, nor were they set forth in any brief of evidence approved by the court. The judge certified that the bill of exceptions was true, and that it specified all of the record material to a clear understanding of the errors complained of, and ordered that the parts of the record so specified be transmitted to the Supreme Court; but the certificate contained no reference to any evidence introduced at the hearing. *Held*: It affirmatively appears from the bill of exceptions that the case was one involving a consideration of the evidence; and, no evidence having been brought up so authenticated as to authorize its consideration by this court, the judgment of the trial court will not be disturbed. *Pierce v. Felts*, 146 Ga. 716, 92 S. E. 212.

Error from Superior Court, Tattnall County; W. W. Sheppard, Judge.

Action by H. W. Tippins against E. H. Kunkel and others. Judgment granting an interlocutory injunction, and defendants bring error. Affirmed.

Daniel & Durrance, of Claxton, and Elders & De Loach, of Reidsville, for plaintiffs in error.

A. S. Way, of Reidsville, for defendant in error.

GILBERT, J. Judgment affirmed. All the Justices concur.

(151 Ga. 583)

BELL et al. v. BRINSON et al. (No. 2160.)

(Supreme Court of Georgia. June 16, 1921.)

(Syllabus by Editorial Staff.)

Deeds \S 133(2)—Surviving child held sole remainderman to exclusion of children of deceased child dying before last surviving life tenant.

Where a deed conveyed land in trust for a woman and her children during her life and the life of her husband, and at her death for the use of her husband and children, and after the death of her and her husband then to such children as they might leave surviving them, share and share alike, where the husband died first, a child who survived the wife took the whole land in fee to the exclusion of the children of a son who died before the wife but after the husband.

Error from Superior Court, Jenkins County; A. B. Lovett, Judge.

Action by S. I. Bell and others against Fannie Brinson and others. Judgment for defendants, and plaintiffs bring error. Affirmed.

E. L. Brinson, of Waynesboro, and H. S. White, of Sylvania, for plaintiffs in error.

Pierce Bros., of Augusta, for defendants in error.

FISH, C. J. On January 7, 1871, Stephen A. Corker conveyed a described tract of land to Augustus H. A. Bell "as trustee of Elizabeth C. Bell, wife of Isaiah A. Bell, and their children born or to be born." The habendum clause was:

"To have and to hold [said land] for the sole and separate use of said Elizabeth C. Bell and her said children, during her natural life and the life of the said Isaiah A. Bell, if he should survive her; and at her death, then for the use of the said Isaiah A. Bell and children born or to be born, and after the death of the said Elizabeth C. and Isaiah A., then to such children as they may leave surviving them, share and share alike, * * * to have and to hold the said tract or parcel of land, and all and singular the premises and appurtenances thereunto belonging, as aforesaid, and every part thereof, unto the said party of the second part as such trustee, and his successors in office."

Isaiah A. Bell and Elizabeth C. Bell had only two children born to them, Henry Bell and Fannie Bell, who became Mrs. Fannie Brinson, both of whom were in life at the time of the execution of the deed. Isaiah A. Bell died in 1906; his wife, Elizabeth C., and the two children, surviving him. Henry Bell died in 1911, leaving several children surviving. Mrs. Elizabeth C. Bell died in 1918. Mrs. Fannie Brinson is still in life. The children of Henry Bell brought this action against Mrs. Fannie Brinson for a partition

of the land embraced in the aforementioned deed, the petitioners contending that under the terms of the deed they were entitled to a half interest in the land. The case was submitted to the judge for a decision without a jury, on an agreed statement of facts as above set forth. The judge on the trial refused the relief prayed, and decreed the title to the land to be in Mrs. Brinson. The petitioners excepted.

The ruling was not error. In accordance with the unambiguous terms of the deed, viz., that "after the death of the said Elizabeth C., and Isaiah A., then [the land to go] to such children as they may have surviving them, share and share alike," Mrs. Fannie Brinson, the only child left surviving them, is entitled to an estate in fee in all the land to the exclusion of the children of her brother, Henry, who died after the death of his father, Isaiah, but prior to the death of his mother Elizabeth. *Luquire v. Lee*, 121 Ga. 624, 49 S. E. 834.

Judgment affirmed.

All the Justices concur.

(151 Ga. 648)

MOORE v. STATE. (No. 2286.)

(Supreme Court of Georgia. June 18, 1921.)

(Syllabus by the Court.)

1. Constitutional law \S 251, 268—Criminal law \S 635—Exclusion of spectators in rape case not in violation of Constitution; statute not unconstitutional as construed and applied; federal constitutional amendments inapplicable to states; court in excluding spectators not limited to grounds specified in motion.

Where, on the trial of one accused of rape, it is made to appear to the court that the female alleged to have been raped, on account of her youth and highly nervous condition, is unable to give her testimony before a crowd of spectators, and that the due administration of justice is thereby impeded, the trial judge may clear the courtroom, during the examination of the female, of all persons except court officials, the jurors on the panel, the defendant, his counsel, his father, brother, and two sisters, the prosecutrix, her counsel, relatives of the prosecutrix, disinterested members of the bar, and representatives of the press, without infringing upon defendant's right to a public trial, as guaranteed by article 1, \S 1, par. 5, of the Constitution of this state, or without violating the defendant's right to due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

(a) Civ. Code 1910, \S 5885, which provides, "During the trials in the superior courts, and all other courts and trials occurring in this state, of any case of seduction or divorce, or other case where the evidence is vulgar and obscene, or relates to the improper acts of the sexes, and tends to debase the morals of the

young, the presiding judge shall have the right, in his discretion and on his own motion, or on motion of plaintiffs or defendants or their attorneys, to hear and try the said case after clearing the courtroom of all or any portion of the audience," as construed and applied by the trial judge in the case at bar, is not violative of article 1, § 1, par. 5, of the Constitution of this state, which declares that "every person charged with an offense against the laws of this state * * * shall have a public * * * trial."

(b) The provision of the fifth amendment to the Constitution of the United States, which declares that "No person shall be deprived of life, liberty, or property, without due process of law," and the provision of the Sixth Amendment to that Constitution, which declares that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed," etc., refer to powers exercised by the government of the United States, and not to those of the individual states.

2. Criminal law §1169(9)—Permitting victim of rape to testify that she did not consent held not to require a new trial.

The objection to the evidence of the female alleged to have been raped, that she did not indirectly consent to sexual intercourse, the objection being that the witness cannot draw a conclusion without stating the facts upon which the same is based, is without merit, where it appears that the witness had already stated the facts fully upon which her statement was based.

3. Criminal law §825(2)—Further Instructions as to consent should have been requested on trial for rape.

More elaborate instructions, if desired, on the question of consent, should have been specifically requested, in view of the general charge and the defendant's contention that he did not have carnal knowledge of the female alleged to have been raped, either with or without her consent.

4. Criminal law §683(1, 2)—Admission of evidence not in rebuttal after defendant rests is discretionary; evidence held proper in rebuttal.

After the defendant has made his statement and rested his case, the admission of evidence not in rebuttal of defendant's statement is a matter in the sound discretion of the court.

(a) The evidence examined, and held to be in rebuttal of the defendant's statement.

5. Criminal law §555, 795(1), 824(3)—Court should charge on included offense when conviction thereof authorized; failure without request to charge on included offense not ground for new trial, when evidence authorizes conviction as charged; evidence held to excuse failure; jury cannot arbitrarily reject part of testimony.

Where a charge of an offense of graver character includes (without additional averment) a minor offense, it is the duty of the trial judge to instruct the jury upon the law

applicable to the lesser offense, where the evidence under any view thereof will authorize a conviction of the lesser offense. Where, however, the evidence, if credible, proves the completed offense as charged in the indictment, the failure of the judge, without appropriate request, to instruct the jury upon the law applicable to the lesser offense, is not cause for new trial, though the jury would have been authorized to convict of the lesser offense in view of the defendant's statement.

(a) The evidence examined, and held to prove, if credible, the offense of rape as charged in the indictment, and sufficient, in connection with other evidence in the record, to support the verdict.

Atkinson, J., dissenting in part.

Error from Superior Court, Glynn County; J. I. Summerall, Judge.

Bill Moore was convicted of rape, and he brings error. Affirmed.

Isaac & Isaac, of Brunswick, Jas. R. Thomas, of Jesup, and Wilson & Bennett, of Waycross, for plaintiff in error.

Alvin V. Sellers, Sol. Gen., of Baxley, R. A. Denny, Atty. Gen., Graham Wright, Asst. Atty. Gen., and F. M. Scarlett, Jr., and J. T. Colson, both of Brunswick, for the State.

GEORGE, J. The defendant was indicted for the offense of rape at the May term, 1920, of Glynn superior court. He was put upon his trial on July 21, 1920, at the May adjourned term, and the jury returned a verdict finding him guilty of the offense of rape, with a recommendation to mercy, fixing the penalty at from 10 to 20 years in the penitentiary. The defendant filed a motion for new trial, which was overruled, and he excepted.

The female alleged to have been raped did not formally appear as prosecutrix, but for convenience she will be so referred to. The prosecutrix was 16 years of age on January 27, 1920, before the commission of the alleged crime on March 31, 1920. She was about 5 feet in height and weighed only 100 pounds. For some time she had been employed as cashier in a retail drug store, and was usually on duty until 10 o'clock in the evenings. She had met the defendant at the home of a friend, a few days before the night of March 31, 1920. The conduct of the defendant on this occasion was entirely proper. On a few occasions thereafter he spoke to her pleasantly in the drug store. On the night of March 31, 1920, he drove his automobile to the drug store and asked the prosecutrix if he might drive her home. She accepted the invitation, and at ten o'clock he returned for her. Instead of driving directly to prosecutrix's home, the defendant took her around what is known as "the Boulevard." On the drive he requested her to remove her gloves, and she removed the glove from the hand nearer

the defendant. He attempted to hold her hand and she objected. At a point on the roadway he stopped the automobile, threw his arms around the prosecutrix, and, according to her testimony, had sexual intercourse with her, forcibly and against her will. The defendant then drove the prosecutrix to her home. They reached home about 15 minutes to 11 o'clock. Prosecutrix's mother met her at the door and asked where she had been. She replied that she did not know, and the defendant made a like reply. The prosecutrix said to her mother, "Mother, this is Mr. Moore," calling the defendant by his name, but not intending (as prosecutrix contended) to introduce the defendant. He shook hands with the mother and bade the prosecutrix good-bye with the statement that he would see her the next day. Just as the mother closed the door, the prosecutrix said to her, "Mother, he has ruined me." The prosecutrix's father was not at the time at home, although she had stated to the defendant that her father was at home, and that if she told him what had happened he would kill the defendant. Her father returned home at 11 o'clock, and the family physician was immediately called to administer to the prosecutrix. The physician testified that he saw the prosecutrix within an hour or two after the commission of the alleged offense, and that he found an abrasion on her knee, a torn or ruptured hymen, oozing of blood, bruised mucous membrane, and that there was blood and a starchy fluid having the appearance of semen on her underclothes. The blood upon the prosecutrix's clothes was not caused by menstrual discharges, according to the testimony of the physician, the prosecutrix, and the mother. The defendant rested his case upon his statement. He said that he took prosecutrix to ride; that she put her arm around him in the car; that he kissed her and pinched her thigh without objection from her; and that he suggested sexual intercourse, but that she stated to him that if she should consent he would not speak to her again. Whereupon, according to the defendant's statement, he replied that if she believed him to be that kind of a man he would take her home. He denied having sexual intercourse with the prosecutrix either with or against her consent. He also stated that when she reached home she formally introduced him to the mother, and that he engaged in conversation with the mother and the prosecutrix, finally bidding the prosecutrix good-bye with the statement that he would see her the following morning, and that he did in fact drive by her home early the next morning, and saw and spoke to her. The foregoing are the main facts in the case; but the evidence of the prosecutrix relating to the conduct of the defendant at the time of the alleged assault upon her, and the nature, character, and extent of the assault and in-

jury to her person, will be set out more at length in the consideration of the special assignments of error.

[1] 1. After the jury was impaneled, special counsel for the prosecution moved that the courtroom be cleared of all parties except officers of court, bailiffs, constables, and parties directly interested, at least during the taking of the testimony of the prosecutrix and possibly of her mother. In making the motion counsel stated:

"We are making this request due to the extreme youth of this young woman, and our information both from her people and physicians as to her extremely nervous state; and we deem it almost essential, in order that she may go through this investigation, that the public be excused."

To this motion counsel for the defendant objected, upon the ground that the defendant was entitled to a fair and public trial under the Constitution, but stated that they had no objection to the exclusion from the courtroom of minors and females not connected with the case. The court ruled that he would clear the courtroom of every person except "officers of court and parties at interest." All persons, except "the officers of court, defendant's father and two sisters, one brother, the jury trying said case and the members of the bar, relatives of the prosecutrix and newspaper reporters," were thereupon excluded, by direction of the court, from the room during the taking of the testimony. To this order and ruling of the court the defendant excepted, upon the grounds: (1) That the court acted arbitrarily, without hearing evidence concerning the age and condition of the prosecutrix, and the nature and character of the evidence to be given upon the trial; and (2) that the order of the court was too sweeping, and deprived the defendant of a public trial, as guaranteed him by the Constitution of the United States and the Constitution of Georgia. Particular reference is made to the Fifth Amendment to the Constitution of the United States, which provides, among other things, that no person shall be deprived of "life, liberty, or property, without due process of law"; to the Sixth Amendment to the Constitution of the United States, which provides, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed"; to the Fourteenth Amendment of the Constitution of the United States, which provides that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws"; and to article 1, § 1, par. 5, of the Constitution of the State of Georgia, which

provides that "every person charged with an offense against the laws of this state * * * shall have a public and speedy trial by an impartial jury." In this connection section 5885 of the Civil Code of 1910, which reads as follows: "During the trials in the superior courts, and all other courts and trials occurring in this state, of any case of seduction or divorce, or other case where the evidence is vulgar and obscene, or relates to the improper acts of the sexes, and tends to debauch the morals of the young, the presiding judge shall have the right, in his discretion and on his own motion, or on motion of plaintiffs or defendants or their attorneys, to hear and try the said case after clearing the courtroom of all or any portion of the audience"—is declared to be unconstitutional because violative of the provisions contained in the Sixth Amendment to the Constitution of the United States and to the provision of the Constitution of this state quoted above.

The provisions of the Fifth and Sixth Amendments to the Constitution of the United States do not affect the case. It is settled that the first ten amendments to that Constitution refer to powers exercised by the government of the United States, and not to those of the individual states. *Loeb v. Jennings*, 133 Ga. 796 (3), 67 S. E. 101, 18 Ann. Cas. 376, and cases cited in the opinion. Nor is the case affected by the due-process clause contained in the Fourteenth Amendment to the Constitution of the United States. See *Loeb v. Jennings*, supra, headnotes 3, 7, and corresponding divisions of the opinion. Although we are of the opinion that no federal question is involved in the case, we hold that the act and order of the court in excluding the spectators as complained of in this case is not violative of the due-process clause (Fourteenth Amendment) of the Constitution of the United States. Provisions respecting a public trial, similar to that of our Constitution above quoted, are found in the federal Constitution, as we have seen, and in the Constitutions of the states, with the exception of New York, so far as we are advised. It was said by Spear, J., in the case of *State v. Hensley*, 75 Ohio St. 263, 79 N. E. 463, 9 L. R. A. (N. S.) 280, 116 Am. St. Rep. 736, 9 Ann. Cas. 111, that—

"The necessity for such provisions arose from the flagrant abuses which disgraced some of the courts of England prior to our American Revolution."

Reference to the Court of Star Chamber is generally made, though it would seem that the secrecy of the trial in the Court of Star Chamber was not the primary cause which led to its abolition by the Long Parliament in 1641. 16 Charles I, c. 10. The name, origin and jurisdiction of this court are involved in more or less obscurity. It is certain that it was an ancient high court exercising wide

civil and criminal jurisdiction. It consisted of the king's privy counsel sitting as a court only, with the addition of certain judges. It sat without the intervention of a jury. It could proceed on mere rumor. The procedure adopted was that of the courts of chancery. Though at one time highly regarded, it finally resorted to the practices of the Spanish Inquisition, and could and did administer torture. It is doubtless true that some of the trials in this court were conducted in secret. It is certain that the accused was not entitled to a jury; that he was not entitled to know his accuser; that he was not entitled to be confronted with the witnesses against him, because the witnesses were examined by interrogatories, as was the practice in the chancery courts, and not in person in open court. Exercising the prerogative of the crown, it could define and punish offenses (including political and press offenses) not recognized by the common law. See 1 Holdsworth's (W. S.) *History of English Law*, 271 et seq.; *Jenks' Short History of English Law*, 166 et seq. Be this as it may, provisions respecting a public trial similar to that of our Constitution quoted above, were undoubtedly made to protect the rights of persons accused of crime. No universal rule applicable to all situations has, however, been stated. It is said in *Cooley's Constitutional Limitations* (6th Ed.) 379:

"It is also requisite that the trial be public. By this is not meant that every person shall in all cases be permitted to attend criminal trials; because there are many cases where, from the character of the charge and the nature of the evidence by which it is to be supported, the motives to attend the trial on the part of a portion of the community would be of the worst character, and where a regard to public morals and public decency would require that at least the young be excluded from hearing and witnessing the evidence of human depravity which the trial must necessarily bring to light. The requirement of a public trial is necessarily for the benefit of the accused, that the public may see that he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions; and the requirement is fairly observed if, without partiality or favoritism, a reasonable proportion of the public is permitted to attend, notwithstanding that those persons whose presence could be of no service to the accused, and who would only be drawn thither by a prurient curiosity, are excluded altogether."

In *Myers v. State*, 97 Ga. 76 (5), 77, 25 S. E. 252, 253, it was held:

"While every person accused of crime is entitled to a public trial, it is not necessary to its legality that a great multitude should be in attendance, and the presiding judge should not permit the bar or courtroom to become so crowded as to impede the progress of the trial by rendering it difficult for the jurors to enter or leave the box, or by preventing the free movement of counsel and witnesses; more—

over, the jury should not be in such close and constant contact with the audience as that remarks of bystanders as to the guilt or innocence of the accused, or other indications of public feeling for or against him, may reach their ears or come under their observation. The bar at least should at all times be kept sufficiently open and clear for the prompt and orderly dispatch of the business of the court."

The exception there considered was not taken to the action of the judge in excluding the spectators who overcrowded the courtroom but to his refusal to exclude them.

In *Tilton v. State*, 5 Ga. App. 59, 62 S. E. 651, it was held:

"Every person accused of crime is entitled to a public trial. The presiding judge, in the exercise of a sound discretion, may, without violating this right, exclude from the courtroom during the trial, for any sufficient special reason, such portion of the spectators as fall within the class to which the reason applies. However, where the judge, without further reason than that the testimony will relate to matters ordinarily indecent to be mentioned, orders, over the objection of the defendant, that 'the courtroom be cleared of every one not connected with the case,' he abuses his discretion and violates the defendant's right to a public trial. Prejudice to the defendant is conclusively to be presumed from such an order, and a new trial necessarily results."

In the opinion by Judge Powell, section 5885 of the Civil Code is quoted, but it is pointed out that no attack upon the constitutionality of the statute was made. The whole question for decision in that case was: "Did the judge abuse his discretion?" The conclusion reached by the Court of Appeals, broadly stated, is that the accused may insist upon the trial being absolutely open and public except in so far as there is some sufficient reason for excluding certain persons or classes of persons. Judge Powell cites and discusses a number of cases from other jurisdictions. Among the cases cited is that of *State v. Hensley*, supra. That was a rape case, and the trial judge, in view of the testimony to be given by witnesses continued the trial during the taking of the testimony in a small courtroom to which no one was admitted except the jury, defendant's counsel, members of the bar, newspaper reporters, and one witness for the defendant. It was held that the order of the court exceeded its power in the premises, and that the enforcement of the order was a denial to the defendant of his constitutional right to a public trial. Other cases cited in the opinion in the *Tilton Case*, supporting in principle the ruling made in *State v. Hensley*, supra, are: *People v. Hartman*, 103 Cal. 242, 37 Pac. 153, 42 Am. St. Rep. 108; *People v. Murray*, 89 Mich. 276, 50 N. W. 595, 14 L. R. A. 809, 28 Am. St. Rep. 294; *People v. Yeager*, 113 Mich. 228, 71 N. W. 491. In the case last cited the Michigan statute, allowing the judge in cer-

tain cases to exclude from the courtroom "every person except those necessarily in attendance," was held to be unconstitutional as applied to a criminal case. The cases cited to the contrary are: *Grimmett v. State*, 22 Tex. App. 36, 2 S. W. 631, 58 Am. Rep. 630, a rape case, where the spectators, during the taking of the testimony of a female became so boisterous with laughter as to interfere with the court and to confuse the witness, attorneys not connected with the case and jurors not on the panel being allowed to remain; *People v. Kerrigan*, 73 Cal. 222, 14 Pac. 849, where the defendant became unmanageable and began to use profane and abusive language to the judge and officers of the court, so that the trial could not proceed until the spectators were excluded; *Stone v. People*, 3 Ill. (2 Scam.) 326, where, on account of noise and confusion on the outside of the courtroom, the judge ordered the doors to the courtroom locked, but directed that the officers permit any one to pass and repass who wished to do so; *Lide v. State*, 133 Ala. 63, 31 South. 953, where the spectators began to applaud the argument of state's counsel; *State v. McCool*, 34 Kan. 617, 9 Pac. 745, where all females were excluded from the courtroom, upon the statement of one of the attorneys in the case that he was about to refer to certain evidence which could not be discussed in their presence; *State v. Brooks*, 92 Mo. 542, 5 S. W. 257, 330; *Jackson v. Commonwealth*, 100 Ky. 239, 38 S. W. 422, 1091, 66 Am. St. Rep. 336, where it was held that the size of the crowd might properly be limited to the seating capacity of the courtroom; *U. S. v. Buck*, 4 Phila. 169, Fed. Cas. No. 14,680, where it was held that dangerous persons who would be likely to interfere with the due administration of justice might be excluded from the courtroom; and *State v. Callahan*, 100 Minn. 63, 110 N. W. 342, where the prosecutrix in a rape case, after long and public examination, became so embarrassed by the presence of the crowd that the judge ordered the spectators to leave the room temporarily. By a divided court this was held to be no abuse of discretion and no denial of the constitutional right to a public trial. In the case last cited, *Lewis, J.*, who delivered the opinion of the majority, after reviewing the case, said:

"Applying these principles, and conceding that a sweeping and unlimited order clearing the courtroom throughout the trial would be error, we are of the opinion that it affirmatively appears from the record that the prosecutrix was seriously embarrassed by the presence of a crowd of spectators, and that by reason of the situation the court and county attorney were unable to elicit from the witness such clear and definite statement of the facts as seemed necessary in such a case. We think it fairly appears from the record that the situation was a temporary one, and that the order

was made simply to relieve the condition with reference to that particular witness; and, while the record does not expressly show that the order was thereafter rescinded, limited, or modified, yet the fair inference from what transpired is that it was not enforced when not necessary. Such being the state of the record, we hold that there was no interference with defendant's constitutional right to a public trial."

In the recent case of *Davis v. U. S.*, 247 Fed. 394, 159 C. C. A. 448, L. R. A. 1918C, 1164, it was held that an order of the court directing that the courtroom be cleared of all spectators excepting relatives of the defendant, members of the bar, and newspaper reporters, deprived the defendants of a public trial as guaranteed by the Sixth Amendment to the Constitution of the United States. In that case the crime for which the defendants were indicted had connection with a train robbery, and the trial, which was held at Muskogee, Okl., excited more than ordinary interest. At previous sessions the courtroom was crowded with spectators, and the court had found it necessary to direct the bailiffs to clear the aisles so that witnesses would not be impeded when called. Ill feeling had developed between defendants, their relatives and friends, and some of the witnesses for the prosecution; and the court had placed the latter in the care of an officer. On the evening of the night session (when the order to clear the courtroom was made) an encounter occurred in a restaurant, in which a relative of one of the defendants hit a witness for the prosecution across the face with a newspaper. This was reported to the court, also that one or more of the witnesses in the courtroom was intoxicated. It did not appear, however, that the courtroom was crowded beyond its seating capacity when the order to clear it was made, or that any person was making a disturbance or threatening to do so, or that there was any well-founded apprehension that a disturbance would occur. By the favor of the court officers, about 25 people were allowed in the courtroom. Two female relatives of the defendant, newspaper men, and about 10 members of the bar were also allowed to remain after the giving of the order. Other citizens, against whom no objection appeared on account of character or condition, sought and were denied admission, although there was space in the courtroom for the accommodation of such citizens. In the course of the opinion it was said:

"As the expression necessarily implies, a public trial is a trial at which the public is free to attend. It is not essential to the right of attendance that a person be a relative of the accused, an attorney, a witness, or a reporter for the press, nor can those classes be taken as the exclusive representatives of the public. Men may have no interest whatever in the trial, except to see how justice is done in the courts of their country. The qualifications of

the broad scope of the constitutional provision and of like provisions in the Constitutions of the states are few, and are based upon considerations of public morals and peace and good order in the courtroom."

The constitutional provision guaranteeing the right of public trial is intended to protect persons accused of crime. While the public have the privilege to attend the trial of a criminal case, the purpose of the provision is to secure a right, not to the public but to the defendant. Manifestly, the state has the right to enforce its laws, and to this end it may enact any needful legislation, having due regard to the constitutional rights of the persons accused, including the right to a public trial. In the case at bar, court officials, the jurors on the panel, the defendant, his counsel, his father, brother, and two sisters, the prosecutrix, her counsel, relatives of the prosecutrix, disinterested members of the bar, and representatives of the press were permitted to remain in the courtroom during the taking of the testimony of the prosecutrix. While disinterested attorneys and representatives of the press are not the exclusive representatives of the public, it is equally certain that they are not officers of court nor the representatives of the state as against persons accused of crime. The trial of a criminal case, conducted in the presence of the defendant, his relatives, disinterested members of the bar, and representatives of the press, cannot be said to be a secret trial; and we are of the opinion that section 5885 of the Civil Code, quoted above, as construed and applied by the trial judge in the case at bar, is not violative of article 1, § 1, par. 5, of the Constitution of this state, which provides that—

"Every person charged with an offense against the laws of this state. * * * shall have a public and speedy trial."

It is true that the judge did not require proof of prosecutrix's age, of her condition, or of the nature and character of the testimony to be given. The age and condition of the prosecutrix was perhaps apparent to the trial judge, and he must have known the general nature and character of the evidence to be given. Though the motion to exclude spectators was based upon special grounds, the court was authorized to act upon any good and sufficient reason apparent to him. We cannot say that the reasons upon which the court acted were not sufficient reasons. The court was advised by counsel (and we cannot say that it was not also apparent to the court) that the prosecutrix, on account of her youth and highly nervous condition, would be unable to give her testimony before the large crowd of spectators. In such circumstances the due administration of justice would have been impeded. The order of the judge clearing the courtroom of all persons

except those named above was not an abuse of discretion.

[2] 2. On the trial of the case counsel for the state asked the prosecutrix whether or not she "directly or indirectly consented for this defendant to have sexual intercourse" with her. To the question the prosecutrix answered in the negative. It is contended that the prosecutrix should not have been permitted to give an opinion or to draw a conclusion without stating the facts and circumstances upon which the conclusion was based. Under the facts and circumstances of this case, the error, if error at all, in admitting the testimony, is not of such gravity as to require the grant of a new trial. From the record it appears that the question was propounded at the conclusion of the direct examination of the prosecutrix. She had detailed the facts and circumstances of the case. After she was permitted to answer the question, she was subjected to a rigid cross-examination, and again went fully into all the facts and circumstances upon which she based her answer.

[3] 3. The failure of the court to charge the jury on the question of consent is assigned as error in one ground of the motion for new trial. It will be noted that the defendant denied having sexual intercourse with the prosecutrix, either with or without her consent. The court gave in charge to the jury the definition of rape as contained in the Penal Code 1910, § 98. At one point in his charge he instructed the jury that the burden was upon the state to prove beyond a reasonable doubt that the defendant did unlawfully and with force and arms make an assault upon the prosecutrix and did have carnal knowledge of her "forcibly and against her will." If the defendant desired further instructions on the subject of consent, an appropriate request should have been made.

[4] 4. The prosecutrix and her mother were examined in chief, and the state rested its case. After the defendant had concluded his statement, the state was permitted to call the family physician, who made an examination of the prosecutrix on the night of the commission of the alleged offense. The testimony of the physician was objected to upon the ground that it was not in rebuttal of anything contained in the defendant's statement. The testimony of the physician is found in the record, and has been referred to already in this opinion. This evidence directly tends to contradict the statement made by the accused. Even if not strictly in rebuttal, the admission of the evidence after the defendant had made his statement and rested his case was a matter in the sound discretion of the court.

[5] 5. Finally, it is insisted that the court erred in failing to charge the law of assault and battery. There was no request for such

a charge, and the defendant in his statement contended that he did not make an assault of any character upon the prosecutrix. He did, however, admit that he kissed the prosecutrix, and put his hands upon her thigh. The admission was coupled with the distinct statement that no objection to this conduct was made by the prosecutrix. However, it is insisted that the offense of assault and battery is necessarily included in the charge of rape, and that under the evidence the jury was authorized to find the defendant guilty of assault and battery only. This contention is based upon the following testimony of the prosecutrix:

"He [the defendant] caught hold of my hand, and I told him he was not going to hold hands with me. He caught hold of it again, and I took my hand and pulled it back this way and told him that he would have to take his hand off mine. * * * The car was out on the boulevard when he stopped it. It was a dark night. There were no lights around there. There were no people. He said the car stopped. I don't know whether he stopped it or not. It stopped still. He says the car has stopped, and moved over toward me. I thought he was going to get out, but he grabbed my body and tried to kiss me. I was fighting him and moving my head, and done everything I could to keep him from kissing me. He just kept on trying to kiss me. Then he pulled me toward him and put his hand under my dress and stuck his finger in me. I started screaming just as loud as I could. The way he had me, I could not do a thing. He was right on me where I could not move. After he stuck his finger in me, I hardly knew what happened. He had sexual intercourse with me. I remember him trying to wipe the side of my leg off, and I told him to take his hand away. * * *

On cross-examination the prosecutrix testified:

"The first intimation from [the defendant] that he wanted to be rude with me was when he caught hold of my hand and when I told him to turn it loose. * * * I did not pay any attention to that, and we went on talking. * * * He put his arm around me, his right arm. He was driving just as fast as he could. I told him to take his arm from around me. He said that was all right. When the car stopped, he said, 'The car has stopped.' I thought he was going to get out and crank the car. I kept him from kissing me. He got over from behind the steering wheel and says, 'The car has stopped.' He grabbed me and tried to kiss me. He was kind of leaning over me. Before I knew he was right on top of me. The last I remember I was sitting up in the seat, trying to keep him from kissing me. When he first grabbed me, he grabbed me with both arms, around the shoulders. I was frightened. He held me tight. The next thing I knew he had run his hand up me and stuck his finger in me. Then he got on top of me. The last I remember I was sitting up. I was almost senseless, but I fought as hard as I could. I screamed continuously. I hollered the time he grabbed me. I never got off the front seat. I was in the same position when I came

back to my senses. I tried to choke him. * * * I could not kick him, but I put my foot over the side door trying to get out. He was on top of me, and I got up on the seat, and he jerked me back. I tried to get my leg up over the door. I did not try to open the door, because he was on top of me and I could not. * * * The last I remember, he grabbed me; just how he had me I don't know. After he stuck his finger in me and got on top of me, I don't remember. He put something else in me much larger than his finger. I could not kick him; he was on me. I was fighting him, trying to shove him off. I don't know how long he was on me. I fought all the time. I remember fighting. I shoved at him and fought at him, tried to choke him, did everything I could, tried to get him up from on top of me. * * * When he grabbed me and tried to kiss me I was scared to death, and when he ran his hand up under my dress it liked to have scared me to death. I couldn't hardly get my leg over the door. I tried to push him off, but not with my foot. I tried to keep his hand out. I tried to keep my dress down."

The mother of the prosecutrix testified that on the night of the commission of the alleged offense, and after the offense was alleged to have been committed, she gave the prosecutrix a douche, using an ordinary syringe. On cross-examination the physician testified that the insertion of the tube might produce a rupture of the hymen, and that the insertion of the finger without cover would have a tendency to cause the same result. It is to be noted, however, that the physician testified to other injuries to the person of the prosecutrix, which in all reasonable probability could not have been produced by either of these means.

It is conceded that a verdict of assault, or of assault and battery, or of assault with intent to commit a rape, may be founded upon an indictment for rape. An assault or assault and battery is necessarily involved in every case of rape. *Spear v. State*, 60 Ga. 381, 382; *Goldin v. State*, 104 Ga. 549, 551, 30 S. E. 749; *Watson v. State*, 116 Ga. 607, 43 S. E. 32, 21 L. R. A. (N. S.) 1. Where a charge of graver character includes a minor offense, if the evidence will justify a verdict finding the defendant guilty of the minor offense, it is the duty of the judge to instruct the jury as to the principles of law applicable thereto. The graver offense must either necessarily include the minor offense, or the indictment must charge the essential elements of the minor offense. To state the rule as strongly as possible, the jury should in all cases be instructed that the defendant may be convicted of the lesser offense necessarily involved in the graver offense, where the evidence submitted, under any view thereof, will authorize conviction of the lesser grade. *Sutton v. State*, 123 Ga. 125, 51 S. E. 316. The mere failure of the court to charge the jury on the law of assault and battery, on

the trial of one indicted for the offense of rape, is not cause for new trial where the evidence in the case, if credible, proves the crime as alleged in the indictment. These general principles are not denied; but it is insisted that in view of the testimony of the prosecutrix the jury might have concluded that after the defendant had put his hand under her dress and inserted his finger in her private parts, she became unconscious and did not know what actually took place thereafter. While the prosecutrix does say that she "hardly knew" what happened after the defendant placed his hands underneath her clothing, and in effect that she lost consciousness through fright, the only reasonable interpretation of her testimony is that on account of the assault she was not fully conscious of and could not remember all the details of the transaction, or else that she shrank from a recital of them. She testified positively that the defendant had sexual intercourse with her. Though stating that she "hardly" remembered what happened, she positively asserted that she continued her struggles until she was released by the defendant, and described in detail the resistance offered by her until the assault upon her person had ended. The mere failure of the judge to instruct the jury on the law of assault and battery on the trial of one indicted for the crime of rape will not be held to be error requiring the grant of a new trial, upon the theory that the jury may have believed a part and disbelieved a part of the testimony of the prosecutrix. That is to say, the jury are not at liberty to accept the testimony of the prosecutrix that an assault was made upon her person, and at the same time arbitrarily reject her testimony, equally positive, that the defendant had sexual intercourse with her, forcibly and against her will. The case differs from a case of assault with intent to rape. It rarely happens that an assault is accompanied by such overwhelming and conclusive evidence of the intent with which it is committed as to require the jury to find that the assault was made with the intent to commit a rape. This principle is recognized in the *Sutton Case*, supra. It is conceded that the testimony of the physician may be viewed as tending either to corroborate the evidence of the prosecutrix that the defendant did in fact have sexual intercourse with her, or as tending to support the defendant's theory in the case. The fact that his testimony may be viewed as tending to support the defendant's theory is, however, immaterial. The testimony of every witness except that of the prosecutrix relates merely to the condition of the prosecutrix after the commission of the alleged offense, and does not tend to disprove the statements testified to by the prosecutrix. In deciding whether the failure of the judge to instruct the jury

on the law of assault and battery is cause for new trial in this case, the evidence of the prosecutrix alone must be considered. As we have said above, her evidence, if credible, proves the completed offense as charged in the indictment, and, in connection with the other evidence in the case, is sufficient to sustain the verdict. Under the defendant's statement, instructions upon the law of assault and battery would have been appropriate but there was no request for such instructions.

Judgment affirmed.

All the Justices concur, except ATKINSON, J., dissenting from the ruling in the fifth headnote and to the corresponding division of the opinion. The evidence for the state was sufficient to authorize a verdict finding the defendant guilty of assault and battery, and did not demand a finding that a rape had been actually committed. It was therefore error to omit, though not requested, to charge the law applicable to a case of assault and battery.

(151 Ga. 717)

LOYD v. STATE. (No. 2615.)

(Supreme Court of Georgia. July 13, 1921.)

(Syllabus by the Court.)

1. Criminal law \S 1158(3)—Trial judge's finding that juror was impartial not disturbed unless discretion abused.

The trial judge occupies the position of a trier when passing upon the ground of an extraordinary motion for new trial in a criminal case, based upon the alleged bias of one of the jurors. His finding that the juror was impartial will not be reversed, unless it is apparent that he has abused the discretion which the law vests in him in such cases.

2. Criminal law \S 958(1)—New trial for newly discovered evidence properly denied in absence of affidavits to support witnesses.

There was no error in overruling that ground of the extraordinary motion for new trial which was based upon alleged newly discovered evidence, in the absence of supporting affidavits as to the residence, associates, means of knowledge, character, and credibility of the witnesses.

Error from Superior Court, Bleckley County; Eschol Graham, Judge.

Thomas Loyd was convicted of rape and his extraordinary motion for a new trial was overruled, and he brings error. Affirmed.

See, also, 102 S. E. 378; 103 S. E. 496; 150 Ga. 803, 105 S. E. 465.

C. A. Weddington, of Cochran, and John R. Cooper and W. O. Cooper, Jr., both of Macon, for plaintiff in error.

M. H. Boyer, Sol. Gen., of Hawkinsville, R. A. Denny, Atty. Gen., and Graham Wright, Asst. Atty. Gen., for the State.

GEORGE, J. Thomas Loyd was indicted and tried for the offense of rape. On the trial of his case the jury returned a verdict of guilty, fixing his punishment at one year in the penitentiary. He made a motion for new trial, which was overruled, and he brought the case to this court, where the judgment of the lower court was affirmed. Loyd v. State, 150 Ga. 803, 105 S. E. 465. At a subsequent term of the court Loyd filed an extraordinary motion for new trial. This motion was overruled and dismissed, after hearing; and that judgment is now before us for review.

[1] 1. The first ground of this motion is that the movant has learned, since his original motion for new trial was overruled and the judgment of the lower court affirmed by the Supreme Court, that he can prove that "one of the jurors [J. A. Wade] who tried and convicted him was heard to say, before he was called on the jury, that the defendant, Tom Loyd, ought to be lynched." In support of this ground the affidavit of Willis Dix was offered by the movant and considered by the court. In rebuttal, the state offered the affidavit of the juror directly denying the statements contained in the affidavit by Willis Dix. The issue of fact between the juror and the witness was passed upon by the trial court, and it does not appear that there was any abuse of discretion in refusing to grant a new trial on this ground. Hall v. State, 141 Ga. 7, 80 S. E. 307.

[2] 2. The other ground of the motion is that the movant has learned, since his first motion for new trial was overruled and the judgment of the lower court affirmed by the Supreme Court, that he can prove that the female alleged to have been raped is a "woman of bad character and that she is known as a lewd woman," and that since his motion was overruled and the judgment of the lower court affirmed by the Supreme Court the woman alleged to have been raped stated that she testified against the defendant because she was hired by two men to swear that the defendant raped her. In support of this ground the affidavits of certain witnesses are attached, and the affidavits of the defendant and each of his counsel of record, to the effect that the defendant and his counsel did not know of this evidence and by the exercise of due diligence could not have discovered the same prior to the trial of the case and prior to the overruling of the first motion for new trial. In rebuttal the state offered the affidavit of the female alleged to have been raped, in which she directly denied the statement alleged to have been made by her subsequently to the trial of the case and

to the judgment overruling the first motion for new trial. The movant did not present supporting affidavits as to the residence, associates, means of knowledge, character, and credibility of the witnesses upon whose affidavits this ground of the motion for new trial was based. In the absence of such affidavits, it must be held that the trial court did not abuse his discretion in denying the extraordinary motion for new trial upon this ground, even if this ground of the motion were otherwise meritorious. *Phillips v. State*, 138 Ga. 815, 76 S. E. 352.

Judgment affirmed.

All the Justices concur.

(151 Ga. 684)

LITTLEFIELD et al. v. TOWN OF ADEL et al. (No. 2194.)

(Supreme Court of Georgia. July 18, 1921.)

(Syllabus by the Court.)

1. *Mandamus* ¶184, 186—Municipal officers not relieved because of expiration of term subsequent to contempt judgment; mandamus against town runs against officers and their successors.

After the officers of a municipality have been adjudged guilty of contempt in refusing to obey a mandamus absolute, and the contempt judgment has been reviewed and affirmed by the Supreme Court, such officers will not be relieved because their terms of office have expired since the rendition of the contempt judgment and they have ceased to hold such offices. The court erred in granting an interlocutory injunction restraining the sheriff of the county from executing the process for contempt.

2. *Courts* ¶480(2)—Injunction will not lie to restrain execution of judgment for contempt.

The writ of injunction will not issue to restrain a sheriff or other officer from executing a judgment of contempt issuing from a court of competent jurisdiction.

Atkinson, J., and Fish, C. J. dissenting.

Error from Superior Court, Cook County; R. G. Dickerson, Judge.

Suit by the Town of Adel and others against J. J. Littlefield and others. Judgment granting an injunction, and defendants bring error. Reversed.

Littlefield brought a suit for damages against the town of Adel, and procured judgment. Upon refusal of the town officials to make payment of the amount of the execution he obtained mandamus absolute, and upon their refusal to comply therewith the defendants were adjudged in contempt. They brought the contempt case to this court, and while it was pending here an election was held and the defendants, who had been ad-

judged in contempt, were succeeded by other officials. This court affirmed the judgment of the court below. The defendants thus adjudged in contempt (who had been the acting mayor, clerk and treasurer, and councilmen of the town) filed an equitable petition, praying injunction to prevent the execution of the attachment for contempt, for the reasons (a) that petitioners never, while they were officials of the town of Adel, had in their hands funds with which they could legally pay said judgment; (b) because at the time the judgment of the court below, holding them to be in contempt, was affirmed by the Supreme Court, they had each and all gone out of office, and had no control over the funds belonging to the town of Adel, and were powerless to comply with the order requiring them to pay over the money; (c) because the officials of the city, who had succeeded the petitioners, did not then have in their hands funds from which the payment could legally be made, even if petitioners could control such funds; (d) because, when petitioners were succeeded in office by others, the mandamus proceeding and the attachment for contempt brought thereon immediately became void and of no effect, so far as petitioners were concerned. Littlefield answered, and pleaded specially that all the facts, matters, and issues sought to be raised by the petition had been finally adjudicated adversely to the petitioners, and that they were therefore estopped from litigating the matter further.

Upon interlocutory hearing the court made the following judgment:

"The sheriff of Cook county, Ga., is hereby restrained and enjoined from executing the process for contempt referred to in the above petition against those officers whose commission as officers of the town of Adel has expired and who are the plaintiffs in the above-stated case."

Error is assigned on this judgment, on the ground that it is contrary to the pleadings, the evidence, and the law of the case, because all the issues raised by the petition for injunction had been finally adjudicated adversely to the plaintiffs, and because the court was, for that reason, without jurisdiction to grant rule nisi or injunction. In the brief of counsel for the plaintiff in error it is stated:

That "the only new matter" involved in this record is the question that, pending the appeal from the judgment of the court below, holding the defendants in contempt, "an election was held in the town of Adel, in which an entirely new and different set of officers, except the clerk and treasurer, were elected by the people, and that the clerk and treasurer's term of office expired at the time the new mayor and councilmen were installed in office, and that he was thereafter re-elected, which made him a new and different officer, so that the town

was operating with an entirely new set of officers."

In the brief of defendants in error it is stated:

"The injunction was sustained solely upon the ground, as therein expressed, that defendants in error, the ex-mayor and councilmen and clerk and treasurer of the town of Adel had already gone out of office and their successors elected and qualified."

The order adjudging the petitioners in contempt was passed by Judge Thomas, of the Southern circuit, to which Berrien county, containing the town of Adel, was at the time attached. Subsequently the county of Cook was created, with Adel as the county site, and attached to the Alapaha circuit. The interlocutory injunction was granted by Judge Dickerson, of that circuit. The terms of office being served by all of the petitioners at the time they were originally adjudged in contempt for the refusal to pay over the funds had expired before the judgment of this court, affirming the judgment of the court below, was made the judgment of that court. Other persons had been elected to each of the offices, except in the case of the clerk and treasurer, who was re-elected.

R. A. Hendricks, of Nashville, for plaintiffs in error.

J. P. Knight, of Nashville, for defendants in error.

GILBERT, J. [1, 2] A mandamus absolute was directed against the town of Adel. The obligation imposed by such judgment devolved upon no particular set of municipal officers, but is perpetual against the persons then holding the offices and their successors in office. The proceeding is really against the township, whether or not the names of any particular officers are mentioned. The resignation of any officer, or all of the officers, during the pendency of the proceeding for mandamus, would not involve an abatement of the suit. If it were otherwise:

"We would always have the unseemly spectacle of constant resignations and reappointments to avoid the effect of the suit." *Thompson v. United States*, 103 U. S. 480, 26 L. Ed. 521; *Maddox v. Graham*, 59 Ky. (2 Metc.) 56.

As stated in the latter case, it may assume the character of an individual proceeding, if it becomes necessary to enforce the orders of the circuit court by attachment or other process for contempt, but a change in the membership of the board does not so change the parties as to abate the proceeding. The constituent parts of the board may not be the same, but the representative body remains identical. If, after the mandamus absolute has been rendered, one or more of the public officials affected thereby should refuse to obey its mandate while still able to comply,

he may be attached for contempt, and his subsequent resignation will not absolve him from some degree of punishment, although at the time he is finally adjudged in contempt he may then be unable to comply with the peremptory mandate because of the expiration of his term of office. If, by reason of such change, resignation, or expiration of the term of office subsequent to the issuing of the writ of mandamus, the writ cannot or ought not to be enforced, these facts should be made known, by proper proceeding, to the court issuing the writ, which alone has jurisdiction over it. A writ of mandamus absolute issued by a court of competent jurisdiction—

"when once issued, cannot, like an ordinary execution upon a judgment at law, be stayed by injunction, and to allow such interference would necessarily lead to a conflict of jurisdiction and interrupt the whole course of judicial proceedings." *High on Extraordinary Legal Remedies*, 519, § 567; *Weber v. Zimmerman*, 23 Md. 45.

As stated in the *Weber Case*, such a course would "lead to a conflict of jurisdiction, producing the greatest confusion, and tending to subvert the administration of justice." Further quoting from *High on Extraordinary Legal Remedies*, p. 521:

"If a judge has already resigned his office, while it is true that he cannot be required by mandamus to perform any judicial act connected therewith, yet if he had refused while still in office to do the act required by the mandamus, as to sign a bill of exceptions, he may be punished by fine as for contempt, since the superior tribunal, having properly acquired jurisdiction over the respondent in the first instance to compel him to perform the required act, cannot be divested of its power to punish for contempt by his resigning the office. And while it is conceded that one important object to be attained in punishing for the contempt is to compel the party to perform the required act, it by no means follows, because this cannot be attained, that no punishment should be inflicted."

In the present case the facts are perhaps further removed from the possibility of relief by injunction. Not only had the writ of mandamus absolute been rendered prior to the expiration of the term of office of the petitioners, but they had been cited for contempt, and had been tried therefor, and formally adjudged in contempt of the court for failure to comply with its judgment of mandamus. That judgment has never been set aside, but, upon the contrary, was affirmed by this court. *Town of Adel v. Littlefield*, 149 Ga. 812, 815, 102 S. E. 433. Nothing, therefore, can be conceived as more definitely settled than that the petitioners were required by valid mandamus absolute to perform an official act; that they were able to comply with such judgment, had failed and refused to do so, and were in contempt of

the court. When that case was here it was said:

"The question as to whether the town had the funds in hand to pay this [judgment] was an issue before the judge at the hearing of the application for mandamus; and his judgment ordering the payment, instead of a judgment ordering the levy of a tax with which to raise the necessary money, adjudicated the question as to whether or not the town had the funds with which to meet the judgment, and decided that question against the contention of the defendants. Whether the judge found erroneously, under the facts submitted, that the town did have the necessary funds, is not before us. The judgment was conclusive upon that question." *Town of Adel v. Littlefield*, supra.

And, again referring to the same judgment, the court said:

"But the judgment for mandamus absolute, as we have pointed out above, stands. It was a judgment rendered by a court of competent jurisdiction. * * * There was no question as to whether or not they had funds in their hands, so as to make an issue of fact which require submission to a jury. The mandamus absolute settles the question as to whether they had the funds or not, and a refusal to obey that judgment rendered the respondents in the contempt proceedings liable to punishment for contempt for refusal to obey the mandamus absolute according to its terms."

In some states contempt judgments are not reviewable. One of the reasons assigned is that if a writ of error should lie, and should have the effect of staying execution upon the judgment, the effect would be that—

"parties guilty of the grossest and most aggravated contempts may set the courts at defiance, obstruct the regular course of justice, and suspend if not totally elude punishment at their own will and pleasure."

On this subject, see *Tyler v. Hamersley*, 44 Conn. 393, 412, 419, 26 Am. Rep. 471, 479, and authorities cited.

In this state judgments for contempt as a general rule are reviewable; but there is a wide distinction between reviewing a judgment of contempt and restraining by injunction the execution of such a judgment valid and binding in every particular. In 6 *Ruling Case Law*, 539, it is said:

"An injunction will not lie to prevent the carrying out of a judgment for contempt."

As authority for this statement the case of *Tyler v. Hamersley*, supra, is cited, wherein it was said that a court of equity has no jurisdiction to grant an injunction to stay the execution of a judgment for contempt. The officials of the New Haven & Northampton Company, a railroad corporation, had been required by a writ of peremptory mandamus to stop its freight and passenger trains at the village of Plantsville, and, having disobeyed the order of the court, were adjudged in contempt. Their effort to have

the judgment of contempt reviewed by the Supreme Court of Connecticut failed. A petition was then filed, as in the present case, for an injunction to restrain the execution of the order of the court for the commitment of the petitioners for a contempt in disobeying the writ of mandamus. In the opinion of the case denying the injunction it was said:

"Courts * * * are clothed with jurisdiction to restrain, by injunction, proceedings at law in all cases where, by fraud, accident, mistake, or otherwise, a party has obtained an advantage in a court of law, which must necessarily make that court an instrument of injustice. In cases of that description the restraint may be imposed to stay trial, and after trial and verdict to stay judgment, after judgment to stay execution, and after execution to stay money in the hands of the officer. But after a judgment an injunction will not be granted to stay its execution, unless there has been fraud or collusion in obtaining it or the verdict upon which it was founded, or where the party has been unable to defend himself effectually at law, without any fault or negligence of his own, or where the plaintiff has possessed himself of something by means of which he has obtained an unconscientious advantage. When an injunction is granted to stay proceedings in the courts of law, it is in no just sense a prohibition to those courts in the exercise of their jurisdiction. It is not addressed to them and does not even affect to interfere with them. The process is directed only to the parties. It neither assumes any superiority over the court in which the proceedings are had, nor denies its jurisdiction. It is granted on the sole ground that, from certain equitable circumstances of which the court granting the process has cognizance, it is against conscience that the party inhibited should proceed in the cause."

Applying these principles to the facts of that case, it was further said:

"The facts charged in the bill show no title whatever in the plaintiffs to equitable relief, and are not even within the jurisdiction of a court of equity. It is an established rule that courts of equity will grant no injunction, or order in the nature of an injunction, to stay proceedings in any criminal matter. If they should do so, said Lord Holt, C. J., the Court of Queen's Bench would break it, and protect any that would proceed in contempt of it. *Holderstafte v. Saunders*, 6 Mod. 16. And Lord Hardwicke allowed a demurrer to a bill for an injunction to stay proceedings on a mandamus issued to the lord of a manor to hold a court. 'The court,' he said, 'has no jurisdiction to grant an injunction to stay proceedings on a mandamus, or on an indictment, or on an information or a writ of prohibition.'"

The terms of office of the defendants in error expired after the rendition of the judgment finding them to be in contempt; they sued out a writ of error to that judgment, and the judgment of this court was rendered subsequently to the expiration of their terms of office. What effect these facts should have in modifying or abrogating the judgment of

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contempt, when modification or abrogation is sought, rests primarily with the superior court which rendered the judgment, by petition praying for modification, but not by means of the extraordinary writ of injunction. In the case of *Thweatt v. Kiddoo*, 58 Ga. 300, it appears that Thweatt had violated an injunction restraining the sale of personal property, and was adjudged in contempt of court therefor, and that judgment had been affirmed by this court. After the judgment of the Supreme Court had been made the judgment of the superior court, Thweatt filed a petition in the latter court, tending to show that he had been misled, offering to make restitution in part, and alleging that he had not the means to fully comply with the original judgment against him. The petition was accompanied with a motion that he be discharged from the contempt. The court overruled the motion, and ordered that Thweatt be committed for contempt. Thweatt presented a bill of exceptions, which the presiding judge refused to certify, because all the material questions had been adjudicated before, and the orders granted were only carrying out the decision already made. Thweatt then petitioned the Supreme Court for a writ of mandamus compelling Judge Kiddoo to certify the bill of exceptions. A nisi was issued by this court, and on the filing of the answer by respondent the mandamus absolute was refused. In the opinion, written by Bleckley, J., it was said:

"What would be cause for terminating, after a reasonable time, imprisonment employed as a remedy without producing remedial results, is not now in question. The question of contempt was settled at a previous term, on substantially the same facts as are contained in this record. 56 Ga. 98. Nothing new has happened to purge the contempt. The alleged inability, from poverty or otherwise, to comply with the order of the court, is not proved to have originated since that order was passed. The imprisonment has not even commenced. After imprisonment has been tried for a reasonable time, and proved unfruitful as a remedy, the question can be made how and when it ought to terminate. Doubtless there is some way to reach a case of bona fide poverty, and prevent imprisonment from becoming perpetual, or even from being unduly protracted. But the poor cannot be indulged in willful disobedience to the lawful commands of a court, any more than the rich. The action of the court, now complained of, was not the rendition of a new judgment, but the refusal to stop short in the execution of the judgment formerly rendered. The judge was right in refusing to sign and certify another bill of exceptions."

Thweatt's Case, it must be remembered, arose on an application to the court to revoke or modify the contempt judgment. It did not seek to employ the writ of injunction to prevent the enforcement of a valid judgment. That the plaintiffs in this case

may be punished, as a consequence of our ruling, notwithstanding their terms of office subsequently expired, would not justify us in abandoning established law. To do so would create a dangerous and mischievous precedent. They have chosen the wrong remedy, when they could have pursued the right remedy. Moreover, the right remedy is yet available. The judgment sought to be enjoined in this case prescribes punishment for failing and refusing to comply with the mandamus absolute when they were able to comply. It does not undertake to punish for refusal after their terms of office expired and they were unable to comply. The order upon which error is assigned does not undertake to vacate or modify the contempt judgment. It is explicitly an interlocutory injunction. Applying the principles above stated, we conclude that the judgment restraining the sheriff from proceeding to execute the judgment of contempt was contrary to law, and must be set aside.

Judgment reversed.

All the Justices concur, except FISH, C. J., and ATKINSON, J., dissenting.

ATKINSON, J. In an action for damages based on a tort, Littlefield obtained a money judgment against the town of Adel, Ga. Subsequently the plaintiff instituted a mandamus suit against the municipality to compel payment of the judgment. On September 25, 1918, Judge Thomas, of the Southern judicial circuit, in whose jurisdiction the suit was instituted, granted a judgment absolute, commanding the town of Adel and certain individuals, "as acting mayor" and "as acting secretary and treasurer" of the municipality, to pay over to plaintiff instant the amount of the judgment. On May 23, 1919, the plaintiff instituted a contempt proceeding against the town of Adel and certain individuals, who were acting respectively as mayor, secretary and treasurer, and councilmen, based on the refusal to pay the judgment as ordered in the mandamus absolute. On May 28, 1919, the contempt case was heard before Judge Thomas, and a judgment was rendered declaring:

"It is therefore ordered by the court that [the officers of the municipality, naming them] be and they are each hereby required and ordered to pay over to said plaintiff or his counsel the said sum [setting out the amount of the judgment], or in default thereof that they and each of them be attached for contempt of court."

On June 10, 1919, the clerk of the superior court issued "process" commanding the sheriff "to arrest" the individuals adjudged in contempt, "and commit them to jail as for contempt of said court in their failure to pay said judgment as aforesaid." Before execution of this process the terms of office of each

of the individuals mentioned in the judgment for contempt expired, and with one exception other individuals were elected and qualified as their successors, so that such persons had no authority over the municipal property or the municipal affairs. On account of change of judicial circuits, Judge Dickerson, of the Alapaha circuit, succeeded to the jurisdiction in that territory which had theretofore been exercised by Judge Thomas. On April 5, 1920, when the sheriff was about to arrest and imprison the defendants, in execution of the writ issued by the clerk, they presented to Judge Dickerson an equitable petition against the sheriff and the plaintiff named in the common-law judgment against the town of Adel, praying to vacate the mandamus absolute and judgment of contempt and to enjoin the sheriff and his deputies from executing the process issued by the clerk, on the ground, among others, that such process was void. At the hearing the judge granted an order which declared:

"The sheriff * * * is hereby restrained and enjoined from executing the process for contempt * * * against those officers whose commission as officers of the town of Adel has expired and who are the plaintiffs" in this case.

The exception is to this judgment. While the mandamus absolute and judgment for contempt were rendered by Judge Thomas, and the judgment restraining the sheriff was rendered by Judge Dickerson, the latter judge, on account of change in judicial circuits, was successor to the former in jurisdiction of the case, and consequently all the judgments issued from the same court. While in the form of an equity suit, the petition presented was in effect a petition to the court which had granted the mandamus absolute and judgment for contempt, to vacate those orders, purge the contempt, and prevent arrest and imprisonment under the process issued by the clerk. The substance and not the style of the action determines its character. *Lambert Holsting Engine Co. v. Dexter*, 127 Ga. 581, 58 S. E. 778. It is not a case where one court is asked to interfere with the judgment of another court in respect to a matter of contempt, but is one in which the contemnor petitions the court which judged him in contempt; and the petition, whatever its form, was a sufficient basis for the judge to take jurisdiction and grant the relief which was granted. In *Nisbet v. Tindall*, 115 Ga. 374, 41 S. E. 569, a receiver was adjudged in contempt and imprisoned for failure to pay over money coming into his hands as an officer of court. His petition was for discharge on the ground

of poverty and his inability to pay the amount he was ordered to pay. The judge ordered his discharge. In affirming that judgment this court in the course of the opinion said:

"It should now be regarded as definitely and finally settled that, in all cases of this character, the question of discharging from custody an officer of the court, who has been imprisoned for not paying over money or delivering property, must be left to the sound discretion of the trial judge, and that he shall have exclusive control of the matter."

There is no reason why the same rule should not apply where the contemnor is other than an officer of the court, and where his term of imprisonment has not commenced. Having the right to apply for discharge, what are the merits of the grounds of relief? Those adjudged in contempt subsequently lost all power to comply with the terms of the mandamus absolute, by expiration of their terms of office and the election and qualification of their successors (except one). This inability to comply would have been ground of defense before the judgment of contempt, and, having arisen after judgment of contempt, was sufficient ground for subsequent discharge of the contemnor. *Nisbet v. Tindall*, supra; 13 C. J. 95, § 148. See, also, cases cited in 6 R. C. L. 537, note 11. All that is said would apply, had the judge sentenced the contemnors to arrest and imprisonment. But he did not do so. The proposed arrest and imprisonment were under a so-called "process" issued by the clerk of the court. That process issued by the clerk was strictly penal, and to be valid must be clearly authorized by a statute or judgment of the court strictly construed. It was unfounded, because the judgment in the contempt proceeding, on which reliance was had for its basis, did not declare that the defendants should be arrested or imprisoned, and there is no statute authorizing the clerk to issue any such commitment. The imposition of a penalty for contempt is the sentence of the court, a judicial function, involving discretion of the judge, and not a mere ministerial act, that could be performed by the clerk. The judge could have fined the contemnors, or committed them to jail, or in his discretion omitted any punishment additional to the judgment of contempt. But the clerk was wholly without power to commit the contemnors to imprisonment, and the process issued by him was void for any such purpose. Being void, the judge could treat it as a nullity and instruct the sheriff to disregard its commands. That is in effect all that he did, and his judgment should not be reversed.

FISH, C. J., concurs in the dissent.

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(151 Ga. 709)

ALFORD v. STATE. (No. 2581.)

(Supreme Court of Georgia. July 13, 1921.)

*(Syllabus by the Court.)***1. Instructions complained of not erroneous.**

The grounds of the motion for new trial complain of certain charges of the court as contained in the excerpts set out therein. All of these excerpts from the charge state correct principles of law as applicable to the facts of the case; and the court did not err in overruling the motion for new trial on these grounds. The charges complained of were also authorized by the evidence.

2. Sufficiency of evidence.

The evidence authorized the verdict.

Error to Superior Court, Pike County; W. E. H. Searcy, Jr., Judge.

Action by the State against George Alford. Judgment for the State, and Alford brings error. Affirmed.

John R. Cooper and W. O. Cooper, Jr., both of Macon, and E. F. Dupree, of Zebulon, for plaintiff in error.

E. M. Owen, Sol. Gen., of Zebulon, R. A. Denny, Atty. Gen., and Graham Wright, Asst. Atty. Gen., for the State.

HILL, J. Judgment affirmed. All the Justices concur.

(151 Ga. 708)

BARBOUR v. BENTON. (No. 2488.)

(Supreme Court of Georgia. July 13, 1921.)

*(Syllabus by the Court.)***State prohibition law.**

The contention of the plaintiff in error is controlled adversely by the case of Jones v. Hicks, 150 Ga. 657, 104 S. E. 771, 10 A. L. R. 1315, the request to review which is denied.

Error from Superior Court, Chatham County; P. W. Meldrim, Judge.

Action between A. D. Barbour and Andy Benton. Judgment for the latter, and the former brings error. Affirmed.

Lawrence & Abrahams and Robt. L. Colding, all of Savannah, for plaintiff in error. Walter C. Hartridge, Sol. Gen., of Savannah, for defendant in error.

GILBERT, J. Judgment affirmed. All the Justices concur.

(151 Ga. 708)

RASKIN v. DIXON, Sheriff. (No. 2489.)

(Supreme Court of Georgia. July 14, 1921.)

Error from Superior Court, Chatham County; P. W. Meldrim, Judge.

Action between Abe Raskin and M. W. Dixon, Sheriff. Judgment for the latter, and the former brings error. Affirmed.

Lawrence & Abrahams and Robt. L. Colding, all of Savannah, for plaintiff in error.

Walter C. Hartridge, Sol. Gen., of Savannah, for defendant in error.

BECK, P. J. This case is controlled by the ruling in the case of Barbour v. Benton, 108 S. E. 61, decided by this court July 12, 1921. Judgment affirmed. All the Justices concur.

(151 Ga. 588)

BRANDT v. COMPUTING CLOTH MEASURING MACH. CO. (No. 2149.)

(Supreme Court of Georgia. June 15, 1921.)

Transferred to Court of Appeals.

Action between R. Brandt and the Computing Cloth Measuring Machine Company. Judgment for the latter, and the former brings error. Case transferred to Court of Appeals.

Green & Michael, of Athens, for plaintiff in error.

Erwin, Erwin & Nix, of Athens, for defendant in error.

PER CURIAM. On authority of the case of Burress v. Montgomery, 148 Ga. 548, 97 S. E. 538, this case is transferred to the Court of Appeals, that court, and not the Supreme Court, having jurisdiction to decide the case. See Brandt v. Buckley, this day decided, 107 S. E. 778.

All the Justices concur.

(27 Ga. App. 258)

REWIS v. STATE. (No. 12439.)(Court of Appeals of Georgia, Division No. 1.
June 30, 1921.)*(Syllabus by Editorial Staff.)***1. Time §9(7)—Certificate to bill of exceptions held signed within 20 days.**

Within Civ. Code 1910, § 6153, requiring that a fast bill of exceptions be tendered and signed within 20 days from the rendition of the decision, the judge's certificate dated April 6th was signed within 20 days from the overruling of a motion for a new trial on March 17th.

2. Criminal law §1064½—Trial judge's certification of ground of motion for new trial not final as to conclusions.

Where a special ground of a motion for new trial stated that there was no proof as to the venue of certain acts, or that the woman with whom the offense was committed was a single woman, the trial judge's certification thereof as true was final only as to the statements of fact, and not as to conclusions.

Error from Superior Court, Tattnall County; W. W. Sheppard, Judge.

A. E. Rewis was convicted of an offense, and he brings error. Affirmed.

Elders & De Loach, of Reidsville, for plaintiff in error.

J. Saxton Daniel, Sol. Gen., of Claxton, for the State.

BLOODWORTH, J. [1] 1. A motion was made to dismiss the writ of error on the ground that the judge "signed the certificate too late, more than 20 days after the rendition of his judgment overruling the motion for a new trial." This motion is overruled. The record shows that the motion for a new trial was overruled on March 17th. The certificate to the bill of exceptions bears date April 6th. This is "with-

in twenty days from the rendition of the decision." Civil Code 1910, § 6153.

[2] 2. Counsel for the plaintiff in error insists that the trial judge certified as true the special ground of the motion for a new trial in which it was stated that there was no proof as to the venue of certain acts of incestuous adultery, and that where the venue was proved there was no proof that the woman with whom the accused, a married man, is alleged to have had sexual intercourse, was a single woman, and that this certificate was final as to the statements therein. This is true as to facts, but not as to conclusions. In *Humphrey v. State*, 24 Ga. App. 22 (1), 99 S. E. 714, it was held:

"The usual general certificate of the trial judge, approving as true all statements of fact contained in a special ground of a motion for a new trial, will be construed by this court as approving as true only such statements in the ground as are purely statements of fact, and not as so approving other allegations therein, which, although stated as facts, should properly be construed as mere conclusions of the movant, based upon facts set forth in the ground."

3. There was ample evidence to support every material allegation in the indictment, including the allegation that the crime was committed in Tattnall county, and that the woman in question had never been married. Indeed, the accused in his statement, after telling of the marriage of his other stepdaughters and their leaving home, and that Maybelle, the one involved in this case, remained at home, added, "She is still single."

The jury having passed upon all these questions of fact, no error of law having been committed, and the trial judge having approved the verdict, the judgment is affirmed.

BROYLES, C. J., and LUKE, J., concur.

(27 Ga. App. 230)

BRYSON v. STATE. (No. 12408.)(Court of Appeals of Georgia, Division No. 1.
June 17, 1921.)*(Syllabus by the Court.)*

1. Intoxicating liquors §13 — State law not superseded by federal law or constitutional amendment.

"The Eighteenth Amendment to the Constitution of the United States, and the 'National Prohibition Act,' popularly known as the Volstead Act, do not supersede or abrogate the existing state law, known as the Prohibition Act, approved March 28, 1917 (Acts Ex. Sess. 1917, p. 7)."

2. Criminal law §201 — Punishment for possessing liquor under both state and federal laws does not place defendant twice in jeopardy for same offense.

Both the sovereignty of the United States and the sovereignty of the state of Georgia having jurisdiction over the illegal act of possessing liquor, the same may constitute a criminal offense equally against both sovereignties, subjecting the guilty party to punishment under the laws of both, and the punishment in one sovereignty is no bar to his punishment in the other; and a conviction for the same offense in both the federal and state courts is not in violation of those provisions of the federal and state Constitutions that provide, in substance, that no person shall be twice put in jeopardy of life and limb for the same offense.

3. Plea of former jeopardy properly stricken.

Under the above rulings, the trial court did not err in striking the defendant's plea of former jeopardy, in which he alleged that he had previously pleaded guilty in the United States District Court to the same offense—possessing the same whisky at the same time as charged in the state indictment—and that a conviction in the state court would be in violation of certain named provisions of the federal and state Constitutions which declare that no person shall be twice put in jeopardy of life and limb for the same offense.

4. Criminal law §201 — Intoxicating liquors §13, 139—National law construed in light of constitutional amendment; possessing for personal consumption prohibited by state, but not by federal law; conviction under national law not bar to conviction under state law.

Moreover, the National Prohibition Act, known as the Volstead Act, when construed, as it must be, in the light of the Eighteenth Amendment, does not prohibit the possession of liquor or other intoxicants for the personal consumption of the owner thereof, his family, and his bona fide guests; whereas our state prohibition law does prohibit and make penal the mere possession of liquor, regardless of the purpose for which it is to be used by the owner; and therefore, the two laws being clearly separate and distinct in this particular, a conviction of the national offense is no bar to punishment for the state offense.

(Additional Syllabus by Editorial Staff.)

5. Courts §217—Court of Appeals has jurisdiction to determine whether conviction under federal law bars prosecution under state law.

The determination of the question whether a conviction under the National Prohibition Act for illegally possessing intoxicants bars a prosecution under the state law, involves only an application, and not a construction, of provisions of the federal and state Constitutions, and is within the jurisdiction of the Court of Appeals.

Error from Superior Court, Cobb County; D. W. Blair, Judge.

D. H. Bryson was convicted of having, possessing, and controlling intoxicated liquors, and he brings error. Affirmed.

Clay & Blair, of Marietta, for plaintiff in error.

Jno. S. Wood, Sol. Gen., of Canton, and Lindley W. Camp, of Marietta, for the State.

LUKE, J. The defendant was indicted, tried, and found guilty of "having, possessing, and controlling" a certain quantity of intoxicating whisky. Prior to entering his plea of not guilty, the defendant filed a plea of former jeopardy in which he alleged that he had pleaded guilty in the United States District Court for the Northern District of Georgia to the illegal possession of the identical whisky and at the same time that he was charged with illegally having, possessing, and controlling in the instant case, and that therefore his plea of guilty in the federal court was autrefois convict as to the case at bar. Upon motion of the state's counsel, the court struck this special plea, as being insufficient in law to set up any defense to the indictment pending. The defendant filed exceptions pendente lite to the ruling of the court striking his plea, and properly assigned error thereon in the main bill of exceptions.

[1] It is no longer an open question in this state that the Eighteenth Amendment to the Constitution of the United States, and the "National Prohibition Act," popularly known as the Volstead Act (Act Cong. Oct. 28, 1919, c. 85, 41 Stat. 305), do not supersede or abrogate the existing state prohibition act. *Jones v. Hicks*, 150 Ga. 657, 104 S. E. 771, 10 A. L. R. 1315.

[2] Therefore the sole question for adjudication (this being the only point insisted upon in this court) is whether or not a defendant who has already been tried and found guilty in the federal court for illegally possessing liquor in violation of the Act of Congress known as the Volstead Act can be legally punished in the courts of Georgia for possessing the same liquors in violation of the state prohibition law (Acts of 1917 [Ex. Sess.] p. 7).

[5] And this court is not without jurisdiction

tion to pass upon the constitutional question, since it involves only an application of certain provisions of the federal and state Constitutions, and not a construction thereof. See *Gulf Paving Co. v. City of Atlanta*, 149 Ga. 114, 99 S. E. 374.

While this identical question has never been passed upon by the appellate courts of this state, it has in principle been settled by decisions of the United States Supreme Court, and other courts of high repute. In the case of *United States v. Amy*, 24 Fed. Cas. 792, 810, it is held that:

"In maintaining the power of the United States to pass this law, it is, moreover, proper to say that, as these letters, with the money in them, were stolen in Virginia, the party might undoubtedly have been punished in the state tribunals, according to the laws of the state, without any reference to the post office or the act of Congress; because, from the nature of our government, the same act may be an offense against the laws of the United States and also of a state, and be punishable in both. *This was considered and decided in the Supreme Court of the United States in the case of Fox v. State of Ohio*, 3 Howard (44 U. S.) 433, and in the case of *United States v. Peter Marigold*, 9 Howard (50 U. S.) 560; and the punishment in one sovereignty is no bar to his punishment in the other." (Italics ours.)

In *Crossley v. California*, 168 U. S. 640, 18 Sup. Ct. 242, 42 L. Ed. 610, it is said:

"But it is settled law that the same act may constitute an offense against the United States and against a state, subjecting the guilty party to punishment under the laws of each government; and may embrace two or more offenses. *Cross v. North Carolina*, 132 U. S. 131 [33 L. Ed. 287], and cases cited. And see *Teal v. Felton*, 12 How. [37 U. S.] 284, 292 [9 L. Ed. 990, 993]."

In the recent case of *United States v. Casey* (D. C.) 247 Fed. 362, 365, (6), it is held:

"That the state in the exercise of its police power has the right to legislate, and in pursuance of that right has legislated, to control the morals of its citizens, and may prosecute the keepers of bawdyhouses, is freely conceded; but their conviction and sentence for that offense in the state court, had action been taken against them there, would not bar their prosecution in this court. [Italics ours.] *Cross v. North Carolina*, 132 U. S. 131, 139, 10 Sup. Ct. 47, 33 L. Ed. 287; *Sexton v. California*, 189 U. S. 319, 323, 23 Sup. Ct. 543, 47 L. Ed. 833; *Byrne*, Fed. Crim. Proc. § 211."

The converse of this proposition is obviously true. Attention is also directed to the recent case of *In re Antonia Guerra*, 94 Vt. 1, 110 Atl. 224, 10 A. L. R. 1560, where the Supreme Court of Vermont had under consider-

ation the question of whether the wartime prohibition act superseded the state law on the same subject, and in passing said:

"It is no objection to the concurrent validity of the two statutes that both penalize the same act, for it has been repeatedly held that the same act may constitute a criminal offense equally against the United States and the state, subjecting the guilty party to punishment under the laws of each, provided the act is one over which both sovereignties have jurisdiction."

See, also, in this connection, *Moore v. Illinois*, 14 How. 13, 14 L. Ed. 306; *Southern Railroad v. Commission*, 236 U. S. 439, 35 Sup. Ct. 304, 59 L. Ed. 661.

In view of the above authorities, we hold that the violation of the federal Prohibition Act for possessing liquors, and a conviction of that offense in the federal court, does not bar or prevent a conviction for the same offense under the state prohibition law penalizing the possession of whisky.

[4] Furthermore, the Volstead Act, construed, as it must be, in the light of the Eighteenth Amendment, does not prohibit the possession of liquor where it is to be used for the personal consumption of the owner thereof, his family, and his bona fide guests, whereas our state prohibition law does prohibit the mere possession of liquor, regardless of the purpose for which it is to be used by the owner. These statutes are therefore entirely and radically different in this respect. This being true, the question under consideration comes, in principle, squarely under the well-settled law of this state, that—

"An act penalized by a law of the state may be penalized also by a municipal ordinance, if there is in the municipal offense some essential ingredient not essential to the state offense, or if the municipal offense lacks some ingredient essential to the state offense. In such case a conviction of the municipal offense is no bar to punishment for the state offense." *Morris v. State*, 18 Ga. App. 684, 90 S. E. 361.

See, also, *Ellis v. Golden*, 18 Ga. App. 749, 750, 90 S. E. 495, and citations.

The federal offense of possessing liquor is not swallowed up by the state offense of possessing whisky, nor vice versa, but, as we have already pointed out, both offenses are separate and distinct, and the same transaction may involve both.

[3] It follows from what has been said that the trial court did not err in striking on motion the defendant's plea of former jeopardy. Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(27 Ga. App. 268)

MOORE v. STATE. (No. 12455.)(Court of Appeals of Georgia, Division No. 1.
June 30, 1921.)*(Syllabus by the Court.)*

1. Criminal law §201 — Punishment under state or federal law not bar to punishment under other.

Both the sovereignty of the United States and the sovereignty of the state of Georgia having jurisdiction over the illegal act of selling whisky, or possessing whisky, the same may constitute a criminal offense equally against both sovereignties, subjecting the guilty party to punishment under the laws of both, and the punishment in one sovereignty is no bar to his punishment in the other, even if the offense under the federal law and the offense under the state law constitute the same transaction. Bryson v. State, 26 Ga. App.—, 108 S. E. 63, this term decided, and authorities cited. Under this ruling the court did not err in the instant case in striking the special plea of autrefois convict.

2. Criminal law §1160 — Verdict authorized by evidence and approved by trial judge not disturbed.

The motion for a new trial contained only the usual general grounds, and, as the verdict was authorized by some evidence and approved by the trial judge, this court is without authority to interfere.

Error from City Court of Macon; Will Gunn, Judge.

Louie Moore was convicted of an offense, and he brings error. Affirmed.

Hubert F. Rawls and Daisy L. Churchwell, both of Macon, for plaintiff in error.

Roy W. Moore, Sol., of Macon, for the State.

BROYLES, C. J. Judgment affirmed.

LUKE and BLOODWORTH, JJ., concur.

(27 Ga. App. 266)

ROUSE v. CHANCE & HOPKINS.
(No. 12422.)(Court of Appeals of Georgia, Division No. 1.
June 30, 1921.)*(Syllabus by the Court.)*

1. Trial §333 — Judgment properly rendered on verdict for plaintiff when amount not in dispute.

"Verdicts are to have a reasonable intendment, and are to receive a reasonable construc-

tion, and are not to be avoided unless from necessity." Civ. Code 1910, § 5927.

2. Trial §331 — Verdict certain when it can be made certain.

"A verdict is certain which can be made certain by what itself contains or by the record." Giles v. Spinks, 64 Ga. 206, 207.

Error from City Court of Waynesboro: Wm. H. Davis, Judge.

Action by Chance & Hopkins against T. J. Rouse, Jr. Judgment for plaintiffs, and defendant brings error. Affirmed.

E. V. Heath, of Waynesboro, for plaintiff in error.

E. M. Price, of Waynesboro, for defendants in error.

BROYLES, C. J. [1, 2] This was a suit upon an open account for repairing an automobile. Upon the trial the defendant testified that he did not owe the plaintiffs anything on the account, as he told the plaintiffs when he left the car with them to be repaired that he did not own it, and that at that time he made an agreement with the plaintiffs for them to repair the car, sell it, retain the cost of repairing, and turn over the balance of the money, if any, to him (the defendant). This was denied by the plaintiffs, and the jury returned the following verdict: "We, the jury, find for the plaintiff—so say we all." Thereupon the court entered up a judgment in favor of the plaintiffs for \$119.71, and the defendant moved for a new trial, one of the grounds being that the verdict was too vague, indefinite, and uncertain to authorize a judgment to be entered thereon for any particular sum, and also that the judgment entered up was void. Under the pleadings and the evidence adduced, the only issue before the jury was whether the defendant was liable on the account. If he was liable, then the undisputed evidence demanded a finding that he owed the plaintiffs \$119.71, the amount of the judgment entered upon the verdict. It follows that the reasonable intendment of the jury was to return a verdict for the plaintiffs for \$119.71. See, in this connection, Mize v. Mashburn, 8 Ga. App. 408 (2), 69 S. E. 316; Selfert v. Holt, 82 Ga. 757, (2), 761, 9 S. E. 843, and authorities cited.

The excerpts from the charge of the court complained of, when considered in connection with the entire charge, show no material error. We do not think the court erred in overruling the motion for a new trial.

Judgment affirmed.

LUKE and BLOODWORTH, JJ., concur.

(27 Ga. App. 261)

BLOUNT v. STATE. (No. 12443.)(Court of Appeals of Georgia, Division No. 1.
June 30, 1921.)*(Syllabus by the Court.)***Verdict authorized and no reversible error committed.**

The verdict was amply authorized by the evidence, and none of the grounds of the amendment to the motion for a new trial shows reversible error.

Error from Superior Court, Tattnall County; W. W. Sheppard, Judge.

Action by the State against J. A. Blount. Judgment for the State, and Blount brings error. Affirmed.

A. S. Way and S. B. McCall, both of Reidsville, for plaintiff in error.

J. Saxton Daniel, Sol. Gen., of Claxton, for the State.

BROYLES, C. J. Judgment affirmed.

LUKE and BLOODWORTH, JJ., concur.

(27 Ga. App. 257)

BARRETT v. FIRST NAT. BANK OF ROME. (No. 12429.)(Court of Appeals of Georgia, Division No. 1.
June 30, 1921.)*(Syllabus by the Court.)*

Appeal and error \S 1140(6)—**Judgment affirmed if attorney's fees not authorized by evidence be written off.**

The verdict in favor of the plaintiff, except the finding for attorney's fees, was authorized by the evidence, and the motion for a new trial contained only the usual general grounds. If the plaintiff, when the remittitur is made the judgment of the lower court, will write off the amount found for attorney's fees, the judgment will be affirmed; otherwise it will be reversed.

Error from City Court of Carrollton; Leon Hood, Judge.

Action by the First National Bank of Rome against B. F. Barrett. Judgment for plaintiff, and defendant brings error. Affirmed on condition.

Eugene Spradlin and Smith & Millican, all of Carrollton, for plaintiff in error.

Boykin & Boykin, of Carrollton, for defendant in error.

BROYLES, C. J. This is the third appearance here of this case. When the case first came to this court, the judgment of the trial court was reversed because of error in repelling certain evidence offered by the de-

fendant, and in directing a verdict for the plaintiff. 17 Ga. App. 425, 87 S. E. 602. On its second appearance, the judgment of the lower court was reversed because of the error in admitting certain evidence offered by the defendant and in directing a verdict for the defendant. 20 Ga. App. 493, 93 S. E. 107.

Upon the trial now under review the case was submitted to the jury, and the verdict in favor of the plaintiff with the exception of the finding for attorney's fees, was authorized by the evidence. The only assignment of error in the bill of exceptions is upon the overruling of the motion for a new trial, and the motion contained only the usual general grounds. If the plaintiff, when the remittitur from this court is made the judgment of the lower court, will write off \$23.64, the amount found for attorney's fees, the judgment will be affirmed; otherwise it will be reversed.

The costs of the writ of error are taxed against the defendant in error.

Judgment affirmed on condition.

LUKE and BLOODWORTH, JJ., concur.

(27 Ga. App. 263)

WALKER v. STATE. (No. 12463.)(Court of Appeals of Georgia, Division No. 1.
June 30, 1921.)*(Syllabus by the Court.)*

1. Criminal law \S 938(1)—**New trial not granted for cumulative evidence of which defendant knew before trial.**

It was not error to overrule the ground of the motion for a new trial, which was based upon alleged newly discovered evidence, as that evidence was cumulative, and it was also obvious that before his trial the defendant must have known of the evidence.

2. Criminal law \S 1160—**Verdict supported by slight evidence, and approved by trial judge, not disturbed.**

There was some slight evidence authorizing the defendant's conviction, and, the finding of the jury having been approved by the trial judge, this court is without authority to interfere.

Error from City Court of Swainsboro; Geo. Kirkland, Jr., Judge.

William Walker was convicted of an offense, and he brings error. Affirmed.

O. A. Rountree and Arthur W. Jordan, both of Swainsboro, for plaintiff in error.

I. W. Rountree, Sol., of Swainsboro, for the State.

BROYLES, C. J. Judgment affirmed.

LUKE and BLOODWORTH, JJ., concur.

(27 Ga. App. 268)

(198 S.E.)

SMITH v. STATE. (No. 12457.)(Court of Appeals of Georgia, Division No. 1.
June 30, 1921.)*(Syllabus by the Court.)*

1. Criminal law \Leftrightarrow 826—Refusal of requests to charge not tendered before jury's retirement not considered.

Grounds 1 and 2 of the amendment to the motion for a new trial, based upon the refusal of the judge to comply with written requests to charge, cannot be considered, since it does not appear that the requests were tendered to the court before the jury retired to consider of their verdict. Civ. Code 1910, § 6084; Macon v. State, 24 Ga. App. 337(1), 100 S. E. 785.

2. Criminal law \Leftrightarrow 1178—Points not argued in brief treated as abandoned.

Special ground 3 of the motion for a new trial, not having been argued in the brief of counsel for the plaintiff in error, will be treated as having been abandoned.

3. Criminal law \Leftrightarrow 1160—Verdict approved by trial judge not set aside when supported by any evidence.

There is evidence to support the verdict, and this court has no authority to set aside a verdict which has the approval of the trial judge when there is any evidence to support it.

Error from City Court of Dublin; S. W. Sturgis, Judge.

Lillie Smith was convicted of an offense, and brings error. Affirmed.

John W. Thomas, and Fred Kea, both of Dublin, for plaintiff in error.

William Brunson, Sol., of Dublin, for the State.

BLOODWORTH, J. Judgment affirmed.

BROYLES, C. J., and LUKE, J., concur.

(27 Ga. App. 265)

ELROD v. STATE. (No. 12454.)(Court of Appeals of Georgia, Division No. 1.
June 30, 1921.)*(Syllabus by the Court.)*

1. Homicide \Leftrightarrow 300(14)—Instruction as to application of doctrine of reasonable fears held not erroneous.

The court did not err in charging the jury that "the doctrine of reasonable fears only applies when the danger is urgent and pressing, or apparently so, at the time of the killing."

2. Criminal law \Leftrightarrow 778(5)—Homicide \Leftrightarrow 340(4)—Instruction as to presumption that homicide is felonious held proper; instructions as to murder harmless, where defendant convicted of manslaughter.

The following is a quotation from Hudgins v. State, 2 Ga. 188, and was properly given in

charge to the jury: "The law presumes every homicide to be felonious, until the contrary appears, from circumstances of alleviation, of excuse, or justification; and it is incumbent on the prisoner to make out such circumstances to the satisfaction of the jury, unless they arise out of the evidence produced against him."

3. Instruction authorized by evidence.

There was sufficient evidence to authorize the charge on mutual combat. Bailey v. State, 148 Ga. 401, 96 S. E. 862; Fordham v. State, 24 Ga. App. 369, 100 S. E. 790; Weldon v. State, 21 Ga. App. 381(8), 94 S. E. 326, and cases cited.

4. Criminal law \Leftrightarrow 825(3)—Homicide \Leftrightarrow 309(1)—Instruction as to provocation in language of statute held proper; instruction not erroneous, because of failure to give other proper instructions without request.

The court properly gave in charge section 65 of the Penal Code of 1910 (as to voluntary manslaughter), including the words "provocation by words, threats, menaces, or contemptuous gestures shall in no case be sufficient to free the person killing from the guilt and crime of murder." This charge was not rendered erroneous by failure to give in connection therewith other appropriate instructions. Grimsley v. Singletary, 138 Ga. 57(8), 65 S. E. 92, 134 Am. St. Rep. 196; Conley v. State, 21 Ga. App. 134(1), 94 S. E. 261. The rulings just cited apply also to the tenth ground of the amendment to the motion for a new trial. If fuller instructions were desired, they should have been requested as required by section 1087 of the Penal Code of 1910, and section 6084 of the Civil Code of 1910.

5. Criminal law \Leftrightarrow 1160—Verdict supported by evidence, and approved, not disturbed.

The judge having approved the verdict, and there being some evidence to support it, this court will not interfere.

Error from Superior Court, Franklin County; W. L. Hodges, Judge.

Sam Elrod was convicted of voluntary manslaughter, and he brings error. Affirmed.

W. R. Little, of Carnesville, and J. H. & Emmett Skelton, of Hartwell, for plaintiff in error.

A. S. Skelton, Sol. Gen., of Hartwell, and Geo. L. Goode and Fernor Barrett, both of Toccoa, for the State.

BLOODWORTH, J. We will discuss only the first and second headnotes.

[1] 1. In the fourth ground of the amendment to the motion for a new trial complaint is made that the court, after charging sections 70 and 71 of the Penal Code of 1910, added:

"The doctrine of reasonable fears only applies when the danger is urgent and pressing, or apparently so, at the time of the killing."

It is insisted:

That this charge "deprived the defendant of the right to rely upon justification of the killing under the fears of a reasonable man," that it "qualified or limited the law of justifiable homicide as contained in sections 70 and 71 of the Penal Code," and that "it confined the jury's investigation to what happened at the instant of the killing."

The charge is not subject to these criticisms. In *Williams v. State*, 120 Ga. 873, 48 S. E. 370, Mr. Justice Evans said:

"The court, while charging as to what the law regards as the fears of a reasonably courageous man, told the jury that the danger 'apprehended must be urgent and pressing, or apparently so, at the time of the killing.' It is insisted by the plaintiff in error that this instruction was not applicable to this case, and could only apply to a case where the evidence disclosed 'a mutual intention to fight.' We cannot concur in this view. 'A bare fear' of injury can never be regarded as sufficient to justify a homicide. Penal Code, § 71. And, as was said in the case of *Jackson v. State*, 91 Ga. 271(1): 'The doctrine of reasonable fear as a defense does not apply to any case of homicide where the danger apprehended is not urgent and pressing, or apparently so, at the time of the killing.'"

Counsel for plaintiff in error insists that the charge in that case is different from the one under consideration, because in that case the court charged the jury that the danger *apprehended* must be urgent and pressing, or apparently so, at the time of the killing, and in the charge in this case the word *apprehended* was omitted. We think this is "a distinction without a difference." However, in *Tolbirt v. State*, 124 Ga. 773 (4), 53 S. E. 327, the Supreme Court approved a charge in the exact language of the one of which complaint is made in this ground of the motion for a new trial, except that in this case the word "killing" is used, and in that the word "homicide." To say that the excerpt from the charge quoted above confined the jury's investigation to what happened at the instant of the killing is to give to the charge too narrow a construction. Moreover immediately following the instruction complained of the judge charged the jury that—

"In order to justify the killing under the excitement of the fears of a reasonable man, all the circumstances as they appeared to him must have been sufficient to excite the fears of a reasonable man that his life or limb was in danger or that his person was in danger, and it must appear that he acted under such fears as these, and that he did not act in a spirit of revenge."

Nor did the judge, in charging as to the different defenses which may arise under sections 70, 71, and 73 of the Penal Code, charge in such a way as would likely con-

fuse these defenses. The instructions as to these different defenses were given separately, and the judge gave the jury appropriate instructions as to the cases in which the provisions of section 73 are applicable.

[2-5] 2. In the fifth and seventh grounds of the amendment to the motion for a new trial it is alleged that the court erred in giving to the jury the following charge:

"The law presumes every homicide to be felonious, until the contrary appears, from circumstances of alleviation, of excuse, or justification; and it is incumbent on the prisoner to make out such circumstances to the satisfaction of the jury, unless they arise out of the evidence produced against him."

This is a quotation from the opinion in the case of *Hudgins v. State*, 2 Ga. 188, and was properly given in charge to the jury in this case. In immediate connection with this excerpt the judge charged the jury that—

"If the evidence relied upon by the state to show the killing contains circumstances of alleviation or justification, the burden of proof that the crime was murder is not shifted."

But, even if this excerpt from the charge and that complained of in ground 6 of the motion for a new trial could be considered as erroneous, each was given while the judge was charging the jury on the subject of murder, and neither charge could have been harmful to the defendant, who was convicted of voluntary manslaughter. See *Thompson v. State*, 24 Ga. App. 144, 99 S. E. 891, and cases cited.

Judgment affirmed.

BROYLES, O. J., and LUKE, J., concur.

(27 Ga. App. 269)

SANDERS v. STATE. (No. 12460.)

(Court of Appeals of Georgia, Division No. 1.
June 30, 1921.)

(Syllabus by the Court.)

Criminal law §935(2)—Master and servant §343—Elements to be proved in prosecution for enticing servant to leave employer stated; new trial erroneously denied when essential facts not proved.

The accused was indicted under section 125 of the Penal Code of 1910. On the trial of the case the state failed to prove at least two essential elements of the crime: (a) That the defendant knew that there was a legal contract between the servant and employer (*Rucker v. State*, 2 Ga. App. 143, 99 S. E. 295); (b) that the defendant, by offering higher wages, or in some other way, did "entice, persuade, or decoy, or attempt to entice, persuade, or decoy" the servant to leave his employer during the term of service, knowing that said servant

was so employed (*Broughton v. State*, 114 Ga. 84 [1], 39 S. E. 868). The proof failing in these respects, the verdict is without evidence to support it, and the judge erred in overruling the motion for a new trial. See *McAllister v. State*, 122 Ga. 744, 50 S. E. 921.

Error from City Court of Miller County; W. I. Geer, Judge.

Ben Sanders was convicted of enticing away a servant, and brings error. Reversed.

N. L. Stapleton, of Colquitt, for plaintiff in error.

P. D. Rich, Sol., of Colquitt, for the State.

BLOODWORTH, J. Judgment reversed.

BROYLES, C. J., and LUKE, J., concur.

(27 Ga. App. 147)

MUTUAL BEN. LIFE INS. CO. v. FOWLER.
(No. 11790.)

(Court of Appeals of Georgia, Division No. 1.
June 14, 1921.)

(Syllabus by the Court.)

1. Rules on evidence not erroneous.

No error that would require the grant of a new trial was committed in any of the rulings on the admission of evidence of which complaint is made in grounds 5, 6, and 7, or in rejecting evidence as complained of in ground 8, of the amendment to the motion for a new trial.

2. Appeal and error \S 302(3)—Ground complaining of admission of evidence must set forth or attach it as exhibit.

This court and the Supreme Court have repeatedly ruled that a ground of a motion for a new trial based on the admission of evidence presents nothing for adjudication if such evidence is not set forth, either literally or in substance, or attached as an exhibit to the motion. *Bennett v. Patten*, 148 Ga. 66 (8a), 96 S. E. 690, and cases cited; *Smith v. Leverett*, 22 Ga. App. 290(2), 96 S. E. 8, and cases cited. As the evidence the admission of which is complained of in grounds 9 and 10 of the motion for a new trial is not set out literally or in substance, these grounds present nothing for consideration by this court.

3. Trial \S 256(1)—Fuller charge on any phase of case should be requested before jury retires.

No reversible error is found in the excerpts from the charge of the court of which complaint is made. The charge covered all the material issues of the case accurately and clearly. If a fuller charge on any phase of the case was desired, a proper written request therefor should have been made to the court before the jury retired to consider of their verdict.

4. New trial \S 70—Properly denied when evidence supported verdict.

There was evidence to support the finding of the jury, which has the approval of the trial judge, and the motion for a new trial was properly overruled.

Error from Superior Court, Meriwether County; J. R. Terrell, Judge.

Action between the Mutual Benefit Life Insurance Company and Bluford Fowler. Judgment for the latter, and the former brings error. Affirmed.

Brewster, Howell & Heyman, of Atlanta, for plaintiff in error.

Hatchett & Hatchett and N. F. Culpepper, all of Greenville, for defendant in error.

BLOODWORTH, J. Judgment affirmed.

BROYLES, C. J., and LUKE, J., concur.

(27 Ga. App. 264)

EDGE v. STATE. (No. 12452.)

(Court of Appeals of Georgia, Division No. 1.
June 30, 1921.)

(Syllabus by the Court.)

1. Time \S 10(8)—Statute as to computation applied to time for filing bill of exceptions.

"When a number of days is prescribed for the exercise of any privilege, or the discharge of any duty, only the first or last day shall be counted; and if the last day shall fall on the Sabbath, another day shall be allowed in the computation." 1 Park's Ann. Code, § 4, par. 8. Under this ruling, and the facts of the instant case, the motion to dismiss the bill of exceptions, on the ground that it was not filed in the office of the clerk of the superior court within 15 days of the date of its certification is denied.

2. Criminal law \S 598(6)—Defendant held not to have exercised due diligence to obtain absent witness for whom continuance was sought.

The indictment was returned by the grand jury of the county of Laurens on July 28, 1920. He was tried and convicted on February 24, 1921, and had been in jail two or three months before the date of his trial. When arraigned for trial he made a motion for a continuance of the case, on the ground of the absence of a material witness, who lived in Laurens county. He testified that on Monday before his trial on Thursday he had a subpoena issued for the absent witness, and gave it the same day to the sheriff to be served; that he was in jail, and could not serve it himself. There was no evidence that the subpoena had been served. Held, under the above facts it did not appear that the accused had used due diligence to get the absent witness to court, and the trial judge did not abuse his discretion in denying the contin-

uance. See, in this connection, *Revel v. State*, 28 Ga. 275 (2); *Long v. State*, 38 Ga. 491 (3); *Bone v. State*, 8 Ga. App. 373 (1), 69 S. E. 37.

3. Sufficiency of evidence.

The evidence demanded the verdict, and the court did not err in refusing to grant a new trial.

Error from Superior Court, Laurens County; J. L. Kent, Judge.

Herman Edge was convicted of an offense, and he brings error. Affirmed.

W. A. Dampier, of Dublin, for plaintiff in error.

E. L. Stephens, Sol. Gen., of Wrightsville, for the State.

BROYLES, C. J. Judgment affirmed.

LUKE and BLOODWORTH, JJ., concur.

(27 Ga. App. 258)

CARTRIGHT v. STATE. (No. 12437.)

(Court of Appeals of Georgia, Division No. 1.
June 30, 1921.)

(Syllabus by the Court.)

1. Sufficiency of proof of venue.

The evidence authorized a finding that the offense charged was committed by the defendant in the county of Carroll.

2. Criminal law §958(1).—Motion for new trial for newly discovered evidence defective when not supported by affidavits of proposed witnesses.

The ground of the motion for a new trial, based upon alleged newly discovered evidence, is fatally defective, as the newly discovered evidence is that of witnesses, and no affidavits as to their residence, associates, means of knowledge, character, and credibility were adduced. Civil Code 1910, § 6088.

3. Verdict authorized by evidence.

The evidence authorized the verdict, and the court did not err in overruling the motion for a new trial.

Error from City Court of Carrollton; Leon Hood, Judge.

Wade Cartright was convicted of an offense, and he brings error. Affirmed.

Jas. Beall, of Carrollton, for plaintiff in error.

Willis Smith, Sol., of Carrollton, for the State.

BROYLES, C. J. Judgment affirmed.

LUKE and BLOODWORTH, JJ., concur.

(27 Ga. App. 286)

FERGUSON v. R. C. HOGAN & BROS. (No. 12413.)

(Court of Appeals of Georgia, Division No. 1.
July 12, 1921.)

(Syllabus by the Court.)

1. Sales §219(2).—Where buyer for cash obtains possession without payment, subsequent acceptance of part payment held not to change agreement.

Where personal property is sold for cash, and not on credit, and the buyer obtains possession of the property without paying for it, the mere acceptance by the seller a few days thereafter of a sum of money from the buyer as part payment of the purchase price of the property does not change the transaction from a cash sale to a credit sale; and a third person who buys the property from the original purchaser obtains no title thereto, and the property can be recovered by the original seller in an action in trover. It would be otherwise if, when the partial payment was made, there was an understanding between the parties that the original agreement as to a cash sale was abrogated, and an agreement for a credit sale substituted.

2. Sufficiency of evidence.

Under the above ruling, and the facts of the case, the verdict in favor of the plaintiffs was authorized by the evidence, and none of the special grounds of the motion for a new trial shows material error.

Luke, J., dissenting.

Error from City Court of Houston County; A. C. Riley, Judge.

Action by R. C. Hogan & Bros. against Alex Ferguson. Judgment for plaintiff, and defendant brings error. Affirmed.

O. C. Hancock, of Macon, for plaintiff in error.

Walter De Fore and Jas. C. Estes, both of Macon, for defendant in error.

BROYLES, C. J. [1] Hogan & Bros. brought a suit in trover against Alex Ferguson for the recovery of an automobile. The evidence authorized a finding that the car was sold by the plaintiffs to one Moore for \$800, and that the transaction was a cash sale, and not a credit one, and that the original price of the car was \$1,000 which was reduced to \$800 in consideration of the fact that the sale was to be a cash one. The evidence further authorized a finding that the buyer, by artifice, obtained possession of the car without paying anything for it, and that a few days afterwards the manager of the plaintiffs sent one of their salesmen to Moore with instructions to get the car or the payment thereof from Moore, and that Moore paid the salesman \$200 as part payment on the car, and that this money was given to the

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plaintiffs' manager, who applied it on the purchase price of the car. Subsequently to this payment, Moore sold the car to Ferguson, the defendant in this suit. While there was some evidence that when this payment was made there was an understanding between Moore and the salesman that the transaction should be changed from a cash sale to a credit one, the undisputed evidence was that the salesman had no authority to make such an agreement in behalf of the plaintiffs, and that such an agreement was never made by the plaintiffs or their manager. In the absence of such an agreement, the mere acceptance by the plaintiffs of the \$200 as part payment of the purchase price of the car would not, as a matter of law, constitute an abandonment by the plaintiffs of the cash sale and the substitution of a sale on credit.

This ruling is not in conflict with the decision in *Moate v. Griswold*, 107 S. E. 887, this term decided, relied on by counsel for the plaintiff in error. In that case the property (an electric light plant) was to be sold for cash, and the buyer obtained possession of it without paying for it, and sold it to a third person. When Moate, the original seller of the property, learned of these facts, he went to Griswold, the original buyer, and they agreed upon a settlement as follows: Griswold was to pay Moate \$54 and ship him another plant for the one taken. The \$54 was paid and retained by Moate, but the other plant was never shipped by Griswold, and Moate brought suit in trover against Griswold to recover the plant. This court held that these facts showed a waiver by Moate of the tortious taking of the property, and a ratification of the conversion, so as to prevent a recovery in trover.

The case of *Bullard v. Bank of Madison*, 107 Ga. 772, 33 S. E. 684, is likewise easily distinguishable by its facts from the present case. In that case a planter sold cotton for cash, and the purchaser obtained possession of the cotton without paying for it, and sold it to a third person, and the planter, with knowledge of the last sale, took from the person to whom he had sold the cotton for cash his note covering the value of the cotton; and the Supreme Court held that this constituted an abandonment of the cash sale and a ratification of the disposition made of the cotton, and thereby the original purchaser and all who claimed under him were released from liability for any conversion for which they may have been guilty. Furthermore, there was undisputed testimony in the instant case that Ferguson knew at the time he bought the automobile from Moore that the title to the car was in the plaintiffs.

[2] All the issues of fact in the case were submitted to the jury with appropriate instructions thereon, and the verdict in favor

of the plaintiffs was amply authorized by the evidence.

All the grounds of the amendment to the motion for a new trial are based upon alleged errors in the charge of the court, and are without substantial merit. Judgment affirmed.

BLOODWORTH, J., concurs.

LUKE, J. (dissenting). I do not agree to the judgment of affirmance in this case, for the reason that, in my opinion, the cash sale of the automobile was abrogated and an agreement for a credit sale substituted. The acceptance of \$200 as part payment on the purchase price and the credit of the same upon the books of the company as a credit upon the purchase price rendered the sale one, on credit, thereby divesting the original seller of title. Therefore, in my opinion, an action in trover would not lie against a third person who bought the car subsequently to the payment and acceptance of the \$200.

(27 Ga. App. 283)

PAYNE, Agent, v. SOUTHERN COTTON OIL CO. (No. 12232.)

(Court of Appeals of Georgia, Division No. 1. July 12, 1921.)

(Syllabus by the Court.)

1. Removal of causes \S 11—Action by foreign corporation against another having agency in state not removable.

An action by a corporation, resident of New Jersey, against a corporation, resident of Virginia, having an agency in Chatham county, Ga., could not originally have been brought in the District Court of the United States for the Southern District of Georgia, and hence could not be removed to that court from the superior court of Chatham county on the ground of diverse citizenship. See *Pullman Co. v. Sutherland*, 150 Ga. 652, 104 S. E. 782.

2. Removal of causes \S 11—Action by foreign corporation against Director General of Railroads held not removable.

An action by Southern Cotton Oil Company, resident of the state of New Jersey, against John Barton Payne, Director General of Railroads, as agent appointed by the President of the United States pursuant to the provisions of the "Transportation Act of February 28, 1920" (41 Stat. 456), arising out of the possession, use, and operation of the Atlantic Coast Line Railroad Company, resident of the state of Virginia, under the provisions of the act of Congress approved August 29, 1916 (39 Stat. 619, c. 418), entitled "An act making appropriations for the support of the army for the fiscal year ending June thirtieth, nineteen hundred and seventeen, and for other purposes," and under the provisions of the "Federal Control Act" approved March 21, 1918 (U. S. Comp. St. 1918, U. S.

Comp. St. Ann. Supp. 1919, §§ 3115½a-3115½p), is not removable from the superior court of Chatham county, Ga., to the District Court of the United States for the Southern District of Georgia. The action as pleaded could not originally have been brought in such District Court, and by no provision of Transportation Act, 1920, was the status changed.

3. Motion to remove properly overruled.

It was not error for the court to overrule the motion of the defendant to remove the case to the District Court of the United States.

Error from Superior Court, Chatham County; P. W. Meldrim, Judge.

Action by the Southern Cotton Oil Company against J. B. Payne, Director General, etc. A motion to remove the case to the United States District Court was overruled, and defendant brings error. Affirmed.

Lawrence & Abrahams, of Savannah, for plaintiff in error.

Chas. E. Cotterill, of Atlanta, for defendant in error.

LUKE, J. Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(27 Ga. App. 204)

GARCIA S. en C. v. TAGGART COAL CO.
(No. 12181.)

(Court of Appeals of Georgia, Division No. 1.
June 17, 1921. Rehearing Denied
June 30, 1921.)

(Syllabus by the Court.)

1. Pleading ¶406(1)—Sales ¶416(1)—Evidence not irrelevant or immaterial when tending to prove allegations not attacked by demurrer or motion; in action for seller's breach evidence held erroneously excluded.

When the sufficiency of a petition is not challenged by a demurrer or a motion to strike, and the plaintiff offers evidence which proves, or tends to prove, any allegation in the petition, it is error for the court to reject the evidence on the ground that it is irrelevant and immaterial.

2. Sales ¶418(7)—Buyer on seller's breach must buy best substitute and ordinarily in nearest available market; failure to buy in nearest available market does not prevent recovery where price or transportation cost no greater.

Where it is known to both parties to a contract for the sale of goods, at the time of the execution of the contract, that the goods are being bought for the purpose of resale, and the seller subsequently breaches the contract by failing to deliver the goods within the time designated in the contract, and there is no available market in which the buyer can readily obtain the same quality of goods, the buyer,

in order to charge the seller with the difference between the contract price of the goods and the price of the substitute goods, bought by the buyer after the contract was breached, with cost of transportation to the place of delivery named in the contract, must purchase the best substitute obtainable, using reasonable care and diligence, and ordinarily must buy them in the nearest available market. However, this rule (as to buying in the nearest available market) is based solely upon the ground that the buyer must lessen the seller's loss as much as possible, and it obviously does not apply in a case where the buyer goes to a market other than the nearest available one, and purchases there as good a substitute, and as cheaply, as he could have bought in the nearest available market, and where the cost of transportation is no more than it would have been if the goods had been bought in the nearest available market.

3. Sales ¶411, 417, 420—Trial ¶139(1)—Petition held to state cause of action for difference between contract price and cost of substitute upon seller's breach; evidence held to warrant finding of seller's knowledge that purchase was for resale; evidence held to make case for jury; when verdict should be directed stated; failure to prove market value except on last date for delivery held not to prevent recovery; "undertake"; buyer's ability and readiness to pay not condition of delivery; evidence held to warrant inference of buyer's ability and readiness to pay price.

The petition set out a cause of action; and, under the evidence adduced, a verdict for the defendant was not demanded. The court therefore erred in directing a verdict in favor of that party.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Undertake.]

Error from City Court of Savannah; Davis Freeman, Judge.

Action by Marcelino Garcia S. en C. against the Taggart Coal Company. Judgment for defendant on a directed verdict, and plaintiff brings error. Reversed.

The contract sued on in this case is contained in a letter from the plaintiff to the defendant company, dated April 22, 1918, and accepted April 24, 1918, which reads as follows:

"We are pleased to confirm by the present our closing with you through Mr. R. P. Lopes for 10,000 tons of high volatile coal, similar more or less to Westmoreland, for delivery by barges at the ports of Sagua la Grande or Caibarien [Cuba], in accord with our instructions, at the price of \$13.75 per ton of 2,240 pounds, cost, freight, and insurance, delivery to be made during the months of July to November, 1918, inclusive; it being understood that you will undertake by every possible means to make a proportionate delivery of the entire quantity in each month commencing in July next and finishing in November next. We are to have the

privilege on our part of increasing this contract to a maximum of 20,000 tons under the same conditions as applicable to the first 10,000 tons, and which option is to be open to us until the 15th of June, 1918, inclusive. We shall be allowed for the discharge of each barge the time required for tugs to run from port of discharge light to Key West and return to port in Cuba with another bargeload and which time is estimated to be about four days, but in any event we guarantee to take the cargo out as fast as the vessels can deliver same. Payment is to be made 30 days after date of barge's clearance for Cuba, or, if preferable to you, by drafts at 30 days date of clearance of vessels, payable in this city [New York]. In confirmation of this transaction we will appreciate very much returning to us the inclosed duplicate copy of this present letter duly accepted by you and which we require for our files."

The petition alleged among other things, the following facts:

"That at the time said contract was made said defendant company well knew that petitioner was engaged in the business of purchasing coal for resale to sugar mills in Cuba, who required all of their supplies by December 1st in each year for use during the grinding season, beginning soon thereafter, and before said contract was reduced to writing Mr. R. P. Lopez, who is referred to in said contract and who negotiated the purchase of said coal, notified said defendant company that petitioner was purchasing said coal for the purpose aforesaid; that said defendant company failed to make a single delivery of coal under said contract until the month of November of said year; that during the time limit of said contract petitioner repeatedly urged said defendant company to provide means for delivering the 10,000 tons of coal sold to it; that it offered to said defendant company a Cuban tugboat and a fleet of barges which could be chartered from Domingo Nazabal, of Cienfuegos, Cuba, which offer was refused, and that it requested said defendant company to divert some of the coal which it was shipping to Havana, Cuba, to the ports of Sagua la Grande and Caibarien, which request was likewise refused; that during the month of October, 1918, said defendant company authorized petitioner to charter for defendant's account, from the Sugar Products Company of New York City, a small steamer, the Hopper, and several barges to be used in delivering as much coal as possible under said contract from Key West, Fla., to said Cuban ports; but by reason of the fact that said defendant company failed to assemble coal in sufficient quantities at Key West, only 978 tons of coal were delivered by this means during the remainder of the contract time."

The petition contained various letters and telegrams sent by the plaintiff to the defendant company during the life of the contract, urging and demanding deliveries of the coal purchased, and renotifying the defendant of the purpose for which the coal was bought. The petition further alleged:

That the defendant company failed to deliver within the contract time 7,445 tons of the coal

purchased; that the market price of coal similar more or less to Westmoreland, at Sagua la Grande and at Caibarien, on November 30, 1918, was \$18 per ton, but petitioner was unable to purchase all of the coal remaining undelivered by said defendant company, in sufficient quantities for immediate delivery, in any Cuban market, and was compelled to purchase the greater portion of said coal in the markets of the United States and to deliver same by steamers at said Cuban ports; that "in order to make prompt deliveries of coal to its customers in Cuba petitioner purchased and transported from Newport News, Va., to Caibarien, Cuba, by the steamship Ottar, 1,937 tons of coal at a total cost, including the purchase price, freight, and insurance, of \$31,928.36; that it purchased and transported from Newport News to Caibarien, by the steamship Nicholas Cuneo, 827 tons of coal at a total cost, including the purchase price, freight, and insurance, of \$13,371.30; that it purchased and transported from Newport News to Sagua la Grande, by the steamship Thyra S., 1,603 tons of coal at a total cost, including the purchase price, freight, and insurance, of \$25,080.88; that it purchased and transported from Newport News to Caibarien, by the steamship Adonis, 1,955 tons of coal at a total cost, including the purchase price, freight, and insurance, of \$32,119.13, and that it purchased at Sagua la Grande, Cuba, 1,128 tons of coal at \$18 per ton, or at a total cost of \$20,214, making a total of 7,445 tons so purchased for the purpose of replacing nondeliveries by said defendant company, at a total cost of \$122,713.67; that "for the purpose of moving said coal from Newport News to Cuba petitioner was compelled to charter from the Munson Steamship Line, as agents for the United States Shipping Board Emergency Fleet Corporation, the steamships Ottar and Adonis, and from the Atlantic Fruit Company of New York the steamship Nicholas Cuneo, and was required in the case of each steamship so chartered to make and execute a charter party," containing provisions for demurrage; that, "although each cargo was loaded and discharged as fast as the port facilities at Newport News and Caibarien would permit," petitioner "incurred and became liable to pay demurrage bills aggregating the sum of \$11,555.11."

Attached to the petition as an exhibit was an itemized statement of each demurrage bill. The petition further alleged that—

"By reason of the failure of said defendant company to deliver 7,445 tons of the coal purchased from it in accordance with the terms of the contract, petitioner sustained an actual loss and damage of \$31,900.03."

A statement of petitioner's alleged damages was attached to the petition as an exhibit. By way of amendment petitioner alleged that—

"All of the coal purchased as aforesaid was of the kind described in petitioner's contract with said defendant company, except the cargoes shipped on the steamers Ottar and Adonis, which were New River coals once screened, a very lumpy coal, and the best substitute to be found in the market at the time said cargoes

were respectively purchased; that said coal was purchased at the lowest prices obtainable for immediate delivery; and that the whole amount was delivered in Cuba by January 20, 1919, at the smallest cost and expense possible."

The defendant filed an answer admitting the contract but denying any liability thereunder, and denying that the defendant was notified at the time the contract was made that the coal was being purchased for the purpose of resale. The defendant admitted also that it had failed to deliver within the contract time 7,445 tons of the coal purchased from it, but alleged that deliveries were made after the contract time, with the full knowledge and consent of the plaintiff; also that if the plaintiff had purchased and transported coal from Newport News, Va., as stated in the petition, the same was not done under any contract with the defendant, and the defendant is not responsible therefor, and that the defendant was given no notice of what the plaintiff proposed to do and no opportunity for furnishing the coal called for by the contract. By an amendment to the answer the defendant expressly denied that it was liable for any of the damages or expenses set out in the petition, or that any of them were collectable, even if the damages were sustained and the expenses incurred.

No demurrer, either general or special, was interposed, and the court, after excluding certain evidence offered by the plaintiff, directed a verdict for the defendant; the court saying to the jury:

"I have had a great deal of difficulty in coming finally to a conclusion as to the law of this case. It has interested me a great deal, the arguments were illuminating, and the respective positions of the parties forcefully presented. I have given to it every moment of available time since you were discharged on Wednesday, and I have finally come to the conclusion to charge you as per the first request of the defendant in the case, that is to say, that *in view of the pleadings and the law* [italics ours] the court directs the jury to find in favor of the defendant, and I will ask Judge Adams to enter a verdict to that effect."

To this judgment the plaintiff excepted, and assigned error upon the rejection of the proffered testimony, and also upon the direction of the verdict. In order to avoid repetition the material evidence excluded by the court, as well as that admitted, is not set forth in this statement of facts, but will be found stated in the following opinion.

Hitch, Denmark & Lovett, of Savannah, for plaintiff in error.

Adams & Adams, of Savannah, for defendant in error.

BROYLES, C. J. (after stating the facts as above). [2] The plaintiff in error contends that under the ruling in the case of *Hardwood Lumber Co. v. Adam & Steinbrugge*, 124 Ga. 821, 68 S. E. 725, 32 L. R. A. (N. S.)

192, the petition set forth a cause of action; whereas the defendant in error contends that under the ruling of this court in *Twin City Lumber Co. v. Daniels*, 22 Ga. App. 578, 96 S. E. 437, it did not. In each of these cases the decision is well considered and ably written, but, when carefully compared, the decisions are not at all conflicting. The *Hardwood Lumber Co. Case* was a suit for the breach of a contract for the failure to deliver a specified quality of lumber; the plaintiffs alleging that the defendant had notice at the time the contract was made that the lumber in question was purchased for the purpose of resale, and that, by reason of the defendant's breach of the contract, they were compelled to buy lumber to fill their subcontract at a higher price than that at which they had purchased it from the defendant, and sought to recover as damages the difference between the contract price of the lumber and the price they were forced to pay for it, plus the expense of transportation. They recovered the full amount sued for, a motion for a new trial was overruled, and the defendant excepted, contending that the proper measure of damages was the difference between the contract price and the market price at the time and place fixed for delivery. The Supreme Court affirmed the judgment of the trial court; the first, second, and third headnotes of the decision being as follows:

"The general rule is that in a suit for breach of contract for failure to deliver goods of a certain quality sold at a specified price, the measure of damages is the difference between the contract price and the market price at the time and place of delivery. This is not an inflexible rule in all cases, so as to exclude a recovery of actual damages sustained in cases to which such rule in its very nature is inapplicable; as, where there is no market at the time and place of delivery by which damages can be measured, and resort must be had to the nearest available market, with the cost of shipment to the place of delivery added. If goods are bought for the purpose of resale, and so known to both parties, and upon failure of the seller to deliver there is no market in which the buyer can readily obtain them, he may go into the market and purchase the best substitute obtainable, using reasonable care and diligence, and charging the seller with the difference between the contract price of the goods and the price of the goods substituted." (Italics ours.)

In discussing these principles, Justice Lumpkin, who delivered the opinion for the court, said:

"Damages are given as compensation for the injury done. 'Damages recoverable for a breach of contract are such as arise naturally and according to the usual course of things from such breach, and such as the parties contemplated when the contract was made, as the probable result of its breach.' Civil Code, § 3799 (Civil Code 1910, § 4395). 'Any necessary expenses which one of two contracting par-

ties incurs in complying with the contract may be recovered as damages." Section 3806 (Civil Code 1910, § 4402). One injured by a breach of contract is bound to lessen the damages as far as practicable by the use of ordinary care and diligence. Section 3802 (Civil Code 1910, § 4398)."

After stating the general rule already quoted from the headnotes, the opinion proceeds as follows:

"It is evident that the general rule cannot be taken as a Procrustean one, subject to no exception or modification. If so, it would exclude the possibility of recovering profits, where [which were] in contemplation of the parties at the time of the contract."

The court in that case quoted with approval and evidently based its decision upon Mr. Benjamin's statement of the rule (2 Benjamin on Sales [6th Am. Ed.] § 1827), which is, in part, as follows:

"If at the time of the sale the existence of a subcontract is made known to the seller, the buyer, on the seller's default in delivering goods, has two courses open to him: (1) He may elect to fulfill his subcontract, and for that purpose go into the market and purchase the best substitute obtainable, charging the seller with the difference between the contract price of the goods and the price of the goods substituted. (2) He may elect to abandon his subcontract, and in that case he may recover as damages against the seller (a) his loss of profits on the subsale, and (b) any penalties he may be liable to pay for breach of his subcontract. * * * If at the time of the sale the existence of a subcontract is not made known to the seller, a knowledge on his part that the buyer is purchasing with the general intention to resell, or notice of the subcontract given to him subsequent to the date of the contract, will not render him liable for the buyer's loss of profits on such subcontract: the buyer may either procure the best substitute for the goods as before, and fulfill his subcontract, charging the seller with the difference in price, or abandon the subcontract and bring his action for damages, when the ordinary rule, it would seem, will apply. * * * In every case the buyer, to entitle him to recover the full amount of damages, must have acted throughout as a reasonable man of business, and done all in his power to mitigate the loss." (Italics ours.)

[3] How stands the instant case in comparison with the Hardwood Lumber Co. Case? The allegations of the present petition were sufficient to make a case for actual damages sustained by reason of the defendant's breach of its contract, to wit: The difference between the contract price and the price of the coal purchased by the plaintiff in order to carry out the subcontract, plus the cost of freight, demurrage, and insurance. The petition alleges (and in determining whether a cause of action was set forth the allegations must be treated as true) that at the time the contract was made the defendant well knew that the plaintiff

was engaged in the business of purchasing coal for resale to sugar mills in Cuba which required all of their supplies by the 1st of December, and that R. P. Lopez, who is referred to in the contract and who negotiated the purchase of the coal, notified the defendant, before the contract was reduced to writing, that the plaintiff was buying the coal for the specific purpose of resale. We are therefore constrained to hold that the petition set forth a cause of action under the exception to the general rule announced in the Hardwood Lumber Co. Case, supra.

As to the case of Twin City Lumber Co. v. Daniels, supra, it is clearly distinguishable from the Hardwood Lumber Co. Case and the case sub judice. In fact, Judge Bloodworth, who wrote the decision in that case for the court, not only recognized the binding force of the Hardwood Lumber Co. Case, but took occasion to differentiate it. He said:

"The plaintiff in error relies largely on the case of Hardwood Lumber Co. v. Adam, supra. That case is easily differentiated from the instant one. There the seller had knowledge at the time of the execution of the contract, and at the time of each extension thereof, that the lumber was purchased for the purpose of resale. The petition in this case does not disclose such a condition." (Italics ours.)

The case of Sanders, Swann & Co. v. Allen, 124 Ga. 684, 52 S. E. 884, is also easily differentiated from the case under review, since it is stated in that case that—

"It was not alleged or shown that the defendants had any notice that the cotton they contracted to sell the plaintiffs had been resold by them."

[1] Having seen that the petition set forth a cause of action, and that therefore the court erred in directing a verdict for the defendant, "in view of the pleadings and the law," we must next consider whether or not the verdict directed was demanded under the evidence; for, if the ruling of the court was correct for any reason, it should be affirmed. This calls upon us to first determine whether certain evidence offered by the plaintiff was erroneously rejected. We think it was. The legal sufficiency of the plaintiff's petition was not challenged by demurrer or a motion in the nature thereof, and—

"It cannot be at this time even a matter of slight doubt that a plaintiff is entitled to prove everything he alleges in a petition upon which he is permitted to go to trial without objection on the part of the defendant, either to its form or its substance." Mayor, etc., of Macon v. Melton, 115 Ga. 153, 41 S. E. 499.

The depositions of F. H. Rhol tended to establish material allegations of the petition, and were therefore improperly rejected. This witness testified, by depositions, as to the quantity of coal purchased by the plain-

tiff, after the breach of the contract, at Newport News, and its cost, including the purchase price, freight, and insurance; also that high volatile coal is of a lumpier nature than low volatile coal, and that two of the cargoes were high volatile coal, similar more or less to "Westmoreland" coal, and that the two other cargoes "were New River coals, once screened, also very lumpy," and "came at that time nearest to anything to Westmoreland than we could find in the market"; also that—

"At the time the sales were made the United States government had established the prices for export coal, * * * and the price charges there were * * * tidewater prices. I don't think Marcelino Garcia S. en C. could have purchased this coal at a lower price. I don't think so, as the prices at that given period were established by the United States Fuel Administration. * * * Those prices were absolutely in vogue at the time of these sales. We had to be thoroughly familiar with the prices of coal at that time. * * * There was a great shortness of coal, and I doubt very much if Garcia could have bought any coal in Cuba at that time. I was familiar with the transportation rates of coal from the United States of America to Cuban ports and particularly ports of Caibarien and Sagua la Grande at that time. * * * The rate was the same from every American port to these Cuban ports." (Italics ours.)

As to the charter parties referred to in the petition, this witness testified:

"There was a uniform charter party, as approved by the joint committee of the West Indies transportation of the United States Shipping Board and United States Fuel Administration, covering those clauses, and all charter parties made under that form carried the demurrage and dispatch clause as expressed therein, namely, 48 cents per gross registered ton per day, and 16 cents per gross registered ton per day dispatched, the steamer to discharge at the rate of 800 tons per running day, Sundays and holidays excepted, except in the case when a steamer was under demurrage."

This witness testified also, on cross-examination, that all restrictions by the Shipping Board and fixed rates that he had mentioned applied "to all tonnage whether they were barges or steamers" (Italics ours). (It will be recalled that the contract called for the shipment of the coal by barges.) The rejected testimony of Carlos Garcia also tended to establish material allegations of the plaintiff's petition, and was likewise erroneously excluded. This witness offered to testify as follows:

"I made these purchases of coal for quick delivery to the sugar mills in Cuba to replace the coal that the Taggart Coal Company had failed to deliver to us. The necessity at the time of making purchases for immediate delivery at Sagua la Grande or Caibarien was that we were at the beginning of December already, and we were continuously receiving cables from

our clients in Cuba, the sugar mills, stating that if they did not receive the coal during December at the latest, since it was already delayed, that they would make us responsible for their losses. I made efforts to buy this coal from others. * * * I could secure nothing for immediate shipment. I purchased the New River coal that these invoices called for because this was the only coal available for immediate delivery. The quality is very similar to the coal specified in our contract with Taggart. * * * There is only a difference in price of \$.280 per ton. * * * I did not hesitate in buying that coal. * * * The coal was accepted by the sugar mills." (Italics ours.)

The rejected interrogatories of W. W. Houston also clearly tended to establish material allegations of the petition, and were therefore erroneously excluded. This witness' testimony related to the quantity of coal loaded on each steamer, and also furnished facts and figures as to the cost of loading each steamer, necessary to compute demurrage charges. The same is true of the rejected interrogatories of Arturo Alfonso Acosta, whose testimony related to and tended to establish the allegations of the petition as to the quantity of coal unloaded by the plaintiff in Cuba, and furnished facts and figures necessary to compute demurrage charges. The certified copies of the four charter parties were likewise erroneously excluded, since this documentary evidence contained the freight rate on coal from Newport News to the Cuban ports, etc.

The following evidence was admitted: R. B. Lopez, a witness for the plaintiff, testified:

"I know the plaintiff and defendant in this case. I am the Mr. R. P. Lopez who is mentioned in the contract involved in this case. At the time of my negotiations with the Taggart Coal Company, and before this contract was reduced to writing and signed, I had a conversation with Mr. Grant Taggart, president of the company, in regard to the time limit of the contract and as to why the time limit should be fixed as between July and November, inclusive. I told him that the contract had to be fulfilled in all its terms; of course, must have the coal there on time on account of it has to be received by the sugar mills. I made statement to him as to purpose for which this coal was to be purchased; that it was for the sugar mills in Cuba and that they had to deliver them on time." (Italics ours.)

This evidence tended to support the allegation of the petition that the defendant had notice at the time the contract was made that the coal in question was purchased for resale. So, also, the following telegram from the defendant to the plaintiff, which was introduced in evidence, tended to establish that such notice was given the defendant:

"It is believed freight rate advanced by government will be as high as eighty cents per ton. Therefore we advise regarding your option ten

thousand tons you *include this in your selling price as you have not yet effected same not having declared your option with us.* (Italics ours.)

The jury were authorized to find from the above evidence that the defendant knew when the contract was made that the coal was the subject of resale.

It will be recalled that one of the defenses set up in the defendant's plea was that the plaintiff received, under the contract, all the coal delivered to the plaintiff, regardless of time. The evidence as to this shows that the first deliverance of coal under the contract was on November 2, 1918; the shipment being from Savannah, Ga., on the barge Benefactor, and constituted 709 tons. The defendant also shipped to the plaintiff, during the latter part of November, 1918, two more cargoes of coal, amounting to 620 tons. These were the only deliverances of coal prior to the expiration of the contract. It is true that several shipments were made by defendant and accepted by the plaintiff after the expiration of the contract, but the parties specifically agreed that these shipments should not prejudice any claim of the plaintiff for delayed deliveries or non-deliveries. In this connection the record shows the following documentary and oral testimony:

Telegram from plaintiff to defendant, dated December 4, 1918:

"Informed that barge number four did not sail from Key West and was discharged and is repairing there. Sugar Products Company proposed shipping portion discharged cargo by Hopper and balance by barge. Do you agree to this? Wire answer immediately. If cargo so shipped within five days from date will accept draft for purchase price of cargo. *This is without prejudice to our claims under contract for nondeliveries and delayed deliveries.*" (Italics ours.)

To this telegram the defendant replied:

"We agree to handling of delayed cargo barge number four as indicated in your wire," etc.

The only other shipment of coal after the expiration of the contract was made on or about December 2, 1918, and, as will be seen from the following evidence, was received by the plaintiff with the express understanding that its acceptance would be without prejudice to the plaintiff's claim for damages. Telegram from defendant to plaintiff:

"Expect barge Savannah finished loading Friday. Waiting your reply to our day letter of yesterday."

Plaintiff replied:

"To avoid delay will accept draft now on way for selling price 350 tons steamer Hopper. Wire consent to such partial acceptance. Will accept further draft for price of 500 tons upon clearance of barge number four from Key West

if cleared within five days from date. Will accept draft for selling price cargo barge Savannah upon clearance if cleared within five days from date. *This is without prejudice to our claim for nondeliveries or for delayed deliveries.*" (Italics ours.)

As to the conversation between the president of the defendant company and the plaintiff's New York representative, set forth in the record, and which the defendant insists showed that the plaintiff agreed after the expiration of the contract to accept the balance of the coal, and that an estoppel in favor of the defendant resulted therefrom because the defendant acted on the agreement to its hurt: Conceding, but not deciding, that the New York representative of the plaintiff had authority to make such an agreement, it is sufficient to say that the evidence was in sharp conflict, and did not demand a finding in favor of the defendant upon this point, either as to the fact of the agreement or that the defendant acted upon the alleged agreement to its hurt, since the undisputed evidence showed that it had purchased the tug Condon before the alleged understanding with the plaintiff.

There was also evidence introduced to show that the defendant had a large supply of coal, approximately 5,000 tons, in Key West during the summer or early fall of 1918, which, instead of being shipped to the plaintiff, was sold to others. There was also evidence tending to show that the defendant's supply of coal at Key West on November 30, 1918, was exhausted. In support of the allegation that the plaintiff was unable to purchase in a Cuban market all of the coal remaining undelivered in sufficient quantities for immediate delivery, the plaintiff introduced C. F. Iglesias, a Cuban coal dealer, who testified:

"I have been in the business of buying and selling coal in the Cuban market since 1910. As to what is the trade meaning of the expression 'high volatile coal, similar more or less to Westmoreland,' I only know two classes of coal handled in Cuba, fine or lumpy. Westmoreland is a lumpy coal. I was familiar with the market price of coal at Sagua la Grande on November 30, 1918. The market price of high volatile coal, similar more or less to Westmoreland, at Sagua la Grande on November 30, 1918, was about \$20 per ton. I do not know what was the market price of the same kind of coal at Caibarien on November 30, 1918. My firm did sell to Marcelino Garcia S. en C. on November 30, 1918, 250 tons of coal at \$18 per ton. It was impossible to have purchased as much as 7,445 tons of high volatile coal, similar more or less to Westmoreland, in any Cuban market for immediate delivery at Sagua la Grande or Caibarien on or about November 30, 1918."

This witness was corroborated in all material particulars by the witness Fitzgibbon, another coal dealer of Cuba. In this connec-

tion Marcelino Garcia, the active partner of the plaintiff firm, testified as follows:

"As to my experience in buying and selling coal in Cuba, I have had over 12 years' experience as an importer of coal. The trade meaning of the expression 'high volatile coal, similar more or less to Westmoreland,' is in Cuba steam lumpy coal. I was familiar with the market price of coal at Sagua la Grande and Caibarien, Cuba, on November 30, 1918. The market price of high volatile coal, similar more or less to Westmoreland, at Sagua la Grande on November 30, 1918, was over \$18 per ton. The market price of the same kind of coal at Caibarien, Cuba, on November 30, 1918, was the same as in Sagua la Grande. As to query, 'Did you or your firm purchase any coal at Sagua la Grande or Caibarien on November 30, 1918, and, if so, please state amount,' etc. We did; 1,128 tons, at \$18 per ton, Westmoreland coal."

Edward Garcia, general manager for the plaintiff at Sagua la Grande, Cuba, testified that on or about November 30, 1918, there was a great scarcity of rolling stock of the railroads in Cuba, and that this condition had existed for the past six or seven years, and that he was thoroughly familiar with the shipping conditions in Cuba; that on or about November 30, 1918, it was impossible to purchase 7,445 tons of high volatile coal, similar more or less to Westmoreland, for immediate delivery at Caibarien or Sagua la Grande; that it was not possible to obtain at Sagua la Grande or Caibarien that amount of coal for immediate delivery except by importing it from the United States; that there was plenty of coal in Havana, but it could not be bought any cheaper or delivered any quicker than if bought at Newport News; that the scarcity of coal cars in Cuba was so great, and the shipping conditions so bad, that it was not possible to get a quick delivery from Havana; that "when a car leaves Havana we never know when it will get there;" "we could get quicker delivery from Hampton Roads than we could get from Havana, absolutely;" that the expense of buying coal at Havana, including the transportation to Sagua la Grande and Caibarien, was greater than if the coal had been bought at Newport News; that none of the Havana coal companies would undertake to deliver coal on cars within a certain time.

We are of the opinion that the above evidence, together with that erroneously excluded, with all reasonable deductions and inferences therefrom, was sufficient to make out a prima facie case in favor of the plaintiff, and, since the evidence introduced by the defendant was insufficient to overcome that case so fully as to leave no question for submission to the jury, the court erred in directing a verdict for the defendant. As was so aptly and succinctly said in the case of *Davis v. Kirkland*, 1 Ga. App. 5, 58 S. E. 209:

"No principle is better settled in Georgia than that a verdict should not be directed, unless

there is no issue of fact; or unless the proved facts, viewed from every possible legal point of view, can sustain no other finding than that directed. * * * The paramount right of the jury to decide any issue of fact in every case, in Georgia, is absolutely exclusive of any such prerogative on the part of the judge. The exercise of this power by the jury, unless waived by the parties, is an indispensable requisite of a legal trial in this state, and an invasion of this right (as has been held by our Supreme Court times without number) demands the grant of another trial."

The contention of the defendant that the plaintiff's case must fail, for the reason "that the deliveries were to be made by installments and there was no effort to show the market price at any date save on the 30th of November, the last day under a contract covering five months for delivery to be made," is without substantial merit. The contract provided:

"Delivery to be made during the months of July to November 1918, inclusive; it being understood that you will undertake by every possible means to make a proportionate delivery of the entire quantity in each month, commencing in July next and finishing in November next."

Obviously the only absolute and mandatory obligation imposed by the contract was that the coal must be delivered "during the months of July to November, 1918, inclusive." The word "undertake," according to Webster's Dictionary, means, among other things, "endeavor to perform," "attempt," and "try." While it seems true, from the correspondence of the parties, introduced in evidence, that the plaintiff desired the coal delivered in monthly installments, and that the defendant agreed to so deliver it, if it possibly could, yet it does not appear, either from the contract itself or from the construction given it by the parties thereto, that the defendant absolutely obligated itself to so deliver the coal. Furthermore, the jury were authorized to infer from the evidence that as a matter of fact it was impossible for the defendant so to deliver the coal, and that, when this fact became apparent, both parties to the contract waived the requirement, if there was such a requirement, in the contract, that the coal must be delivered in monthly installments. Under these facts we do not think the failure of the plaintiff to allege and prove the market price of the coal at any date except the 30th of November should prevent a recovery in its favor.

Neither is there any substantial merit in the further contention of the defendant that—

The "plaintiff's case must fail because he has not alleged and proven that he was able and ready to perform during the time of the existence of the contract, by paying the price at the time and place of delivery."

The plaintiff's ability and readiness to pay was not "a condition of the delivery," for the contract expressly provided that payment was to be made 30 days after date of barge's clearance for Cuba, or, if preferable to seller, "by drafts at 30 days date of clearance of vessels," payable in New York City. Furthermore, there is a clear inference from the evidence that the plaintiff promptly paid the defendant for all the coal delivered under the contract. The evidence also shows that shortly after the breach of the contract the plaintiff bought the amount of coal the defendant had failed to deliver under the contract and paid for it a higher price than the contract price. The jury were authorized to infer from this evidence that the plaintiff was able and ready to pay the defendant the contract price during the life of the contract.

Nor can we agree with the contention of the learned counsel for the defendant that the plaintiff's case should fail because the proof showed that, after the defendant's breach of the contract, the substitute coal was not purchased by the plaintiff in the nearest available market. The only reasons for requiring the buyer to purchase substitute goods in the nearest available market are: First, because conditions there, including the quality of the goods and the price thereof, are apt to be nearer like those at the market fixed for delivery than at a more distant market; and, second, because the cost of transportation therefrom naturally and ordinarily would be less than from a more distant market. However, where the buyer purchases the substitute in a market which is not the nearest available market, but obtains as good a substitute, and as cheaply, as he could have bought in the nearest available market, and the cost of transportation from the market in which he bought the goods is no more than it would have been from the nearest available market, the reasons for requiring the purchaser to resort to the nearest available market fall. And in such a case the failure of the purchaser to buy in the nearest available market will not prevent him from recovering as damages the difference between the contract price and the price of the goods substituted, with cost of transportation to the place of delivery and other necessary expenses. In other words, after the seller breaches the contract by failing to deliver the goods ordered, the buyer is required to do everything necessary and reasonable to lessen his damages (Civil Code 1910, § 4398), but when he has done that he has done all that the law requires of him. This ruling is simply plain common sense, and its inherent soundness is so obvious that it needs no citation of authority to bolster it up.

In the instant case, while it does not appear that the plaintiff purchased the substi-

tute coal in the nearest available market, the undisputed evidence showed that the defendant suffered no loss because of this. While the evidence was perhaps conflicting as to whether or not, after the contract was breached, coal in sufficient quantity could have been purchased by the plaintiff at Havana—the nearest available market—the undisputed testimony was that the 6,322 tons of coal purchased by the plaintiff at Newport News, Va., were bought and transported to Sagua la Grande and Caibarien at a less cost than if they had been purchased at Havana, since the market price of coal at Havana was "around \$14," and the freight rate per ton from there to Sagua la Grande "was \$2.63." At these figures, 6,322 tons of coal at \$14 per ton, plus \$2.63 per ton for freight, would amount to \$105,134.86, whereas the plaintiff bought this amount of coal at Newport News and transported it to the above-named Cuban ports at a total cost, including purchase price, freight, demurrage, and insurance, of \$102,499.67. As to any American markets nearer and more available than Newport News, suffice it to say that the depositions of the witness Rhol, which the court erroneously excluded, undisputably show that at the time the coal in question was purchased the government had established prices for export coal, and that the price paid by the plaintiff was the "tidewater" price, and also that the transportation rate fixed by the United States Shipping Board was the same from every American port to the ports of Sagua la Grande and Caibarien.

While the plaintiff alleged in the petition, and showed by the evidence, what was the market price of coal on November 30, 1918, at the places fixed for delivery, the evidence authorized a finding that, after the breach of the contract, in neither of those markets, nor in any other Cuban market, could the plaintiff have readily obtained for quick delivery the necessary amount of coal of the kind contracted for or of any good substitute therefor. The plaintiff therefore had the right to buy the substitute coal in the nearest available market, or, under the particular and extraordinary facts of this case, to buy it in any market in the United States. (The order of the United States Shipping Board making the cost of transportation the same from any port of the United States to any Cuban port was obviously based upon the abnormal conditions caused by the great World War.) This ruling is not in conflict with those former decisions of this court and of the Supreme Court that hold that the buyer in certain instances must resort to the nearest available market; but, under the extraordinary fact in this case that the cost of buying the coal at Newport News, Va. (including the cost of transportation), was no more than if it had been bought in the

nearest available market, it is in perfect harmony and accord with the broad principles of fair and just dealings upon which those decisions are based.

In sum, under the particular and peculiar facts of this case, the petition set out a cause of action; the evidence set forth in the bill of exceptions was erroneously excluded; and a finding for the defendant was not demanded by the evidence adduced. The court therefore erred in directing a verdict in favor of the defendant.

Judgment reversed.

LUKE and BLOODWORTH, JJ., concur.

(27 Ga. App. 291)

VARNER v. STATE. (No. 12444.)

(Court of Appeals of Georgia, Division No. 1.
July 12, 1921.)

(Syllabus by the Court.)

1. Criminal law §778(4)—Instruction held sufficient as to burden of proof.

An explicit and comprehensive charge on the subject of reasonable doubt, wherein the jury are instructed in effect that the defendant enters into the trial of his case with the presumption of innocence in his favor, which continues with him throughout the case until the evidence produced by the state shows his guilt beyond a reasonable doubt, sufficiently informs the jury that the burden is on the state to prove the defendant guilty. See, in this connection, *Thomas v. State*, 129 Ga. 419 (4), 59 S. E. 246.

2. Criminal law §789(8)—Instruction that evidence must satisfy jury "to reasonable and moral certainty," and that this was the same as "beyond a reasonable doubt," held proper.

The phrases "to a moral and reasonable certainty" and "beyond a reasonable doubt," as applied to the quality of proof in a case, being identical in meaning (*Austin v. State*, 6 Ga. App. 211, 64 S. E. 670), it was not error for the court to charge the jury that "it is necessary that the state do more than raise a mere possibility of guilt; it must produce evidence that has the convincing power to satisfy the jury to a reasonable and moral certainty, which is the same thing as to say to satisfy the jury beyond a reasonable doubt."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Beyond a Reasonable Doubt; Second Series, To a Moral Certainty.]

3. Instructions not erroneous.

The grounds of the amendment to the motion for a new trial, complaining that the court erred in charging the jury upon the subject of "good character," and with reference to "a weapon likely to produce death," are not subject to any of the criticisms urged by the plaintiff in error.

4. Criminal law §797—Instruction as to jury's right to recommend mercy not error.

There was no error in charging the jury as follows: "If you find the defendant guilty of assault with intent to murder, and you fix his sentence as it would be your duty to do, that is, a penitentiary sentence in case you find him guilty, you may nevertheless add to your verdict a recommendation to the mercy of the court, and, should that be your verdict, and should your recommendation be approved by the court, then the defendant would be sentenced as for a misdemeanor. I have or will give you what a misdemeanor sentence is."

5. Criminal law §913(4)—Disregard of recommendation of mercy in sentencing defendant held not ground for new trial.

The special ground of the motion for a new trial, complaining that the court erred in sentencing the defendant to the penitentiary, because the verdict of the jury recommended him to the mercy of the court, is not cause for a new trial. Such recommendations are entirely subject to the approval of the court. *Echols v. State*, 109 Ga. 510, 34 S. E. 1038; *Daniel v. State*, 118 Ga. 16 (1), 43 S. E. 861; *Mack v. State*, 118 Ga. 755, 45 S. E. 603. See, also, *Elzie v. State*, 21 Ga. App. 502(2), 94 S. E. 627 and cases cited.

6. Motion for new trial properly overruled.

There was ample evidence to warrant the verdict, and the court did not err in overruling the motion for a new trial.

Error from Superior Court, Bibb County;
H. A. Mathews, Judge.

Marvin Varner was convicted of assault with intent to murder, and he brings error. Affirmed.

John R. Cooper and W. O. Cooper, Jr. both of Macon, for plaintiff in error.

Chas. H. Garrett, Sol. Gen., of Macon, for the State.

LUKE, J. Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(27 Ga. App. 273)

(193 S.E.)

OSBORNE v. STATE. (No. 12490.)

(Court of Appeals of Georgia, Division No. 1.
June 30, 1921.)

(Syllabus by Editorial Staff.)

1. Criminal law \S 918(3)—Refusal to require jurors to be called and to rise for purpose of striking not ground for new trial.

Where a list of the 24 jurors put upon defendant had been furnished him, and he was directed to strike therefrom, the refusal to allow the jurors to be called separately and made to rise and remain standing until the next juror was called for the purpose of striking the jury did not require a new trial.

2. Criminal law \S 1064(4)—Ground of motion for new trial complaining of exclusion of evidence of certain statements by defendant held insufficient.

A ground of a motion for a new trial complaining of the court's refusal to allow defendant's counsel to prove by a witness, who testified concerning an admission by defendant, other statements made under oath by defendant at the same time, did not show error, where it did not show what such other statements were, or whether proof thereof would have benefited or harmed defendant.

3. Criminal law \S 1064(6) — Point made in brief, but not in motion for new trial, not considered.

A complaint in the brief for plaintiff in error that the court, in excluding evidence, expressed an opinion as to what the evidence showed or did not show, cannot be considered, where no such complaint was made in the motion for a new trial.

4. Intoxicating liquors \S 236(5) — Evidence held to support conviction for possessing whisky.

Evidence, though circumstantial, held sufficient to support a conviction for possessing whisky found buried underground in a coal house on defendant's premises and only a little distance from his dwelling house, where defendant offered no explanation as to the whisky being on his premises.

5. Criminal law \S 1160—Verdict approved by trial judge cannot be disturbed when evidence not insufficient as a matter of law.

Where the finding of the jury has been approved by the trial judge, and the Court of Appeals cannot say as a matter of law that the jury were not authorized to find that the circumstantial evidence adduced excluded every reasonable hypothesis save that of defendant's guilt, the court is without authority to interfere.

Error from Superior Court, Fulton County; M. C. Tarver, Judge.

Anthony Osborne was convicted of possessing whisky, and he brings error. Affirmed.

T. J. Ripley and W. M. Bailey, both of Atlanta, for plaintiff in error.

John A. Boykin, Sol. Gen., and E. A. Stephens, both of Atlanta, for defendant in error.

BROYLES, C. J. [1] 1. There is no substantial merit in the following ground of the motion for a new trial:

"A new trial should be granted because the court refused to allow the 24 jurors put upon the defendant on the trial to be called separately and distinctly and made to rise and remain standing until the next juror was called at the time when the defendant was put upon trial in said case, request having been made by the defendant's counsel to have the jury called separately for the purpose of striking said jury. After said 24 jurors were put upon the defendant counsel for defendant accepted the first 12 and went to trial. A list of 24 jurors was furnished counsel prior to this agreement, and he was directed to strike therefrom."

[2, 3] 2. A ground of the motion for a new trial is as follows:

"A new trial should be granted because during said trial the court refused to allow the defendant's counsel, after asking the witness for the state, Officer W. L. Payne, if he heard all of Anthony Osborne's statement while under oath on the trial of Amelia Osborne in the federal court, and the court refused to allow defendant's counsel to prove by this witness other statements made under oath by Anthony Osborne at the time that he admitted to the witness, or swore on the trial in said federal court, that he was the head of the house on which premises the liquor was found, said court saying at the time that it made no difference what other statements were made, or what other evidence was sworn to by Anthony Osborne on that trial, and was immaterial."

It does not appear from this ground what were the "other statements made under oath by Anthony Osborne" that the defendant desired to prove, or whether this proof would have benefited or harmed the defendant. This ground does not complain that in making his ruling excepted to the judge expressed "an opinion as to what the evidence showed or didn't show." Such complaint is made only in the brief of counsel for the plaintiff in error, and cannot be considered by this court.

[3] None of the excerpts from the charge excepted to, when considered in the light of the entire charge and the facts of the case, show reversible error. Moreover, in none of the excerpts is the alleged error pointed out; the only averment being that "the charge was error."

[4, 5] 4. The accused was charged with possessing whisky. The undisputed evidence showed that 10 gallons of corn whisky, in one-gallon tin cans, was found buried six or eight inches under the ground in a coal house on the defendant's premises and "a little distance" from his dwelling house. The defend-

ant, in his statement to the jury, admitted all these facts, but denied that the whisky was his, or that he knew it was there or knew who it belonged to. He offered no explanation whatever as to how the whisky happened to be there, or how such a quantity could have been buried in his coal house and near his dwelling house without his consent or knowledge. Neither the evidence nor the defendant's statement showed that any one outside of his own family (of which he admitted being the head) lived or worked on the premises, or near by. The court fully and correctly charged on the law of circumstantial evidence, and the jury evidently found that the defendant had offered no sufficient explanation as to the whisky being on his premises, and rejected his statement as to knowing nothing about it being there.

Under these particular facts this court cannot say, as a matter of law, that the jury were not authorized to find that the circumstantial evidence adduced was sufficient to exclude every reasonable hypothesis save that of the defendant's guilt; and, the finding of the jury having been approved by the trial judge, this court is without authority to interfere. The cases cited by the learned counsel for the plaintiff in error are distinguishable by their peculiar facts from this case.

Judgment affirmed.

LUKE and BLOODWORTH, JJ., concur.

(116 S. C. 314)

McKEE v. MADDEN. (No. 10664.)

(Supreme Court of South Carolina. June 30, 1921.)

Trial — 194(13)—Instruction as to presumption of knowledge of contents of instrument held a charge on the facts.

In action by seller of automobile for claim and delivery, following buyer's default in payment of purchase-money note secured by mortgage, defended on the ground of fraud in the execution of the note and mortgage, instruction as to presumption that person who signs instrument knows what it contains held objectionable, as a charge on the facts.

Appeal from Common Pleas Circuit Court of Laurens County; R. W. Memminger, Judge.

Action by J. W. McKee against Dora Madden. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Featherstone & Knight, of Laurens, for appellant.

Blackwell & Sullivan, of Laurens, for respondent.

GARY, C. J. The following preliminary statement appears in the argument of the appellant's attorneys:

"Appellant bought an automobile from respondent and gave a note and mortgage for balance of purchase money. Respondent brought action for claim and delivery, the past-due mortgage being the basis of his claim of title. The appellant answers the complaint, setting up the following defenses: (1) Fraud in the execution of the note and mortgage; (2) payment; (3) breach of warranty and failure of consideration; (4) counterclaim for damages by reason of breach of warranty. The action was tried before Judge Memminger and a jury. The jury found for the plaintiff respondent in the sum of \$243. The defendant appeals from the judgment of the circuit court."

His honor the presiding judge charged as follows:

"Now, on this matter of a written instrument, gentlemen. Where a person's signature on a written instrument is admitted to be genuine the party is held to be bound by what is contained in that instrument. The charge made that it was procured by fraud has to be established by testimony. A person is presumed to protect themselves to the extent of becoming aware or knowing what an instrument is that they sign in writing. They must take ordinary and reasonable diligence to protect themselves. People can't just walk in and sign a written instrument, and then play the baby act and say they did not know what was in it, that it was not read to them, or whatever it might be. They must satisfy the jury that a fraud has been committed to the extent in which they have been misled; otherwise, they are bound by the contents of it. To let that sort of thing go on without holding it down to a proper case, there would never be a written instrument worth anything. It would be just as well to carry on all transactions by word of mouth. Now the law says that, when a person signs his name to a written instrument, he cannot escape the consequences of it, unless fraud or deception is shown. That is upon the defendant in the case, who sets up that defense. Miss Madden claims that she was deceived and defrauded into signing that instrument with that amount \$370 instead of \$270."

An exception to the foregoing assigns error, in that it was a charge on the facts. The testimony of the plaintiff, corroborated by her brother and nephew, shows that the error was prejudicial to the rights of the plaintiff. The exception is therefore sustained.

None of the other exceptions, when considered in connection with the entire charge, show prejudicial error.

Reversed and remanded for a new trial.

WATTS, FRASER, and COTHERAN, JJ., concur.

(116 S. C. 286)

SMITH v. HEYWARD et al. (No. 10658.)

(Supreme Court of South Carolina. June 30, 1921.)

Judgment ¶17(1)—Order settling estate not based on notice is invalid.

A judgment or order settling an estate where entered without notice to some of the parties interested is invalid and cannot be allowed to stand.

Appeal from Common Pleas Circuit Court of Greenville County; George E. Prince, Judge.

Action by Robert T. Smith, as executor of Elizabeth H. Heyward, deceased, against Julius H. Heyward, the executor, and others. From an order settling the estate, Henry Middleton, one of the defendants, appeals. Reversed.

See, also, 115 S. C. 199, 105 S. E. 275.

A. T. Smythe and E. L. Visanska, both of Charleston, for appellant.

Miller, Hunger, Wilbur & Miller, of Charleston, Haynsworth & Haynsworth, of Greenville, F. H. Horlbeck, of Charleston, S. M. Wolfe, Atty. Gen., and E. M. Blythe, of Greenville, for respondent.

FRASER, J. The case shows:

"This action was brought by Robert T. Smith, as executor of Elizabeth M. Heyward, deceased, against Julius H. Heyward, the other executor, and the heirs, devisees, legatees of the testatrix to have the court construe her will, determine the validity of certain bequests and the proper disposition of the residue of the estate, and also for the appointment of a receiver on account of the dissensions existing between the executors. The decision of the Supreme Court construing the will and deciding the issues in this case appear in 115 S. C. at page 199 et seq. [105 S. E. 275].

"After the decision of the Supreme Court was handed down, Mr. Nettles, as attorney for the executor Julius H. Heyward, opened negotiations with Mr. H. J. Haynsworth, of counsel for the executor Robert T. Smith, with the idea of agreeing upon an order under which the estate could be expeditiously settled. No agreement on all points having been reached, Mr. Nettles, in December, 1920, served notice upon Mr. Haynsworth of application to Judge Prince for an order in the case. No notice of the application for the order was given to the attorneys for Henry Middleton. Upon the call of the motion, Mr. Haynsworth stated that there were several other attorneys in the case and asked for time to communicate with them. Judge Prince then let the hearing go over until the following week, when he heard the arguments from Mr. Haynsworth, Mr. Heyward, and Mr. Nettles, and, after allowing further time to hear from the Charleston attorneys, he signed and filed the order hereinafter set forth on January 13, 1921. Judge Prince did not know that Mr. A. T. Smythe and Mr. W. L.

Visanska were attorneys in the case, though he did know there were attorneys in the case who were not present at the hearing."

The order affected the interests of Henry Middleton, and neither Mr. Middleton nor his attorneys had any notice of the motion. It needs no citation of authority to show that it was error to make an order affecting the interest of a party of which he had no notice. The high character of all the parties and their attorneys leaves no doubt of perfect good faith, but notice was necessary, and, as none was given, the order appealed from is reversed.

GARY, C. J., and WATTS and COTHRAN, JJ., concur.

(116 S. C. 316)

ATLANTIC COAST LINE RY. CO. v. TOWN OF TIMMONSVILLE. (No. 10665.)

(Supreme Court of South Carolina. June 30, 1921.)

Licenses ¶34—Railroad entitled to recover amount paid, in absence of evidence that tax was levied on gross income and capital investment.

Railroad suing to recover license taxes imposed by ordinance enacted pursuant to Civ. Code 1912, § 2947, paid under protest, held entitled to the recovery of the taxes paid, in the absence of evidence that the tax was levied either upon the gross income or upon the amount of capital invested as required by such statute.

Appeal from Common Pleas Circuit Court of Florence County; S. W. G. Shipp, Judge.

Action by the Atlantic Coast Line Railway Company against the Town of Timmonsville. Judgment for plaintiff, and defendant appeals. Appeal dismissed.

Whiting & Baker, of Florence, for appellant.

F. L. Willcox and J. M. Lynch, both of Florence, for respondent.

GARY, C. J. The following statement appears in the record:

"This action is brought for the recovery of license taxes paid by plaintiff to defendant under protest in the years 1915 and 1916. The complaint sets forth two causes of action similar in form, the first being the recovery of \$300 paid as license tax for the year 1915, and the second for the recovery of \$300 paid as license tax for the year 1916; each cause of action alleging, in substance, the assessment of the tax by ordinance of the town of Timmonsville, the payment under protest duly made, and the contention that the license tax required of plaintiff was improperly imposed, of a confiscatory character, and not graduated as required by statute. The answer of defendant admits the payment of the taxes under protest

duly made, but alleges that the said tax was lawfully and properly imposed in the pursuance of the power vested in the corporate authorities of the town of Timmonsville to assess and collect such taxes for corporate purposes. The case was brought to trial before Judge S. W. G. Shipp at the May, 1920, term of the court of common pleas at Florence, S. C."

Section 2947, Code of Laws 1912, provides:

"Said city or town council may, and they are hereby authorized annually to require by ordinance the payment of such reasonable sums of money as a license by any person or persons, corporation or corporations, engaged or intending to engage in any calling, business, occupation or profession, in whole or in part, within the limits of said cities or towns, except those engaged in the calling or profession of teachers or ministers of the gospel; provided, that said license shall be graduated according to the gross income of the persons, firms or corporations required to pay such license, or upon the amount of capital invested in said business."

It was admitted by counsel for defendant that the tax, the subject-matter at issue, was paid under protest for the years 1915 and 1916. Plaintiff introduced license ordinance of the town of Timmonsville, No. 39, ratified June 28, 1915; the provision relating to railroads being as follows:

"Railroads, steam, for business done exclusively within the town of Timmonsville, and not including any business done to or from points without state, and not including any business done for the government of the United States, its officers or agents, for each company as follows: Atlantic Coast Line Railroad Company, \$300. C. A. & W. Ry. (Seaboard Air Line Ry. Co.), \$50."

At the close of the testimony his honor thus ruled:

"Gentlemen of the Jury: You have heard the testimony in this case and you have heard the statute read, which provides that whenever a municipal corporation undertakes to levy a license tax that there are two ways in which they must proceed to levy the tax. One way is to find out what the capital stock of the concern sought to be taxed is, and tax it according to its capital stock; and the other way is to find out what its gross income is, and tax it that way. When you undertake to tax people in any other way except upon the capital stock invested or their gross income, it is an illegal tax. The law provides that a person may pay the tax under protest and bring suit and have the legality of the tax settled.

"They have introduced an ordinance here which failed to show that the town of Timmonsville taxed the railroad company, either according to the capital stock invested or the gross income.

"It is wholly a question of law and does not involve any question of fact, and, as a matter of law, I hold that the plaintiff is entitled to recover this tax. So, Mr. Foreman, you will write a verdict for the plaintiff."

The defendant appealed on the following exceptions:

"(1) The court erred in refusing to grant the motion for a nonsuit made by defendant at the close of plaintiff's testimony; the error being that the testimony offered by plaintiff fails to show that the taxes issued against the defendant, for the recovery of which this action was brought, were not properly graduated and assessed in accordance with the constitutional and statutory provisions relating to license taxes.

"(2) The court erred in holding that the proposed testimony relating to the method of determining the amount of license tax assessed against defendant was incompetent; it being respectfully submitted that such testimony was competent for the purpose of showing that the said tax was properly and fairly graduated and assessed.

"(3) The court erred in directing a verdict against the defendant; it being respectfully submitted that the burden of proof rests upon the party attacking the validity of an ordinance, and that no evidence was offered by defendant tending to show that the license tax paid by defendant had not been fairly and properly graduated and assessed in accordance with constitutional and statutory requirements."

The ruling of his honor, the presiding judge, is sustained by the case of *Wood-Mendenhall Co. v. City of Greer*, 88 S. C. 249, 70 S. E. 724.

Appeal dismissed.

WATTS, FRASER, and COTHRAN, JJ., concur.

(116 S. C. 324)

BRICE v. McDOW et al. (No. 10671.)

(Supreme Court of South Carolina. June 30, 1921.)

1. Schools and school districts \S 97(3) — Yorkville district held entitled to issue building bonds without limitation.

The amendment of 1914 to Const. art. 8, § 7, and article 10, § 5, gave the Yorkville district of York county power without limitation to issue bonds to raise funds to pay for construction of buildings.

2. Constitutional law \S 33 — Existing statute held to furnish machinery for issuing bonds after amendment of Constitution.

Act Feb. 17, 1911 (27 St. at Large, p. 417) authorizing board of trustees of Yorkville school district to issue \$35,000 in bonds, furnished necessary machinery for an election to determine issuance of bonds under the subsequent Constitutional amendment of 1914 to Const. art. 8, § 7, removing the limits provided thereby, and an act of Legislature was unnecessary.

3. Constitutional law \S 143 — Statute may not render invalid bonds legal when issued.

If bonds of school district were valid when issued, no act of the Legislature could invalidate or change them, as it would impair obligations of contract.

4. Constitutional law ⚡29 — Provisions presumed as self-executing.

The general presumption of law is that all constitutional provisions are self-executing, and are to be interpreted as such rather than as requiring further legislation, for the reason that unless such were done it would be in the power of Legislature to practically nullify a fundamental of legislation.

5. Statutes ⚡183—Special act will not repeal general law.

The general rule is that a special act will not repeal a general law, unless there is a manifest repugnancy between the provisions of the two acts, and where there is a statute general in its terms and another particular statute dealing with the same subject in a particular way or particular purpose, the two should be read together and harmonized, if possible, letting both of them stand.

6. Schools and school districts ⚡91—Special act as to building bond issue by Yorkville district held not to deny district right to make use of general law.

Act Feb. 17, 1911 (27 St. at Large, p. 417), authorizing board of trustees of Yorkville district to issue bonds to the amount of \$35,000 for erection of buildings and other purposes, which was in excess of 4 per cent. of assessed valuation, was intended for a particular time and purpose, and did not deny the right of the school district to make use of the general law (Civ. Code 1912, § 1743), limiting indebtedness of any school district to 4 per cent. of assessed valuation.

7. Schools and school districts ⚡97(4)—Election on bond issue held properly called by town council.

Inasmuch as the town of York is a municipality, and the limits of Yorkville school district are coincident, an election to determine whether or not the school district should issue bonds, declared by the town council at the request of the board of trustees of the school district, upon petition, was not in violation of Civ. Code 1912, § 1743, requiring that an election be held by the board of trustees.

8. Schools and school districts ⚡97(4)—Filing of plat not condition precedent for special election.

Filing of a plat in the office of the clerk of court was not a condition precedent for a special school election to determine the question of issuing bonds under Civ. Code 1912, § 1743.

9. Schools and school districts ⚡97(6)—Resolution as to signing of bond unissued may be amended.

That resolution of Board of Trustees of school district only required that bonds be signed by chairman and secretary, instead of by the full board, was immaterial in a suit to determine the validity of the bonds, where the bonds were not yet issued, as the trustees could adopt another resolution rescinding the old one, providing in the new resolution that the signatures of the full board be placed upon the bonds.

10. Schools and school districts ⚡97(4)—Object of bonds properly expressed in petition and a notice of election.

Petition for election and notice ordering election on question of issuing bonds were proper where it was stated therein that the bonds were to be used for the purpose of erecting buildings, repairing, altering, and equipping old buildings for school purposes, under Civ. Code 1912, § 1743, and Const. art. 8, § 7, as amended in 1914.

Appeal from Common Pleas Circuit Court of York County; Ernest Moore, Judge.

Suit by J. S. Brice against Thomas F. McDow and others, as Trustees of Yorkville School District No. 11. Decree for defendants, and plaintiff appeals. Affirmed.

The judgment of the lower court was as follows:

This is a friendly suit, brought by the plaintiff to determine the validity of a proposed bond issue of \$125,000 for Yorkville school district, York county. The complaint is a very voluminous one, and sets forth all the facts in regard to the proposed issue, and alleges that from these facts and the law, as shown, the board of trustees are without authority to issue the bonds for the reasons given.

The service of the complaint is duly admitted by the defendants, constituting the board of trustees of the district, and the said defendants have filed an answer admitting all the facts stated in the said complaint, except in paragraph 6 thereof, that they are without authority to issue the bonds. They allege, on the contrary, that by reason of the facts and the law recited in the complaint they have full authority so to do.

The undisputed facts as appear then are as follows:

That Yorkville school district was incorporated under the special act of the Legislature in December, 1888 (Act Dec. 22, 1888 [20 St. at Large, p. 246]), and under this act the board of trustees created thereby are vested with the management of school affairs in the said district, including the power to issue bonds for school purposes. That act fixed the limit of bonds at \$4,000. In 1901 the original act of 1888 was amended (Act Feb. 15, 1901 [23 St. at Large, p. 845]), giving the board of trustees additional power to issue bonds in the manner and form therein provided, not exceeding \$15,000. In 1911 an act was passed by the General Assembly (Act Feb. 17, 1911 [27 St. at Large, p. 417]) giving the board of trustees of the said school district authority to issue bonds of the form and amount they might deem necessary for the purpose of erecting new school buildings, purchasing lot, repairing old buildings, and other school purposes, the said bonds to be issued not to exceed \$35,000.

In 1914 a joint resolution was adopted by the General Assembly of South Carolina, providing that the limitations of indebtedness, as contained in section 7, art. 8, and section 5, art. 10, of the Constitution of 1895, should not apply to Yorkville school district, when the proceeds of the bonds were applied exclusively to

the erecting, making additions to school buildings in the said district, and where the question of incurring indebtedness was submitted to the qualified electors of the district, as provided in the Constitution. It appears that this joint resolution was duly and legally adopted in accordance with the provisions of section 3, art. 16, of the Constitution, the yea and nay vote being taken thereon, as appears in Senate Journal 1914, pp. 806, 839, 840, 1043. In accordance with this joint resolution, constitutional amendment therein provided was submitted to the voters of the state of South Carolina at the general election in 1914, and, as a result of the election, the amendment was adopted. Thereafter, in 1915 (29 Statutes, 107), the General Assembly passed an act ratifying the said constitutional amendment proposed by a joint resolution, as stated above. It is alleged in complaint and admitted in answer that the joint resolution proposing constitutional amendment was adopted in accordance with Constitution, and same duly recorded in Senate Journal 1914, p. 806. This is found as a fact. No other acts of the Legislature have been passed in relation to the Yorkville school district.

The first question raised by the plaintiff is that, under the law, as above stated, and without regard to the facts and the manner of conducting the election, which will be hereinafter noted, that the said school district is without authority to issue the bonds proposed, it having been created by special act of December 22, 1888, and having had authority conferred and restrictions imposed upon it from time to time by a special act, the last of which was passed February 17, 1911, limiting the maximum amount of bonds to \$35,000; that the said law has not been amended or supplemented, or restriction of the bonded debt therein contained removed.

It is further stated or claimed that the district is not entitled to claim authority of the bond issue by virtue of the provisions of the constitutional amendment above recited, since the said constitutional amendment simply amounts to the removal of the limitations imposed by the Constitution on the indebtedness of the said school district, and does not thereby confer authority for the issuance of the bonds.

It is further objected in this connection that, even if the said constitutional amendment is to be construed as conferring authority for the issuance of bonds in excess of the amount specified in act of 1911, no machinery for carrying out such authority is provided, and no officers are invested with the power or duty to hold any election for bonds, and that the act of the General Assembly is required to provide such machinery. In this connection, too, is the objection that the proposed bond issue will exceed 8 per cent. of the assessed valuation of the school district, and that it will exceed 15 per cent. of the value of all taxable property in the said district, which also includes the municipality of York.

[1-4] So, then, in consideration of this matter, the objections as noted above will be considered together. The question presented by the said objections briefly is: Did the school district of York have the authority to issue bonds in an unlimited amount after the passage of and ratification of constitutional amendment of 1914, or was it necessary that such constitu-

tional amendment be followed by an act of the General Assembly, giving specific authority to issue the proposed \$125,000 of bonds? The question is a most interesting one, and, after careful consideration, I am of the opinion that the school district did have and does have the power to issue the bonds, and that the objections above noted cannot be sustained. It was held in the case of *Dick v. Scarborough*, 73 S. C. 151, 53 S. E. 86, that section 5 of article 8 of the Constitution, providing that cities and towns may acquire by construction or purchase waterworks systems and plants after the question had been submitted to a majority vote of the electors on the question of bonded indebtedness for such purpose; that this section expressly conferred upon cities and towns the power to issue bonds for the purposes provided. If this is true, it seems that article 7, § 8, and article 5 of section 10 would give to the political subdivision therein named the power to issue bonds up to the limit provided after such question had been submitted to a vote of the people, as provided by those terms. Therefore the constitutional amendment of 1914, which took off the limit of bonded indebtedness provided for by the foregoing provision, would in itself confer bonding powers in an unlimited amount. If the proper construction of the *Scarborough Case*, cited above, is, as I think it is, that the constitutional amendment did confer authority to issue bonds, then such authority could not be limited or curtailed by any act of the Legislature, and to this extent the limit provided in the act of 1911 at \$35,000 must fall, but all other provisions of that act of 1911, not being inconsistent with the constitutional amendment, must stand as providing machinery for election, the authority of which was given by virtue of the constitutional provision.

It seems to me, thus, that the constitutional amendment of 1914 might in this respect operate, if that view of it is taken, as an amendment to the act of 1911, by simply removing the limit of indebtedness provided in that act. The principle that the constitutional amendment to the Constitution can amend a prior statute is recognized in the case of *Cleveland v. Spartanburg*, 54 S. C. 83, 31 S. E. 871.

Another case to be noted in this connection is the case of *Bray v. City Council of Florence*, 62 S. C. 57, 39 S. E. 810. In that case it was held that an act of the Legislature limiting the amount of bonded debts of municipalities, in the words of the statute, does not so operate after such limitations have been removed by amendment. The only difference between this *Bray Case* and the case at bar is that in the *Bray Case* the limitation of the statute placed upon cities and towns to vote bonds was, in the exact language of the Constitution, "not over 8 per cent." An amendment was duly passed to the Constitution, taking off this limit as to the city of Florence, and the city of Florence thereby proposed to issue bonds exceeding the 8 per cent. limitation. The plaintiff contended that the constitutional amendment should have been followed by an act of the Legislature removing its former limitations, and, while the court decided that such act was not necessary, on the ground that the language of the acts was in accordance with the language of the Constitution, yet it would seem that the principle in this case would be the same. The limitation

imposed on the school district was not 8 per cent., but a definite sum of \$35,000 by a legislative enactment. Was not the intention of the Legislature by that act simply to say to the school district that it should keep within the constitutional limit? And the effect of the constitutional amendment removing the limitation would be the same in this case as it was in the Bray Case. This Bray Case also suggests the fact that, if the General Assembly had desired to impose a limitation after the constitutional amendment, a new act would have been necessary. Under the authority of *Dick v. Scarborough*, cited above, it may be doubtful as to whether there was any authority in the Legislature to limit the indebtedness after the constitutional amendment, and if this is the proper construction of the *Scarborough* Case, as I think it is, the principle recognized in the Bray Case, if it is recognized, that the Legislature would have the authority after a constitutional amendment to further limit indebtedness, would be practically overruled by the later decision. However, even if we should consider that the principle of the Bray Case is correct, instead of the principle of the *Scarborough* Case, the answer here would be that, even though the Legislature might have had authority to limit indebtedness of the Yorkville school district after the amendment, it has not done so, thus implying that it does not care so to act. After these bonds are issued, if they are valid up to this time, certainly no subsequent act of the Legislature could invalidate them, for such act would impair the obligations of contract.

I hold, therefore, that the constitutional amendment of 1914 did confer upon the school district authority to issue bonds, limited only by the discretion of the board of trustees, that no further act of the Legislature was necessary, that the machinery for an election had been provided for by the act of 1911, and by previous acts, and that these acts stand so far as the machinery for the election is concerned, and are repealed only so far as the limitation of indebtedness is concerned. The constitutional amendment of 1914 must be regarded as self-executing, taken in connection with the former act. The general presumption of law is that all constitutional provisions are self-executing, and are to be interpreted as such, rather than as requiring further legislation, for the reason that, unless such were done, it would be in the power of the Legislature to practically nullify a fundamental of legislation. 6 R. O. L. p. 58; *Black on Interpretation of Laws*, p. 21.

It follows from the above conclusion that the objection to the 8 per cent. and the 15 per cent. limitation, as stated in subdivision "g," par. 6, of the complaint, must also fail, for the reason that such limitations are absolutely wiped out by the constitutional amendment.

[5] Having reached the conclusion, therefore, that the bonds proposed to be issued are valid by reason of the constitutional amendment and of the act of 1911, and the previous acts which provided machinery for election, it might not be necessary to go further, but, as the question has been raised in the complaint, and if for any reason the conclusions stated above are wrong, it will be well to consider whether or not the bond issue can be sustained by the provisions of the general law relating to school districts. This general law is stated in section

1743 of the Code of 1912, and the provisions of it are substantially recited in the complaint. This act, which constitutes a general law in regard to school district bonded indebtedness, was passed in 1907, and provided that the limit of indebtedness should be 4 per cent. of the assessed taxable property in the district. The last act relating to Yorkville school district was passed in February, 1911, and is a special act in regard to Yorkville school district, so then the question to be considered is whether by the passage of that special act after the enactment of the general law, Yorkville school district would be deprived of the benefits of the general law, if such became necessary. The general rule is that a special act will not repeal a general law, unless there is a manifest repugnancy between the provisions of the two acts; and where the statute is general in its terms, another particular statute dealing with the same subject in a particular way or particular purpose, the two should be read together, and harmonized, if possible, letting both of them stand. 13 Cyc. 1093, 1151; 25 R. C. L. 929.

The principles of statutory construction are more or less elastic, and governed by circumstances. If the general law and the special law are not plainly repugnant, or if the general law is not plainly repugnant, the same should stand together, and the right to plead the general law is not abrogated; or, if the general law imposes conditions upon the issuance of bonds, and the special act authorizes one district to issue bonds without the happening of these conditions, the special act might be regarded as an act for a particular time and purpose, and would not constitute a denial of the right of the district to make use of the general law.

[6] Now, what are the facts that appear here? Let us examine the provisions of the special act of 1911 and the general school law (Civ. Code 1912, §§ 1698-1835), to see wherein they differ.

(1) The special act of 1911 limits indebtedness of Yorkville district to \$35,000; the general act of 1907 limits indebtedness of any school district to 4 per cent. of assessed valuation.

(2) The special act provides that the petition be signed by a majority of freeholders; the general law provided that the petition should be signed by one-third of the freeholders and one-third of the electors.

(3) The general law provided that a plat must be filed before election; the special law contained no such provision.

(4) The special law provided for notice of election for 3 weeks; the general law provided for notice of 10 days.

(5) The general law provided that the proceeds be used for erecting buildings, and for paying indebtedness; the special law provided that the bonds should be used for the purpose of purchasing lot or lots, erecting and furnishing school building, or purchasing or adding to or remodeling or repairing existing buildings for school purposes.

(6) The general law provided that the bonds should be signed by all the trustees; the special law provides that they may be signed only by the chairman and secretary of the board.

Upon consideration of the above distinctions, it will be seen that the special act of 1911 relat-

ing to Yorkville school district is more liberal in its terms than the act of 1907, which is the general law. For instance, it appears by the record that the assessed valuation of Yorkville school district in 1910, which was the last valuation before the act of February, 1911, was passed, was \$750,325. Thirty-five thousand dollars is more than 4 per cent. of this assessed valuation, so it is seen that the Legislature was intending to be more liberal with the district by this act than by the general law. In all other respects noted above, except that of the time for publication of notice of election, the special act is also more liberal. Hence, when we have these evidences of liberality of the special act of 1911, it must be taken that the intention of the Legislature was to make that act an act for a particular time and purpose, and not to deny the right to the district to make use of the General Law, if such was necessary.

[7] So, having determined that the district had the right to use the general law, let us see if the provisions of the general law have been complied with. Subdivision "e" of paragraph 6 of the complaint states in detail the objection to the use of the general law by the district in this election. The first objection is that the general law provided that the election to be held was not to be held by the trustees of the district. It is alleged as a fact in the complaint, and not denied, that this election was nominally held by the town council of the town of York, but in reality it was by the trustees of the district. The record shows that the petition was signed by more than one-third of the resident electors and freeholders; that this petition was first presented to the board of trustees; that the board of trustees passed upon the validity of the petition, approved it, decided upon an election by the proper resolution, submitted the matter to the town council of the town of York, naming the managers of election, suggesting the form of the ordinances, and all other details in connection with the election. Inasmuch as the town of York is a municipality, and that the limits of Yorkville school district are coincident with that of the town, and that the laws of the state in regard to special election in municipalities provided that certain acts must be done, and the election held by the municipal authorities, it is conceded that it was the part of wisdom for this election to be held in the name of the town council of York in order to prevent conflict with other sections of the law. For one thing, books of registration for special election had to be opened by town authorities; could not have been opened by the board of trustees. The election was duly held by virtue of the ordinance passed by the town council at the request of the board of trustees. The election was declared by the town council and reported to the board of trustees, and the said board, by a proper resolution, adopted the same.

So, then, no other conclusion can be reached but that the acts of the town council of the town of York in holding and declaring this election was the act of the board of trustees, having been done at the request of the board in the first instance, and having been certified back to the board in the last instance. Therefore the objection as to the manner of conduct

of the election was not in violation of the provisions of the general law.

[8] The next objection is that no plat was filed in the office of the clerk of the court, as required by the general law. It appears that the limits of the Yorkville school district are well known, the shape being a circle, with a radius of one mile from the center at the intersection of Congress and Liberty streets in the said town. Also, a plat was on record in the office of the county superintendent of education; but in *Dove v. Kirkland*, 92 S. C. 321, 75 S. E. 503, it was held that that Constitution did not require the filing of such plat as condition precedent for election, and such was not necessary.

[9] The next objection, that the bonds are to be signed by the chairman and secretary, instead of the full board, is immaterial, for the bonds have not been issued, and this condition can be easily complied with, and all doubt removed simply by the board of trustees adopting another resolution and rescinding the old one, providing in the new resolution that the signatures of the full board are to be placed upon the bonds.

It appears from the record that the form of ballot used at the election was in accordance with the general law, for the reason that an affirmative ballot was used and a negative ballot was used, the two being separate and distinct.

[10] It is further objected that the petition under which the election was held and the notice ordering the election stated that the purpose for which the bonds were to be used was different from that provided for in the general law, and also that provided in constitutional amendment. The language of the act of 1907 permits the use of proceeds for erecting building, for equipment thereof, for maintaining, and for paying indebtedness. The election in question was for the purpose of erecting buildings, repairing, altering, and equipping old buildings for school purposes. We do not think that the purposes stated in the petition under which the election was held would be in conflict with the general law or that of constitutional amendment. The language of that general law and constitutional amendment is to be construed liberally, and when so construed we think it was the intent of the law to cover all necessary things which might have to be done for maintaining a proper and adequate school system in school districts and of Yorkville school district. Even the purchase of a lot might be justified under the general law, for the reason that the equipping and maintaining of a proper school system could not, in a great many instances, be accomplished without the purchase of a lot. The general act and the constitutional amendment, and also act of February 7, 1911, must certainly be construed as confirming authority for the issuance of bonds for purposes stated in the petition. See, also, *Dick v. Scarborough*, 73 S. C. 151, 53 S. E. 86.

It is therefore concluded that the proposed bond issue can be sustained under the general school law of the state, and is valid. The limit of indebtedness under the general law was originally 4 per cent., but this limit was increased to 8 per cent. by act of 1920; hence the general law as it now stands would provide the

limit of indebtedness in school district to 8 per cent., the exact language of the Constitution, but the constitutional amendment of 1914 removed the limitation, and hence, the limitation of the general law being in exact accordance with the language of the Constitution, the constitutional amendment removed that limit under the principle stated in *Bray v. Florence*, supra.

For these reasons, it is ordered, adjudged and decreed that the complaint herein be dismissed, and that the board of trustees of Yorkville school district, the defendants herein, be allowed to proceed with this proposed bond issue.

J. S. Brice, of York, for appellant.

T. F. McDow and John A. Marion, both of York, for respondents.

WATTS, J. For the reasons assigned by his honor, Judge Moore, it is the judgment of this court that the judgment of the circuit court be affirmed.

GARY, C. J., and FRASER and COTH-RAN, JJ., concur.

(116 S. C. 305)

TILL v. HAMILTON RIDGE LUMBER CO.
(No. 10660.)

(Supreme Court of South Carolina. June 30, 1921.)

Master and servant — 286(1) — Negligence question for jury.

In an action for the death of plaintiff's intestate, a servant of defendant, the question is for the jury, where plaintiff's evidence tended to establish all the material averments of negligence, and defendant's evidence tended to disprove that of plaintiff, and to show that the servant assumed the risk of injury.

Appeal from Common Pleas, Circuit Court of Hampton County; J. W. De Vore, Judge.

Action by Mrs. Lizzie Till, as administratrix, against the Hamilton Ridge Lumber Company. From a judgment for plaintiff, defendant appeals. Dismissed.

Randolph Murdaugh and George Warren, both of Hampton, for appellant.

W. D. Connor, of Hampton, and Holman & Boulware, of Barnwell, for respondent.

GARY, C. J. This is an action for actual and punitive damages, alleged to have been sustained on account of the negligence and recklessness of the defendant, thereby causing the death of plaintiff's husband.

The allegations of the complaint material to the questions involved are as follows:

"That on the 2d day of July, 1919, the said John D. Till was employed by the defendant,

Hamilton Ridge Lumber Corporation, at its mill in Estill, S. C., in the capacity of carpenter, which was the trade and calling of the said John D. Till; that on the said day the defendants changed the work of the said John D. Till from his occupation as a carpenter and put him to work as assistant millwright at the said plant; that shortly after going to work as assistant millwright at said mill on the following morning, July 3, 1919, while the said John D. Till was dressing a pulley on which a belt was running, pursuant to the instructions from the defendant and in the line of his work and duty as assistant millwright, the said belt caught the sleeve of his shirt, or his arm, or hand, and jerked the same in between the belt and the pulley on which it was running and jerked the said John D. Till up against the framework supporting the said pulley so violently that he was thereby fatally injured, resulting in his death at about 7 p. m. on the following day, July 4, 1919; that the said John D. Till came to his death as above stated by reason of the fact that the said belt which caught his sleeve, arm, or hand as aforesaid was improperly fastened together, in that the ends thereof did not meet each other squarely and evenly, but was so put together that on each side of the belt, at the point where the ends were joined together, the belt projected out far enough for the exposed end to catch things which it came in contact and carry them along with it to and around the said pulley, and the said belt was thus rendered a dangerous and unreasonably unsafe and unsuitable appliance, or a dangerous and unreasonably unsafe place for the said John D. Till to work in."

The defendant denied the allegations of the complaint and set up the defenses of contributory negligence and assumption of risk.

The jury rendered a verdict in favor of the plaintiff for \$6,000 actual damages, and the defendant appealed upon the following exceptions:

"(1) Because his honor erred in refusing defendant's motion for a nonsuit or directed verdict on the ground that there was no evidence of negligence on the part of the defendant operating as a proximate cause of the injury complained of.

"(2) Because his honor erred in refusing defendant's motion for a nonsuit or directed verdict on the ground that the deceased, John D. Till, was negligent, and that his negligence contributed as a proximate cause of the injury complained of.

"(3) Because his honor erred in refusing defendant's motion for a nonsuit or directed verdict, on the ground that the evidence admitted of no other conclusion than that the deceased, John D. Till, assumed the risk from which the injury resulted."

The testimony in behalf of the plaintiff tended to sustain every material allegation of the complaint. On the other hand, the testimony introduced by the defendant tended to disprove the plaintiff's testimony, and to show that the plaintiff's husband con-

tributed to his own injury, and that he assumed the risks incident to his employment.

Under such circumstances, the facts were properly submitted to the jury.

Appeal dismissed.

WATTS, FRASER, and COTHRAN, JJ., concur.

(116 S. C. 288)

NICKLES v. MILLER et al. (No. 10654.)

(Supreme Court of South Carolina. June 30, 1921.)

1. Principal and agent \S 78(2)—Action held one for accounting between principal and agent instead of on an account or judgment.

Principal's action against agent against whom principal had previously obtained a judgment held an action for accounting between principal and agent, and not an action on an account or judgment. (Per Fraser, J., and Gary, C. J.)

2. Reference \S 8(1)—Reference held proper in principal's action for accounting against agent on complicated account.

Principal's action against confidential agent for accounting in which the account was complicated and obscure held a proper case for a reference. (Per Fraser, J., and Gary, C. J.)

3. Witnesses \S 164(1) — Death stops parol evidence as to contract partly in parol and partly in writing.

Where a contract is partly in writing and partly in parol, death stops the parol evidence, and the writing stands. (Per Fraser, J., and Gary, C. J.)

4. Judgment \S 913 — Principal's complaint against agent held to state a cause of action on a judgment.

Principal's complaint against agent held to state a cause of action on a judgment. (Per Cothran, J.)

5. Appeal and error \S 882(3)—Defendant in law action, having demanded an accounting involving long and intricate account, could not complain of reference.

In principal's action against agent on a judgment, wherein defendant's answer was practically a demand and an offer for an accounting by which to demonstrate that the judgment had been paid where the account was a long and intricate one, the agent could not complain that the matter was referred to a referee on the ground that it was an action at law having himself tendered the equitable issue. (Per Cothran, J.)

Watts, J., dissenting.

Appeal from Common Pleas Circuit Court of Abbeville County; John S. Wilson and Geo. E. Prince, Judges.

Action by W. F. Nickles, as executor of the estate of Sue A. Kellar, against L. T. Miller, as executor, and Fannie E. Wilson, as execu-

trix, of the estate of M. H. Willson, deceased. Judgment for plaintiff, and defendants appeal. Affirmed.

The referee's report and the order of the trial judge, referred to in the opinion, are as follows:

Report.

This case was referred to me by order of the circuit court for Abbeville county as special referee to take the testimony and report my finding of fact and conclusions of law on the issues raised by the pleadings. A reference was held at Abbeville June 14, 1916, and continued at Anderson May 21, 1917, at which a deposition of Mrs. Kellar was read, testimony taken, and affidavit of L. T. Miller by consent admitted in evidence. Exhibits were admitted in evidence at Abbeville numbered from 1 to 21, inclusive, and at and from 1 B to 12 B, inclusive. A stenographic copy of the testimony, the affidavit, deposition and all the exhibits except the excerpts from the master's books are herewith submitted, together with the minutes of the reference as part of the report.

The case is brought on a judgment of the probate court for Abbeville county dated January 24, 1909, whereby it was adjudged that M. H. Willson, as administrator of the estate of Miss Jane L. Gordon, deceased, pay to plaintiff, Mrs. Susan A. Kellar, \$626.42 on a partial distribution of funds from the estate of Jane L. Gordon, deceased, this being Mrs. Kellar's distributive share of the amount shown to be due from funds then ready for distribution.

This judgment is admitted by the answer and payment is pleaded. This issue of whether this judgment has been paid is the only one in the case.

By a subsequent judgment of the said probate court it was adjudged that an additional sum of \$127.58 was due the plaintiff, Mrs. Kellar, as her share in the final distribution of the said estate, but it is conceded that this has been paid, and I find that it was paid by check of M. H. Willson, administrator, to Mrs. Sue A. Kellar, dated April 13, 1910, for \$128. In addition to these funds I find that Mrs. Kellar received from the sale of real estate of Miss Jane L. Gordon, through the master's office on December 23, 1906, \$1,000, and on November 16, 1909, \$1,444.75.

The third paragraph of the answer alleges that during the years 1909 and 1910 M. H. Willson paid to Mrs. Kellar about \$2,838.07, and it claimed that the judgment sued on was paid by some of these amounts. The fourth paragraph sets out these various payments, and, as it is by these or some of them that the defendant must show satisfaction of the judgment, if at all, I shall give my findings of them in detail. I find that there is no evidence of the payment of \$900 alleged to have been paid Mrs. Kellar on January 22, 1909, by M. H. Willson, but that Mrs. Kellar loaned J. T. Hunter \$900 of her money then on hand, said sum being withdrawn from her amount in People's Savings Bank of Abbeville by her check, and I find that the second item of \$200, loaned to Mrs. Fannie M. Speed was loaned from Mrs. Kellar's own funds then on hand and withdrawn from

her account in said bank on her own check signed in her name by M. H. Wilson as her agent. I find the same to be true as to the third item, to wit, \$600 loaned to J. H. Moore and J. M. Mars, except that the check of Mrs. Kellar was signed in her name by another agent. As to the fourth item I find that M. H. Wilson loaned W. D. Barksdale \$300 of Mrs. Kellar's money on the date alleged, checking on her bank account for same, and \$300 of his own funds on his check as administrator, taking a note and mortgage payable to his order to evidence and secure payment of the loan. That was paid on or about January 5, 1910, on which date M. H. Wilson gave to her his check for \$268.78 as her net share of the proceeds of the collection. This check is the eighth item of credits alleged in the answer. I find that M. H. Wilson collected \$660 from W. D. Barksdale in payment of this loan, of which Mrs. Kellar's share would normally be \$230, she having advanced one-half of the principal. He stated at the time of making this payment to her credit that the \$268.78 paid to her was her share, and in the absence of any clear explanation of the discrepancy I assume that there was some reason for this arrangement and find that this amount cleared him of further liability to her on account of this Barksdale loan. The only evidence offered of the seventh item of \$15 paid December 16, 1909, to wit, a check of S. A. Kellar to L. W. Kellar & Bro. bearing that date, showed that this amount was not paid for her by M. H. Wilson. I have already stated that the ninth item, a payment of \$128 to Mrs. Kellar, was to satisfy or pay a judgment in the probate court for her share in the final distribution of the estate of Miss Jane L. Gordon. The eleventh item of \$20.10 paid January 5, 1910, appears from the evidence to have been paid by Mrs. Kellar's check on her own account, signed in her name by M. H. Wilson, as her agent, to Philson Henry & Co.

The allegations relating to the thirteenth item refer to a loan made to L. T. Miller. The testimony of W. F. Nickles shows this to have been made to L. T. Miller by Mrs. Kellar in 1906 out of her own money. Her passbook with the People's Savings Bank contains an entry of a check on her account for \$175 to L. T. Miller. Mr. Miller in his testimony states that this loan was paid by him, but he does not deny that he borrowed her money from her. There is no proof that Mr. Wilson should have credit for this amount.

I find that none of these items above referred to can constitute a credit or payment by M. H. Wilson on the judgment sued on. I recall no testimony to substantiate the fourteenth item of credit claimed, to wit, \$4.79 cash paid to Mrs. Kellar by Mr. Wilson. This must therefore be disallowed.

I find that the other items claimed as payments are fully proved, to wit: \$13.21 paid June 4, 1909; \$15 paid February 3, 1908; \$25 paid July 19, 1910; and \$36.99 paid September 12, 1910.

Defendant's counsel also proved to my satisfaction that Mr. Wilson paid Mrs. Kellar \$42.95 on or about February 16, 1903, and \$14.88 on or about January 15, 1903. These are proved by entries in Mr. Wilson's account book as administrator, and in the absence of any testimony showing that the administrator was indebted

to her on any other account, and in view of the proof as to his scrupulous integrity, I think that he should have credit on account of this judgment for these amounts. It is contended that these amounts were deducted by Mr. Wilson from Mrs. Kellar's share of the proceeds of the Barksdale loan, thereby reducing the amount put to her credit from \$330 to \$268.78. It is of course entirely possible that this was done. Such explanation is not entirely satisfactory, however, as these payments would not entirely account for the deduction, and Mr. Wilson is reported to have said that the amount he deposited was Mrs. Kellar's share of the proceeds of the collection, not the net amount he owed her on all accounting to that date, or of the amount he owed her in addition to the judgment in her favor. Some element must have entered into this Barksdale loan which the subsequent death of Mr. Wilson prevents our knowing, and by reason of which she was entitled to only \$268.78 of this money. The payments of \$14.88 and \$42.95 were made prior to the rendering of the judgment in the probate court, it is true, and it is therefore rather irregular to consider them as payments on this judgment, but it is not unusual to have the judgment in such cases represent the total amount of the share of the distribution, and then by a private accounting adjust the mutual account in making payment. The payments were made, and I think it but just that Mr. Wilson have credit for them on this account.

It was earnestly and ingeniously contended in argument that the total of loan made by Mrs. Kellar and of the disbursements made by her for other purposes when deducted from her known and established sources of funds would leave her so small an amount for living expenses that she must necessarily have been paid this judgment in order to live. This calculation, however, leaves out the interest which her bank book in evidence shows she received, and furthermore it is not proved that she was solely or indeed at all dependent on the funds received from the Gordon estate for her living expenses.

It is contended, as evidencing the fact that the check for \$128 given by Mr. Wilson to Mrs. Kellar in payment of the balance due on the final settlement of the Gordon estate on April 13, 1910, was intended also to be in full payment of all amounts due to her by Mr. Wilson, that he thereafter drew no other checks in her favor, although he lived nearly two years after that date. This argument overlooks the \$25 check of July 9, 1910, and \$36.99 paid by him to cover her overdraft on September 12, 1910.

I do not conceive that the conclusions I have reached that Mr. Wilson owed Mrs. Kellar the bulk of her judgment in any wise impeaches his admitted honesty and integrity in his dealings with her and with all other persons. He was doubtless careful and zealous in her interest always. He never, so far as the testimony shows, claimed to have discharged his admitted debt to her. According to the clear testimony of Mr. Nickles, he in his mind set aside a mortgage of W. D. Barksdale drawn in his favor doubtless for convenience in making satisfaction of it and otherwise, as representing the bulk of her estate unaccounted for. With so careful a business man as the testimony shows him to have been, the fact that, while he filed

receipts and discharges from all the other distributees of the estate, he filed none from her, is indicative that he had not put all her money in her name or turned it into her bank account or paid it to her.

As plaintiff's counsel argued, he proceeded on the assumption which we are too prone to entertain that he would live long and could finish his settlement later. He died without warning before carrying out his generous and fair intentions toward his sister's affairs. His sudden death and the lack of acquaintance with her business affairs on the part of his sister unfortunately leaves some doubt as to the accuracy and completeness of my findings, but with the lights before me I must conclude, and so find, that plaintiff is entitled to recover against defendants as his administrators the amount of the judgment less the payments above found to have been proved. The judgment must bear interest from its date at 7 per cent. per annum. It might be equitable to credit the estate with some commissions for making loans, etc., but of this there is no proof.

I find that there is due plaintiff to the date of this report \$367.18.

Order.

Upon the call of the above-entitled action for trial, a motion was made by plaintiff's attorney that the issues in the case be referred to a referee for trial. It appeared to my satisfaction, from the statements of counsel for the plaintiff, that the trial of cause would require the examination and investigation of long and intricate accounts which would require considerable and very tedious work. In addition to counsel's statement, the plaintiff's attorneys have filed affidavits herein in confirmation of counsel's statement in regard to the trial requiring an investigation of long and intricate accounts. In addition to this, Mr. W. F. Nickles, cashier of People's Bank, has filed his affidavit to the same effect. It appears to me that this is a case which should more properly be referred to a special referee to try. It is therefore, on motion of Wm. P. Greene and D. H. Hill, plaintiff's attorneys, ordered that the issues raised by the pleading herein be, and the same are hereby, referred to T. Frank Watkins, Esq., of Anderson, S. C., to take the testimony and report to this court his findings of fact and of law.

Graydon & Graydon, of Columbia, for appellants.

D. H. Hill and Wm. P. Greene, both of Abbeville, for respondent.

FRASER, J. This is an action to enforce a judgment of the probate court, but involves an accounting between principal and agent. The case was put on calendar No. 1 by the plaintiff's attorney. Upon the call of the case for trial, the substituted plaintiff's attorney moved that the case be referred to a referee to take the account and report his findings thereon to the court. When the court found that the account was complicat-

ed and obscure, and that it involved an accounting between those standing in a fiduciary relation, the presiding judge referred the case to a referee.

[1, 2] I. This order of reference presents the first question for this court. The exception that raises this question cannot be sustained. This action is not an action on an account or judgment, but an action for accounting between principal and confidential agent. The account is complicated and obscure and presents a proper case for a reference to a referee.

II. Both principal and agent are dead. There was a judgment against the agent in favor of the principal. The agent was the general agent of the principal, and paid her money from time to time, but there is no satisfactory evidence to show that the payments were made on account of that judgment, and the referee and circuit judge were correct in so holding.

[3] This is just one of those unfortunate cases in which two perfectly honorable people, closely allied in blood and mutual confidence, have a part of their business in writing and part in parol. Death stops the parol evidence, and the writing stands.

The judgment is affirmed. Let the report of the referee and the order of the trial judge be reported.

GARY, O. J., concurs.

WATTS, J. I dissent. I think judgment should be reversed. It is a legal action pure and simple, and appellant has been denied substantial right in not having a trial by jury.

COTHRAN, J. [4, 5] I concur in this judgment, but think that the exceptions raising the question of the propriety of referring the case should be overruled, not upon the ground stated in the leading opinion: "This action is not an action on an account or judgment, but an action for accounting between principal and confidential agent," for the complaint shows that it was upon a judgment of the probate court, but upon the ground that the defendant's answer was practically a demand and an offer for an accounting, by which to demonstrate that the judgment had been paid. The defendant cannot therefore complain if the equitable issue tendered by him, involving, as was developed, a long and intricate account, and transactions between a principal and a confidential agent or trustee, was remitted for trial to a tribunal admittedly most capable of determining it. Particularly is this true where, as it appeared here, "it would be impracticable for an ordinary jury to comprehend and decide the issues correctly." *McCabe v. Mercantile Co.*, 106 S. C. 25, 90 S. E. 161.

(116 S. C. 282)

(108 S.E.)

STATE v. HERRON. (No. 10653.)

(Supreme Court of South Carolina. June 30, 1921.)

1. Criminal law \S 1170½(2)—Cross-examination of defendant as to testimony at coroner's inquest harmless in view of his denial.

In a homicide prosecution, action of court in allowing prosecution to cross-examine defendant as to his testimony at the coroner's inquest was not ground for reversal, where he denied having made a statement at the coroner's inquest, and no attempt was made to show that he had made such a statement.

2. Homicide \S 340(1)—Instruction held harmless in view of the facts.

In a homicide prosecution, instruction that the killing would be reduced from murder to manslaughter if committed immediately after provocation, but that it would be murder if defendant waited until the next day, if error in setting a limit to the cooling time, was harmless, where the killing was done immediately after the provocation.

3. Criminal law \S 1129(4)—Two assignments of error not included in one exception.

Two assignments of error should not be included in one exception.

4. Homicide \S 300(3)—Instruction on self-defense requiring actual danger held not error.

In homicide prosecution in which the defendant claimed to have killed deceased in self-defense, instruction on self-defense stating that there must be actual danger held not error, where court immediately thereafter stated that defendant had the right to rely on appearances.

5. Homicide \S 116(3)—Self-defense not available unless defendant actually believed that he was in danger.

Self-defense is not available in homicide prosecution unless defendant actually believed at the time of the killing that he was in danger; appearances known to be only appearances being insufficient.

6. Homicide \S 300(3)—Instruction as to defendant's duty to retreat held not error.

In a homicide prosecution, where court instructed jury that defendant had the right to act on appearances, it was not error to further charge jury that, "if there is a reasonably safe way to escape, then the defendant must retreat."

7. Criminal law \S 1170(1)—Defendant cannot complain of exclusion of evidence which would have damaged his case.

The defendant cannot complain on appeal of the exclusion of evidence which would have been damaging to his case.

8. Criminal law \S 763, 764(13)—Court should not state comparative values of direct and circumstantial evidence.

The court has no right to state the comparative values of direct and circumstantial evidence.

9. Criminal law \S 1172(2)—When instruction comparing values of direct and circumstantial evidence is reversible error.

Instruction that circumstantial evidence was just as good as direct evidence and sometimes better would have been reversible error if the case depended on circumstantial evidence, but was not reversible error in view of the fact that the killing was admitted and the defense rested solely on the defendant's direct evidence.

10. Criminal law \S 1137(3)—Defendant cannot complain of instruction given according to his request.

Where the court tried to charge the law as requested by defendant and succeeded fairly well in so doing, the defendant cannot complain of the instruction given.

Appeal from General Sessions Circuit Court of Aiken County; James E. Peurifoy, Judge.

Tom Herron was convicted of manslaughter, and he appeals. Affirmed.

John F. Williams, of Aiken, for appellant. R. L. Gunter, Sol., and William M. Smoak, both of Aiken, for the State.

FRASER, J. The appellant was charged with the murder of a man named Corbett. He was convicted of manslaughter. The appellant, Corbett, Huggins, Herron, Schofield, and a son of the appellant got into an automobile and went off to find some whisky. They found the whisky and drank it. Later in the day the party drove into the town of Salley, and in the automobile was Corbett, dead. Corbett's neck was broken, and his head showed a lick on the side, made with a blunt instrument.

It seems that at first there were conflicting statements, but the appellant now admits that he struck the fatal blow. While there is testimony to show that Herron and Corbett had been quarreling and several attempts to fight had been made, no one saw the fatal encounter. Herron admitted the killing and set up self-defense. The jury convicted him of manslaughter, and acquitted Huggins and Schofield, who were indicted with him.

[1] I. The first exception complains that his honor erred in allowing the solicitor to cross-examine the appellant, as to what he testified to before the coroner at the inquest. The fact upon which this exception is based does not appear in the record. Herron denied that he had made a statement at the coroner's inquest, and no attempt was made to show that he had. This exception cannot be sustained.

[2] II. The second exception complains of error in that his honor told the jury that, if the deceased had spit in the face of the appellant and appellant killed him then and there, it might reduce the killing from mur-

der to manslaughter, but that, if he waited until next day and then did his killing, it would be murder, because the slayer had had time to cool. While it may be that, if the killing had been delayed, his honor may not have had the right to set a limit to cooling time, still here whatever was done was done at once, and, even if it was error, it could not have affected the result. This exception is overruled.

III. The third exception includes two assignments of error: a. There must be actual danger. b. The defendant must "actually believe" that there was danger.

[3] It is contrary to rule to include two assignments of error in one exception. Considering the gravity of the case, we will consider both.

[4] (a) His honor did say there must be actual danger, but he immediately followed with a clear statement that one had the right to rely on appearances. This assignment of error cannot be sustained.

[5] (b) There was no error in charging the jury that the slayer must actually believe that he is in danger. A man cannot take advantage of appearances, that he knows are only appearances, to slay his fellow man. This assignment of error is overruled.

[6] IV. When the judge charged the jury (fourth exception) that the defendant had the right to act on appearances, as he did clearly, it is not error to say that, "if there is a reasonably safe way to escape, then the defendant must retreat." That clear statement modified the whole charge, and there was no error here.

[7] V. The appellant cannot complain (fifth exception) that his honor erred in excluding from the consideration of the jury the real evidence in the case. It was very damaging to the appellant.

[8, 9] VI. The sixth exception complains that his honor erred in charging that circumstantial evidence is just as good as direct evidence, and sometimes better. It is true that the trial judge had no right to state the comparative values of direct and circumstantial evidence, and, if this case depended at all on circumstantial evidence, a new trial should be ordered; but the case in no way depended upon circumstantial evidence. The killing being admitted, the defense rested solely on the appellant's direct evidence. There was no reversible error here.

[10] VII. The appellant cannot complain of error (seventh exception) in charging the law as to the effect of drunkenness on crime. His honor tried to charge the law as the appellant requested him to do, and we think he succeeded fairly well.

The judgment is affirmed.

GARY, C. J., and WATTS and COTHRAN, JJ., concur.

(116 S. C. 319)

McALISTER v. THOMAS & HOWARD CO
(No. 10666.)

(Supreme Court of South Carolina. June 30, 1921.)

1. Negligence \S 32(1)—Instruction on duty to licensee proper.

Where defendant's own requested charge conceded that plaintiff was a licensee, it was proper to modify that portion of the charge which stated that defendant's only duty was not to willfully or wantonly injure him, and impose on defendant the duty of reasonable care.

2. Damages \S 208(8)—Denial of nonsuit as to punitive damages proper.

In an action by a customer, who fell into an open elevator shaft in defendant's building, the denial of a nonsuit as to punitive damages was proper; there being evidence of defendant's recklessness.

3. Trial \S 345—Defects in form of verdict must be presented at time of publication.

A defect in the form of a verdict must be presented at the time it is published, and failure to do so waives the right to raise that matter later.

Appeal from Common Pleas Circuit Court of Greenville County; J. W. De Vore, Judge.

Action by R. E. McAlister against the Thomas & Howard Company. From a judgment for plaintiff, defendant appeals. Affirmed.

J. J. McSwain, of Greenville, for appellant.

H. P. Burbage and J. Robt. Martin, both of Greenville, for respondent.

GARY, C. J. This is an action for damages, alleged to have been sustained by the plaintiff through the wrongful acts of the defendant. The complaint alleges:

"That the defendant is a duly chartered corporation, and is engaged in business as a wholesale merchant; one of its main places of business being the city of Greenville, S. C.

"That on or about the 31st day of March, 1919, plaintiff was standing on the first floor of the building occupied by said Thomas & Howard Company, near the elevator shaft used by the latter in operating an elevator and hauling merchandise and customers and others thereupon. That while thus standing near said elevator shaft, around which was no guard, guard rail, chain, or other protection to prevent people from falling through, plaintiff moved backward to dodge a hand truck passing through the passage occupied by him, and, not knowing of the existence of the open elevator shaft, fell and plunged through and down said shaft a distance of 20 or 30 feet, and struck the hard surface below. That both of plaintiff's legs were broken, his right arm crushed and broken, and the bones of his foot horribly crushed and splintered.

"That plaintiff was standing near the elevator at the special instance and request of the

defendant, Thomas & Howard Company, its agents and employees, and was at the times aforesaid on his way to a point near said elevator at the request and suggestion of the defendant, Thomas & Howard Company, its agents and employees, where he was told and invited to go for the purpose of inspecting and purchasing a lot of merchandise," etc.

The defendant denied the allegations of the complaint, and by way of defense alleged:

"That the injuries sustained by the plaintiff were due in the first place to his own carelessness and negligence in stepping into an elevator shaft, which was well lighted and entirely obvious to the most casual glance, and that further and in addition the plaintiff was guilty of contributory negligence, which combined and concurred with the alleged negligence of this defendant as a proximate cause thereof, in that the plaintiff without taking heed and without availing himself of the abundant light, stepped into the open elevator shaft, thus causing his own injury."

The jury rendered a verdict in favor of the plaintiff against the said defendant for \$2,500.

[1] The defendant appealed upon exceptions the first of which is as follows:

"That the presiding judge erred in modifying and changing the first request of defendant, Thomas & Howard Company, so as to instruct the jury that the said defendant owed to plaintiff the duty to observe ordinary care, even if the plaintiff, without knowledge or consent of the defendant, went to a part of the building to which he had not been invited; whereas, in the circumstances outlined by the request, the only duty that said defendant owed to the plaintiff was not to injure him willfully or wantonly."

The first request was as follows:

"If the jury find that the plaintiff was not invited by any agent of the defendant, Thomas & Howard Company, to go with him from the first floor to the second floor to get the goods proposed to be bought, and if the jury find that the plaintiff without any such invitation, and without the knowledge or consent of any agent of the defendant, did go to a part of the building to which he had not been invited, then the plaintiff would be at most a mere licensee, while at such place to which he had not been invited. The owner of the premises owed no duty to such licensee."

It will be observed that the request was based upon the theory that the plaintiff, under the circumstances therein mentioned, was a licensee. It is therefore unnecessary to cite authorities to show that the request was properly modified.

[2] The second exception is as follows:

"That the presiding judge erred in refusing the motion of the defendant, Thomas & Howard Company, for a nonsuit as to the alleged cause of action for punitive damages, and erred in refusing the motion of said defendant for a directed verdict in its favor as to the alleged

cause of action for punitive damages, and in like manner in refusing a new trial upon said grounds, for the reason that there was no testimony whatever in the case from which it might legally be inferred that there was any recklessness or wantonness in the conduct of the said defendant, and to submit the issue of punitive damages was highly prejudicial to said defendant, and permitted arguments and considerations of damages calculated to mislead the jury."

This exception cannot be sustained, for the reason that there was ample testimony tending to sustain the allegations of recklessness.

[3] The third exception is as follows:

"That the presiding judge erred in refusing the motion for new trial on the ground that verdict was not responsive to the instructions, in that the verdict does not state whether it is for actual damages, or punitive damages, or for how much actual or how much punitive damages, and the jury disregarded the instructions of the court, and, having so disregarded instructions in one respect, it may be presumed to have disregarded the instructions in other respects, and for that reason the verdict should have been set aside and a new trial should have been granted."

It was the duty of the defendant's attorney to call attention to the form of the verdict, when it was published. By failing to do so he waived the right to raise the question presented by this exception. *Rhame v. City of Sumter*, 113 S. C. 151, 101 S. E. 832.

Affirmed.

WATTS, FRASER, and COTHRAN, JJ., concur.

(116 S. C. 307)

DENNY v. DOE et al. (No. 10662.)

(Supreme Court of South Carolina. June 30, 1921.)

1. Trial \S 83(2)—Permitting view of damaged automobile in rebuttal is within court's discretion.

The manner in which the trial shall be conducted is necessarily left in large measure to the discretion of the presiding judge, and his ruling in permitting the jury to view the damaged automobile after the close of defendant's evidence will not be reviewed on exception that it was properly evidence in chief and not in rebuttal, unless an abuse of his discretion appears.

2. Appeal and error \S 1064(1)—Exception to charge as indicating owner of automobile, and not car, was liable, not sustained, where no personal judgment was sought.

In an action to recover damages inflicted by an automobile, an exception that a portion of the charge was misleading as indicating that the owner of the automobile, and not the car, was liable, will not be sustained where no personal judgment against the owner was sought.

3. Trial \Leftrightarrow 194(7)—Exception that charge automobiles were meeting was on facts not sustained where appellant argued they were meeting.

An exception that a statement in the charge that the automobiles involved in the accident were meeting was a charge on the facts contrary to Const. art. 5, § 28, will not be sustained where appellant himself argued that they were meeting.

4. Highways \Leftrightarrow 183½, New, vol. 11A Key-No. Series—Automobile causing damage is liable under statute though it was being used without owner's consent.

The fact that an automobile had been taken without the owner's consent or knowledge, by his chauffeur for the trip on which it inflicted injuries on plaintiff's car, does not prevent holding the automobile liable under the statute for the damages inflicted by it.

5. Highways \Leftrightarrow 166—Statute imposing liability on automobile causing damage while being used without owner's consent is constitutional.

The statute making an automobile liable for damages inflicted thereby is constitutional even when making the automobile liable while being used without the owner's knowledge or consent.

6. New trial \Leftrightarrow 32—Improper remarks as to wealth of automobile owner do not require new trial where no personal judgment was sought.

It was not error for the trial court to refuse to grant a new trial for improper remarks by plaintiff's attorney concerning the wealth of the claimant of the automobile which caused the damage, where no personal judgment against the claimant was sought.

7. Appeal and error \Leftrightarrow 216(3)—Exception to charge on statute instead of suggested charge not sustained where suggested charge was not requested.

An exception to a portion of the charge in an action for damages caused by an automobile collision, alleging error in charging the jury (Civ. Code 1912, § 2167), when he should have charged that the automobile should be run on the safest side of the road under the conditions, will be overruled where no request was presented embodying the proposition contended for in the exception.

Appeal from Richland County Court; M. S. Whaley, Judge.

Action by L. A. Denny against John Doe and one Studebaker automobile which was claimed by George Morgan. Judgment for the plaintiff, and claimant appeals. Appeal dismissed.

O. T. Graydon and Cole L. Blease, both of Columbia, for appellant.

Cooper & Winter, of Columbia, for respondent.

GARY, C. J. The record contains this statement:

"This action was commenced by L. A. Denny against a certain Studebaker automobile and John Doe, the name of the owner being unknown. It was an action for damages done to the automobile of said L. A. Denny. The action was begun by the service of summons and complaint, in which action the said automobile was duly attached, and was replevied by the defendant by delivery of a bond in the sum of \$1,600."

The allegations of the complaint are as follows:

"(1) That plaintiff is a resident of the county and state aforesaid, and is the owner of one Hanson automobile, and that the defendant John Doe is a nonresident of the state of South Carolina, and lives and resides in one of the other states of the United States, upon information and belief, in the state of Florida.

"(2) That on or about the 28th day of August, 1920, one L. D. Bethel was driving the automobile of this plaintiff above described upon and along a public highway of Richland county, S. C., to wit, the Garner's Ferry road, and, while so operating the said automobile in a careful, prudent, and lawful manner, the defendant above named, his agents and servants driving and operating the said Studebaker automobile, bearing a Florida state license No. 495, above described, ran and smashed into the automobile of this plaintiff, and thereby broke, wrecked, and damaged the same, breaking the body, wheels, and other parts of the same.

"(3) That the injuries and damages to plaintiff's automobile were caused and occasioned on account and in consequence of the carelessness, recklessness, willfulness, and wantonness of the defendant, his agents and servants above named, in the driving and operation of the said Studebaker automobile, in that he operated and was driving the same at a high and excessive rate of speed and without keeping a proper watch and lookout for persons traveling this public highway, and in that he was operating and driving the said automobile in a willful, careless, and unlawful manner and in violation of the statute laws of South Carolina, and operating and driving the same upon the wrong side of the public highway, all to the injury and damage of this plaintiff in the sum of \$3,000."

The defendant George Morgan answered the complaint, denying the material allegations thereof, and for a first defense said:

"That the said car is the property of one George Morgan, and was on the night in question being run without the knowledge or consent of the said George Morgan by the chauffeur, and the said action of the chauffeur in so running the automobile was without the scope of his authority, and without the consent of the owner thereof, and that said George Morgan is not responsible for said accident in any way."

He also pleaded contributory negligence and contributory willfulness, and set up a counterclaim for \$500. The plaintiff made reply to the counterclaim.

The jury rendered a verdict in favor of the

plaintiff for \$600 actual damages, and the defendant appealed upon the following exceptions:

"(1) That the county judge erred in allowing the jury after the close of the defendant's case to leave the courtroom and view the automobile of plaintiff, it being respectfully submitted:

"(a) That such evidence was evidence in chief, and not in reply.

"(b) That counsel for the defense had no method of replying to such evidence at said time.

"(c) That looking at an automobile which had been damaged for several months was highly prejudicial to the defendant's case.

"(2) That his honor the county judge erred in charging the jury as follows: 'I mean negligence and carelessness on the part of the defendant, Mr. Morgan, through his agent, on account of the negligence or carelessness in which the car owned by Mr. Morgan was handled, and that the damage amounted to \$3,000'—it being respectfully submitted that said charge was not in response to the issues made in said case, and was highly prejudicial to the defendant, in that it led the jury to believe that Mr. Morgan was responsible instead of the car.

"(3) That his honor the county judge erred in charging the jury as follows: 'Our Supreme Court held that that applied where two automobiles were meeting one another, not where they were following one another. So this is a case where they were meeting each other and so applies'—it being respectfully submitted that said charge was a charge upon facts and in contravention of article 5, § 28, of the Constitution.

"(4) That his honor the county judge erred as a matter of law in refusing a new trial on the ground that under the admitted facts in the case the said automobile was taken without the knowledge or the consent of the owner and in violation of the law, and that no liability could attach thereto.

"(5) That his honor the county judge erred in refusing to grant a new trial on the ground that said act was unconstitutional in so far as the same attempted to apply to an automobile which being operated in violation of the state law and without the knowledge or consent of the owner.

"(6) That his honor the county judge erred in refusing to grant a new trial on the ground that the remarks of the counsel with reference to the wealth of Mr. Morgan were improper for the reason that the said case was not against Mr. Morgan, but against one Studebaker automobile.

"(7) That his honor erred in charging the jury section 2157 when he should have charged that a man should run his automobile on the side of the road which is safest under the conditions of a given case."

The exceptions will be considered in regular order:

[1] First exception: The manner in which the trial shall be conducted must necessarily be left in large measure to the discretion of the presiding judge; and his ruling is not subject to appeal, unless his discretion has

been erroneously exercised, which has not been made to appear in this case.

[2] Second exception: A sufficient reason why this exception cannot be sustained is that no personal judgment is sought against the defendant George Morgan.

[3] Third exception: This exception cannot be sustained for the reason that it is stated in the argument of the appellant's attorneys that the two cars were meeting each other.

[4] Fourth exception: This exception is disposed of by the following cases, which show that it cannot be sustained: *Bank v. Brigman*, 106 S. C. 362, 91 S. E. 832, L. R. A. 1917E, 925; *In re McFadden*, 112 S. C. 258, 90 S. E. 838; *Tate v. Brazier et al.*, 115 S. C. 337, 105 S. E. 413.

[5] Fifth exception: The authorities which we have just cited show that this exception cannot be sustained.

[6] Sixth exception: This exception must be overruled, for the reason that the plaintiff did not seek to recover a personal judgment against the defendant Morgan.

[7] Seventh exception: This exception must also be overruled, for the reason that the appellant's attorney should have presented a request, embodying the proposition for which they now contend.

Appeal dismissed.

WATTS, FRASER, and COTHRAN, JJ., concur.

(116 S. C. 298)

ADGER v. KIRK et al. (No. 10655.)

(Supreme Court of South Carolina, June 30, 1921.)

1. Will § 179—Prior will held revoked by subsequent instrument.

Where testatrix by will gave her husband power of appointment over one-half of the corpus of a trust fund, the husband's last will, which was executed in Tennessee with only two witnesses, is a revocation of a Georgia will, attested by three witnesses, not only generally but with respect to exercise of the power, though testatrix's will was executed in Alabama, where three witnesses are necessary.

2. Will § 70—Testamentary power may be exercised by will in accordance with laws of donee's domicile.

Where testatrix gave her husband power of appointment over one-half of the corpus of the trust fund, consisting of personality, the power of appointment could be exercised by a will of the husband executed according to the laws of his domicile, and it was not necessary where the laws of the domicile required only two witnesses that the instrument should be attested by three witnesses in accordance with the laws of the state wherein the will of testatrix was executed.

3. Wills ⇨75—Will held an exercise of a power of appointment.

Where the will of testatrix gave her husband power of appointment by will over one-half of the corpus of the trust fund, the husband's will stating that it was in the exercise of the power and authority vested in him constitutes an exercise of the power of appointment.

4. Wills ⇨704—In proceeding for construction of will giving power of appointment question of debts of donee cannot be raised.

In a proceeding for the construction of a will giving a power of appointment, the question of the debts of the donee cannot be raised.

5. Powers ⇨28—Property over which testator has power of appointment not subject to debts.

Where the will of testator's wife gave him power of appointment over one-half of a trust fund, such fund is not subject to his debts.

Appeal from Common Pleas Circuit Court of Charleston County; Frank B. Gary, Judge.

Suit by John B. Adger, as administrator d. b. n. c. t. a. of the estate of Mary L. F. Flinn, deceased, against Helen Octavia Kirk and others. From a decree for plaintiff which sustained exceptions of the Presbyterian Church in the United States to the report of the master, Helen Octavia Kirk and another appeal. Affirmed.

The following is the decree of the court below:

This is an action instituted by John B. Adger, as administrator d. b. n. c. t. a. of the estate of Mary L. F. Flinn, deceased, against Helen Octavia Kirk and others claiming an interest under the said will. He asks for the instruction of the court as to the proper interpretation of certain provisions thereof. The issues were referred to the master, who held several references, took testimony, and made his report. To this report exceptions are taken by the trustees of the General Assembly of the Presbyterian Church in the United States because, as they allege, the master erred in holding as a matter of law that the exercise by Harvey W. Flinn of the power of appointment in his will of 1908 was the only proper exercise of his said power, and in not holding that the power of appointment was properly exercised by his last will, in 1916, which was properly executed and probated under the laws of the state of Tennessee, where he resided.

J. Lindley Flinn, as executor of Harvey W. Flinn, also excepts because the report fails to provide for the payment of the debts of the said Harvey W. Flinn which are claimed against the executor of the estate of the said Harvey W. Flinn in the state of Tennessee.

As explanatory of the exceptions, it should be stated that the will of Mary L. F. Flinn, the will of which an interpretation is sought, was executed in the state of Alabama, in Jefferson county, and contains this preamble: "I, Mary L. F. Flinn, wife of the Rev. Harvey W. Flinn, of the city of Bessemer and county and state aforesaid," etc.

After making certain bequests, the will directs that, as to the remaining two-thirds of such rest, residue, and remainder, "I will and direct that the same be invested by my executors and the net income thereof paid to my husband, Harvey W. Flinn, for the full term of his natural life, and upon his death I direct my executors to pay over one-half of the corpus of this trust fund to such persons or for such estates as my said husband by his last will shall direct." This will had three attesting witnesses and was admitted to probate in Charleston county, S. C.

In 1908 the said Harvey W. Flinn, then residing in the state of Georgia, executed his will. It had three attesting witnesses. The laws of Georgia required only two. In unmistakable language he undertook to exercise the power of appointment above referred to. This will was admitted to probate in Charleston, S. C.

In 1916 Harvey W. Flinn, residing in Tennessee, executed another will, expressly revoking all prior wills by him made. It had two attesting witnesses. The laws of Tennessee required only two. It was admitted to probate in the state of Tennessee. This will contains this language: "Being of sound mind, in the exercise of the power and authority vested in me, do hereby make * * * hereby revoking any former will by me at any time made."

The trustees of the General Assembly of the Presbyterian Church in the United States were the beneficiaries under this last-attempted exercise of the power of appointment referred to.

The property that would go to the appointee under a valid exercise of the power is entirely personal property.

The questions that arise under the exceptions of the trustees of the General Assembly of the Presbyterian Church in the United States are:

(1) Was the will of Harvey W. Flinn made in Tennessee his last will?

(2) Did it revoke his former will, made in Georgia?

(3) Was it a valid exercise of the power conferred upon Harvey W. Flinn by the will of his wife made in Alabama?

Let us briefly consider the first question:

[1] The master finds that "this Tennessee will, executed before two witnesses, conforming to the laws of that state, is recognized as controlling the disposition of personality belonging to the testator, wheresoever situate. It is therefore both his 'last will' and his 'last valid will,' though not so recognized in reference to the power conferred under the will of Mary L. F. Flinn."

I agree with the master as to the first part of the proposition, to wit, that the Tennessee will was the "last will" and the "last valid will" of Harvey W. Flinn and disposed of his personal property wherever situated. The answer to the first question above stated is therefore in the affirmative. But I cannot agree with his conclusion that the Georgia will, though revoked in part, was not revoked in so far as it undertook to exercise the power of appointment.

It will not be questioned that the donor of the power had the right to prescribe the man-

ner in which the appointment should be exercised. She has directed that her executors pay over the trust fund in question "to such person or for such estates as my said husband by last will shall direct." It would indeed present a legal anomaly to hold that the Georgia will had been revoked and yet may do what can only be done by testator's last will.

My conclusion is that the Georgia will was revoked not only in part, but in toto. There should therefore be an affirmative answer to the second question before stated.

[2] Coming now to the third question, it may be said that the general rule is that, when a power of appointment is given, its execution is governed by the law of the domicile of the donee of the power. Especially is this true when the property affected is personal property. An apparent exception to this universal rule is presented by the case of *Blount v. Walker*, 28 S. C. 545, 6 S. E. 558. In this case our court held as a conclusion of fact that the donor of the power had inferentially directed that the exercise of the power of appointment should be according to the laws of South Carolina, and the court respected the donor's directions.

A careful reading of this case discloses a set of circumstances very different from those in the case before us. The principles announced in *Blount v. Walker* are not, therefore, necessarily applicable here. In that case the original testatrix was a resident of South Carolina, and her will was made in South Carolina. It deals with real estate in South Carolina, and her will was probated in South Carolina, and her estate was administered here. From these and other circumstances a divided court inferred that the intention of the donor was that the exercise of the power should be accompanied by the formalities of a South Carolina will. The original will provided that the appointment should be by the donee's "last will and testament duly executed."

There were some other circumstances in *Blount v. Walker* pointed out by Chief Justice McIver from which the intention of the donor was inferred. I shall not stop to recite them.

In the case before us the donor of the power was a resident of Alabama. Her will complied with the laws of both South Carolina and Alabama. The property affected is personal property.

We conclude that there are no circumstances surrounding the will of Mrs. Mary L. F. Flinn from which the court must infer that her directions or intentions were that the exercise of the power should be in accordance with the South Carolina law. And we conclude that there is no reason in this case to depart from the general rule that the power should be exercised in accordance with the law of the domicile of the donee of the power, if there is nothing from which to infer a different direction on the part of the donor.

[3] It is claimed that the words of the Tennessee will do not constitute an exercise of the power of appointment but I cannot take this view of the matter. In view of the recently filed opinion of our Supreme Court in *Price v. Ouiga Realty Co.*, January 26, 1920, 113 S. C. 566, 101 S. E. 819, I am constrained to hold that to conclude that the language of the Tennessee will was not a proper exercise of the

power of appointment would be taking a view that "is entirely too literal and technical." See the cases of *Bilderback v. Boyce*, 14 S. C. 528, *Moody v. Tedder*, 16 S. C. 557, and *Burkett v. Whittemore*, 36 S. C. 423, 15 S. E. 616.

There should, therefore, be an affirmative answer to the third question above stated.

The exceptions of the trustees of the General Assembly of the Presbyterian Church in the United States are, therefore, sustained and the report of the master is to that extent modified.

[4,5] The exceptions filed by J. Lindley Flinn as executor of Harvey W. Flinn's will cannot be sustained for several reasons:

(1) It is the will of Mary L. F. Flinn that is before the court for instruction.

(2) There is nothing in the record to show that there are creditors of Harvey W. Flinn who should be protected.

(3) The remainder over which Harvey W. Flinn is given the power of appointment is not a part of the estate of Harvey W. Flinn, but it passes under the will of the donor of the power. It could not, therefore, be held to respond to the debts of Harvey W. Flinn.

This is conclusively shown by the case of *Bilderback v. Boyce*, 14 S. C. at page 541. This exception is therefore overruled.

It is therefore ordered, adjudged, and decreed that the exceptions of the trustees of the General Assembly of the Presbyterian Church in the United States be, and the same are hereby, sustained, and to that extent the report of the master is modified.

It is further ordered that exceptions interposed by J. Lindley Flinn as executor, etc., be, and the same are, overruled.

Smythe & Visanska, of Charleston, for appellants.

Paul M. McMillan, of Charleston, and J. S. Verner, of Columbia, for respondent.

GARY, C. J. For the reasons therein assigned, the decree of his honor the circuit judge is affirmed.

WATTS, FRASER, and COTHRAN, JJ., concur.

(115 S. C. 386)

SMYTHE v. BRUNSON et al. (No. 10548.)

(Supreme Court of South Carolina. Dec. 20, 1920.)

1. Appeal and error \S 1010(1)—Finding sustained by evidence conclusive.

The trial court's finding in a law case, where sustained by sufficient evidence, is conclusive.

2. Vendor and purchaser \S 334(7)—Purchaser may not recover for shortage in grant where sale was in gross of a certain lot.

Where a lot was not sold by front foot or square foot, but the sale was in gross of the lot for a certain sum, the purchaser cannot recover of the vendor for the difference between the lot as described in the deed and the lesser amount shown by survey.

Appeal from Common Pleas Circuit Court of Greenville County; T. J. Mauldin, Judge.

Action by Ellison A. Smythe against George W. Brunson, Jr., and another, to recover for a shortage in lots sold described in a deed as having a 51-foot front, whereas the survey only showed 49.7 feet, in which Thomas Harrison, defendant's vendor, was served with notice to come in and defend title and he answered denying the allegations of the complaint. Reference was made to a master, his findings excepted to, and sustained. The court found that the evidence showed that the grant was not at so much per front foot or per square foot, but that the sale was of a certain lot for so much money, being a sale in gross, and refused compensation for the deficiency, and entered a decree dismissing the complaint, from which the plaintiff appeals. Affirmed.

The decree of the circuit judge was as follows:

This case came before me for trial upon exceptions by the defendants to the report of the master, to whom all issues of law and fact were referred.

The plaintiff is a purchaser of a part of what is known as the Heldman lot, conveyed to Heldman by McBee in 1850, and described in that deed as having a frontage of 140 feet on Main street, in the city of Greenville, at the southeast corner of Main and Broad streets. The entire lot was sold as the property of the estate of Heldman by the master and purchased by B. M. McGee, who afterwards sold 81 feet frontage to Alvin H. Dean, the same being on the corner of said streets. Dean sold same to one Harrison, and he sold 30 feet frontage to Gower and Houston and 51 feet frontage to B. H. Peace. The plaintiff claims the 51-foot lot through B. H. Peace. The 30-foot lot sold to Gower and Houston was at the corner of Main and Broad streets, and upon it they erected a brick building. Afterwards, the plaintiff, having acquired the lot adjoining it, the 51-foot lot fronting on Main street, began to build upon it, and discovered that between the Gower and Houston building and the lot next below the 51-foot lot, instead of a frontage of 51 feet, there was a frontage of only 49 feet 7 inches, a deficiency in frontage of 1 foot 5 inches. The plaintiff then brought this action against his grantors for damages for breach of warranty by reason of the deficiency in frontage. They vouched Harrison, and he Alvin H. Dean.

In the first place, it is pertinent to state that the conveyance to the plaintiff was not at so much per front foot or at so much per square foot; it was a sale of a certain lot for so much money, a sale in gross; and the rule in such case is that, where land is sold in gross, no compensation will be granted for a deficiency in the quantity conveyed, unless such deficiency is so great as to justify an inference of fraud or mistake equivalent to fraud. This can scarcely be said of a deficiency of 17 inches in a frontage of 612 inches, less than 3 per cent. Upon this ground I hold that the plaintiff is not entitled to recover.

But, assuming for the sake of argument that he is so entitled, it is evident that his recovery is dependent upon establishing, by the

greater weight of evidence, that the walls of the Gower and Houston building occupying the entire space conveyed to them are correctly located. Naturally, if the Gower and Houston building is over the line and upon the 51-foot lot claimed by the plaintiff, his first thought would be to sue them for the possession of the 1 foot 5 inch strip. He has not done so, and pitches his action upon the theory that the Gower and Houston building is properly located, and, their title antedating his, there has been a breach of warranty in his title. He must go further and show that the lots below him are properly located and are not impinging upon his 51-foot lot. The defendant contends that the Gower and Houston wall on Broad street is at least 1 foot 5 inches further down than it should have been, and that this error on their part has caused the encroachment upon the plaintiff's lot. The defendant has presented a formidable array of facts which convince me that their contention is correct, and I so find; at least they completely meet the plaintiff's effort, as was incumbent upon him, to show by the preponderance of the evidence that the Gower and Houston corner was properly located. Many years ago, shortly after Heldman went into possession of the entire lot, 140 feet front, he built a brick house at the Broad street corner. The front door was in the corner of the building, and steps were built extending into Broad street about 18 inches. The Broad street wall of the house was about 18 inches back of a line drawn from the corner of the lower step parallel with Broad street. At the lower corner of the house—that is, the corner on Broad street—a fence inclosing his garden was built. It began about 18 inches from this corner, and the space between the fence corner post and the house, really a part of the fence, was inclosed with two planks about 8 or 10 inches wide. The line of this fence as it extended down Broad street was in line with the corner of the steps referred to. Between the steps and the corner of the fence there were two cellar doors, opening upon Broad street and in the space between the Broad street wall of the house and a line extended from the center of the steps to the corner of the fence. At the lower corner of the lot, front on Broad street, there was erected by Heldman a stable, the front of which was flush with the fence. Heldman then occupied this space for nearly 50 years. After Alvin H. Dean sold off the front part of the lot to Harrison, he removed the stable and fence and built a brick storehouse. He purposely set back the front of this building 18 inches. This, in my opinion, is the explanation of the mislocation of the Gower and Houston building. When they bought, the old Heldman house was standing. They decided to tear it down and erect a new building. The front of the Dean building was on a line with the wall of the old Heldman house, and in building their Broad street wall Gower and Houston placed it where the old wall stood. The defendants are not responsible for this, and, if the plaintiff has any remedy at all, it is against Gower and Houston and not the defendants.

The findings of fact by the master inconsistent with the foregoing conclusions are reversed, the exceptions are sustained, and the complaint is dismissed.

Sirrine & Nettles, of Greenville, for appellant.

Cothran, Dean & Cothran, of Greenville, for respondents.

WATTS, J. This is an action brought against defendants Brunson and Peace, November 17, 1913, to recover \$445.46. These defendants served notice on Thomas Harrison to come in and defend the title. Within due time he answered, denying the allegations of the complaint. An order of reference was agreed upon and the case was heard by the master, who rendered his report June 12, 1917, finding the allegations of the complaint to be true and giving judgment for the plaintiff. To this report the defendant Thomas Harrison excepted and the case was heard by Hon. T. J. Mauldin, circuit judge, who filed a decree on July 21, 1919, sustaining the exceptions to the master's report and dismissing the complaint.

[1] The exceptions, six in number, impute error of fact and of law on the part of his honor. This being a law case, his honor's finding of fact must be sustained, as there is plenty of evidence to support his finding.

[2] The evidence shows that the lot was not sold by front foot or square foot. It was sold in gross for a certain sum. This case is controlled by *Jones v. Bauskett*, 2 Speers, star page 68, cited with approval in *Shuler v. Williams*, 112 S. C. 349, 99 S. E. 819, and by *Shuler v. Williams*.

All exceptions are overruled and judgment affirmed.

HYDRICK and FRASER, JJ., concur.

The CHIEF JUSTICE and GAGE, J., absent on account of sickness.

(116 S. C. 339)

DAWSON v. DELLA TORRE et al.
(No. 10675.)

(Supreme Court of South Carolina. June 30, 1921.)

1. Divorce \S 326—Divorce decree rendered in foreign state must be recognized in South Carolina.

Where decedent, who owned land in South Carolina, married in Maryland, a judgment of divorce rendered in Maryland on due service will be recognized in South Carolina, even though the courts of South Carolina cannot grant a divorce; for full faith and credit must be given by the courts of one state to judgments of another.

2. Dower \S 52—Divorce bars dower.

Where plaintiff, who was married in Maryland, in that state procured a divorce from her husband, who owned lands in South Carolina, such judgment of divorce, being binding on the South Carolina courts under the full faith and credit clause, will bar plaintiff from recovering dower in South Carolina lands of her former husband.

Appeal from Common Pleas Circuit Court of Charleston County; S. W. G. Shipp, Judge.

Action by Mary S. Dawson against Thomas Della Torre and another. From an order sustaining a demurrer to the complaint, and dismissing the same, plaintiff appeals. Affirmed.

The decree referred to follows:

This is an action for recovery of dower in certain property now owned by the several grantees and devisees of plaintiff's deceased husband, from whom she has been granted a divorce a vincule matrimonii by a court of general jurisdiction in the state of Maryland, where the plaintiff and her husband were married.

The case is now before me on a demurrer to the complaint. It is admitted by counsel for plaintiff that the divorce granted by the court in Maryland is valid and binding in that state, but it is claimed not to bind the defendant in this state, nor on plaintiff so far as her dower is concerned.

The complaint alleges facts which would entitle the plaintiff to dower in the premises described in the complaint if she had been the wife of the deceased husband at the time of his death or if she had not been legally divorced by the Maryland court in July, 1906.

The sole question therefore before me now is whether or not the judgment of absolute divorce granted by the court in Maryland as aforesaid is binding on the plaintiff herein to the extent of depriving her of her dower interests in the property of her deceased husband situated in South Carolina, where the husband had his legal residence at the time of his marriage to plaintiff on December 24, 1890, in the city of Baltimore, Md., until the date of his death on February 23, 1917.

The plaintiff alleges in her complaint, paragraph 8, "that said Dr. John L. Dawson, the defendant in said cause, having never had a domicile in Maryland and having been served only with process by appointment in a railroad station in Baltimore while passing through, was not subject to the jurisdiction of said court in Maryland, and was not bound in South Carolina by said proceedings in Maryland, and this plaintiff alleges that she has never remarried." This allegation is a mere conclusion of law. The fact that he was not a resident of Maryland and was served only while passing through the jurisdiction is not sufficient allegation of fact to show that the service was not good. If he had been brought into the jurisdiction under legal process in another action, he might not have been subject to process in that action wherein he was then served, but nothing appears here to show that he was not there of his own volition. Certainly there was no allegation tending to show a collusion, for that implies a fraud on the court; so, if the defendant in that action, Dr. Dawson, had come within the jurisdiction of the court for the purpose of placing himself within the jurisdiction or for the purpose of allowing himself to be legally served with process, it would have signified no collusion.

If the plaintiff was the legal wife of Dr. John L. Dawson at the time of his death, she

would now be entitled to all she claims in her complaint. But according to her own admissions, in her complaint and through counsel, she was not the legal wife of Dr. Dawson at his death nor had she been his wife since the decree of the court granting an absolute divorce in July, 1906.

Now then, since it has been established that these parties were divorced absolutely by a court of general jurisdiction in another state of the Union, this state and its courts are compelled to "give full faith and credit" to the judgment of such court in a sister state, and the only remaining question that could enter into our inquiry would be whether such court had jurisdiction of the cause and the parties.

In the case of *Thompson v. Whitman*, 18 Wall. 457, 21 L. Ed. 897, cited as authority in *McCreery v. Davis*, 44 S. C. 195, 22 S. E. 178, 28 L. R. A. 655, 51 Am. St. Rep. 794, we find the following language, to wit: "The record of a judgment rendered in another state may be contradicted as to facts necessary to give the court jurisdiction; and if it be shown that such facts did not exist, the record will be a nullity, notwithstanding it may recite that they did exist. Want of jurisdiction may be shown either as to the subject-matter of the person, or, proceedings in rem, as to the thing." In the same case it was held that the want of jurisdiction of the court by which a judgment is rendered in any state may be questioned in a collateral proceeding in another state, notwithstanding the provisions of the fourth article of the Constitution and the law of 1790, and notwithstanding the averments contained in the record of the judgment itself." Again, in *Hanley v. Donoghue*, 116 U. S. 4, 6 Sup. Ct. 244, 29 L. Ed. 535, cited in the case of *McCreery v. Davis*, supra, we find this language, to wit: "Judgments recovered in one state of the Union, when proved in the courts of another, differ from judgments recovered in a foreign country in no other respect than that of not being re-examinable upon the merits, nor impeachable for fraud in obtaining them, if rendered by a court having [competent] jurisdiction of the cause and of the parties."

That our state, aside from its duty under the federal Constitution, recognizes divorces granted by courts of other states, there can be no doubt. We find in our Criminal Code, § 381, relating to bigamy, the following, to wit: "Whoever, being married, and whose husband or wife has not remained continually for seven years beyond the sea, or continually absented himself or herself, the one from the other, for the space of seven years together, the one of them not knowing the other to be living within that time, * * * or whose marriage has not been annulled by decree of a competent tribunal having jurisdiction both of the cause and the parties, shall marry another person," etc. Again we find a provision very much similar in section 3754 of our Civil Code, relating to bigamous marriages, providing that marriages of persons having a husband or wife living are void, but adding a proviso as to "any person who shall be divorced." This statute was referred to in the case of *McCreery v. Davis*, supra, and the Supreme Court, in discussing it, said that, while there were no cases in our reports construing it, yet it was evidently meant to mean only "valid" divorces, and since neither the state of New York, where the mar-

riage was performed, nor the state of South Carolina, where one of the parties lived (the defendant), recognized as a cause for divorce that for which that divorce was granted, the statute would not avail anything. This language would indicate clearly that, had that divorce been granted on grounds recognized in New York, where the marriage was performed, and the court had had jurisdiction of the persons, this state would have recognized the judgment of the state granting this divorce. Now in the case at bar the marriage was performed in the state of Maryland, and the court granting the divorce was a court of the state of Maryland, and jurisdiction of the defendant had been acquired for he was served in the state of Maryland.

In the case of *Haddock v. Haddock*, 201 U. S. 567, 26 Sup. Ct. 527, 50 L. Ed. 868, 5 Ann. Cas. 1, Chief Justice White (then Associate Justice), in laying down certain propositions of law which he says were "irrevocably concluded by previous decisions of this court" goes on in his opinion, using this language, to wit: "It has, moreover, been decided that where a bona fide domicile has been acquired in a state by either of the parties to a marriage, and a suit is brought by the domiciled party in such state for divorce, the courts of that state, if they acquire personal jurisdiction also of the other party, have authority to enter a decree of divorce, entitled to be enforced in every state by the full-faith and credit clause. *Cheever v. Wilson*, 9 Wall, 108 [19 L. Ed. 604]."

It seems, therefore, well settled that where a marriage has been contracted in a state, and afterwards in that state where one of the parties is domiciled, a suit for divorce is begun and the other party is personally served, the judgment of that court is binding not only on the parties, but on every court in every state of the Union where that judgment is properly pleaded or admitted by the adverse party to exist.

The case at bar has all the essential elements which make the judgment of absolute divorce granted by the Maryland court valid and binding on the parties, their privies, and the courts of this state. Therefore I sustain the demurrer to the complaint in this action and dismiss the complaint, and it is so ordered.

Willis & Willis, of Baltimore, Md., and Mitchell & Smith, of Charleston, for appellant.

Henry W. Connor, Nathans & Sinkler, Jos. W. Barnwell, Ficken & Erckmann, and Wm. Henry Parker, all of Charleston, for respondents.

FRASER, J. The case contains the following statement:

"This is an appeal from an order sustaining a demurrer to the complaint and dismissing the complaint.

"The summons was served on December 15, 1917. The complaint is for dower in lands in South Carolina, and alleges that the plaintiff-appellant, Mary S. Dawson, was married to the late Dr. John L. Dawson at Baltimore, Md., on December 24, 1890, Dr. Dawson being and having been for many years a resident of Charleston, S. C., and the plaintiff and her hus-

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band, after the marriage, resided in Charleston together as the place of their matrimonial domicile until the 10th of May, 1908, at which time the plaintiff and Dr. Dawson separated and lived apart; that on May 17, 1906, plaintiff filed a bill for divorce against Dr. Dawson on the ground of abandonment in the circuit court for Hartford county, in the state of Maryland, and a decree for divorce was granted by said court on July 24, 1906, and the plaintiff has never remarried; that after the marriage and during the period of coverture the said Dr. Dawson was seized in fee and possessed of certain described pieces of real property in Charleston, S. C., and there died, a resident of Charleston, on February 23, 1917, and the terms of his will and his disposition of his property to certain of the defendants are set forth.

"The answers of the defendants who answered vary in form, but all set up the divorce granted by the Maryland court as an affirmative defense. On February 16, 1918, the plaintiff demurred to this affirmative defense set up in the various answers on the ground that it did not state facts sufficient to constitute a defense. Thereafter, on April 11, 1918, the defendants Della Torre and Lynah, executors and trustees, served a demurrer to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. Still later and five days before the hearing, to wit, on November 27, 1918, the defendant Charleston Library Society served an oral demurrer to the complaint. The specifications of all these demurrers are hereinafter set forth in this record.

"The main issue was whether or not the Maryland divorce operated as a bar to plaintiff's right to dower in land in South Carolina of which Dr. Dawson was seized during the coverture.

"The demurrers were argued before Judge Shipp at Charleston, and on January 8, 1919, his decree was filed sustaining demurrer to and dismissing the complaint. From that decree this appeal is taken."

[1, 2] The issue is simple and entirely free from complications. The marriage was contracted in Maryland under the laws of that state. In Maryland marriages are contracted in contemplation of their possible dissolution for certain causes. The Maryland court, after personal service on the deceased in Maryland, and upon what we must assume a proper showing that a cause existed, dissolved the marriage relation. While this was contracted in view of a possible dissolution, the South Carolina court could not have dissolved it for any cause. The South Carolina courts must, however, under the full-faith and credit doctrine, recognize the dissolution affected by the same authority that made it. It is hard to imagine a clearer case for the operation of the full-faith and credit doctrine than this. Something has been said about a collusive service on the husband. If true, it can do the plaintiff no good. She cannot profit by her own wrong. So far as this case is concerned and between these par-

ties, the status, and everything connected with it, was absolutely destroyed, so far as this record shows.

The cases on the subject are many, and to review them would be unprofitable. It generally is unprofitable. In *McCreery v. Davis*, 44 S. C. 195, 22 S. E. 178, 28 L. R. A. 655, 51 Am. St. Rep. 794, the divorce was void for want of jurisdiction, and the statements largely dicta. Marriage is frequently spoken of as a contract, but it is not. It has no element of a contract. It is a status. A man and woman may contract to assume the status of marriage, but, whether it be regarded here as a contract or a status, the result is the same. The contract was rescinded. The status was destroyed. Our statutes, both civil and criminal, recognize the fact that the relation may be destroyed absolutely. A divorce, meaning a valid divorce, of course, relieves the parties from the penalty of bigamy, under the criminal law, and under the civil statute allows the parties to marry again. There is no limit to the number of remarriages in the statute. To allow an accumulation of dowers, founded on the same right, is a *reductio ad absurdum*. They are all good, or none. The Maryland divorce of a Maryland marriage destroys dower, and the judgment appealed from is affirmed.

Let Judge Shipp's decree be reported.

GARY, C. J., and WATTS, J., concur.

(116 S. C. 258)

CLARENDON COUNTY v. SUMTER COUNTY. (No. 10635.)

(Supreme Court of South Carolina. June 30, 1921.)

Counties \Leftarrow 14—General Assembly cannot permit portion of territory voted to be annexed to another to remain in county from which taken.

Where, under Civ. Code 1912, §§ 643, 646, 647, the taking certain specified territory from C. county and annexing it to S. county and changing the county lines accordingly was duly petitioned for and submitted to an election, and the result of the election, in favor of such proposition, was duly certified to the authorities, including the General Assembly, but, after the election had been declared, individuals in a certain portion of the affected area procured a survey to be made of a line which would leave them in C. county, the General Assembly had no power, in view of the express limitation in Const. art. 3, § 1, requiring submission to vote of the question of alteration of any existing county line, to permit such portion of the territory voted to be annexed to S. county to remain in C. county and to alter accordingly the lines voted for, as for the General Assembly to exempt a certain subarea, part of the original area, from the result of the proceedings regularly had, would be to alter county lines in a manner not first submitted to vote.

Petition in the original jurisdiction of the Supreme Court by Clarendon County against Sumter County to determine between adjoining counties the question of annexation of territory. Question answered.

Du Rant & Ellerbe, of Manning, for petitioner.

Lee & Moise, Jennings & Harly, and Clifton Wood, all of Sumter, for respondent.

COTHRAN, J. This is a petition in the original jurisdiction of this court of exceptional character, the nature of which will be understood from the following statement:

The record for appeal is singularly barren of dates. At some time prior to January 1, 1921, a petition was filed with the Governor of this state, signed by more than one-third of the qualified electors residing in a certain portion of Clarendon county, adjoining Sumter county, praying that the county line between these two counties be so changed as to annex said territory to Sumter county.

Upon the filing of this petition, the Governor, in compliance with section 647, vol. 1, Code of Laws A. D. 1912, appointed commissioners; the commissioners selected surveyors; the surveyors surveyed, located, and marked the proposed change of line, platted the same, and filed certified plats with the secretary of state and the respective clerks of court of the two counties.

The election was then ordered by the Governor in the area proposed to be annexed, upon the question of annexation, which election was held according to law and resulted in a majority of more than two-thirds in favor of the proposition which was submitted. The result was duly certified to the election commissioners of Clarendon county, by them to the secretary of state, and by him to the General Assembly at its session which convened in January, 1921.

It is conceded that all of the constitutional and statutory requirements up to this point were complied with. No protest or objection was made. The election was fairly and duly held in compliance with the law.

After the election had been declared certain individuals residing in the lower portion of the area procured a survey to be made of a line which would exclude them from said area and leave them in Clarendon county.

At the session of the General Assembly held in January, 1921 (Acts 1921, p. 283), an act was passed annexing to Sumter county the area originally proposed to be annexed, but provided for an exemption from the terms of the act of a certain subarea included within the lines of the private survey referred to. This exemption was made, however, subject to the following proviso:

"Provided the Supreme Court holds in a proceeding to be forthwith instituted in said court by the counties of Sumter and Clarendon, or

either of them, any taxpayer thereof, that the General Assembly is empowered in altering existing county lines to do other than to provide for the annexation of the whole of the territory voted to be cut from one county and annexed to another, and if the General Assembly may permit the portion of territory embraced within the survey and shown upon the plat filed with the Secretary of the State to remain in the county from which it was proposed to cut the same. If the court holds that the General Assembly is without power to do other than provide for the transfer or reject the whole of the territory voted to be cut from one county and annexed to another, then the whole of the territory embraced within said survey and plat, and first described in this act, shall become and be annexed to the county of Sumter."

The act referred to was followed by a concurrent resolution dated March 5, 1921, by which this court was requested to hear and determine the issue between the two counties, expressed tersely in this form:

"Has the General Assembly the power to permit a portion of the territory voted to be annexed to the county of Sumter, to remain in the county of Clarendon, and to alter the lines accordingly?"

To the solution of this question we will therefore address ourselves.

While article 7, § 7, of the Constitution purports to be an express grant to the General Assembly of the power to alter county lines, such grant was unnecessary, as the General Assembly under article 3, § 1, was fully vested with general legislative power, included in which is the power to alter county lines. That section, however, is an express limitation upon the power, and provides:

"That before any existing county line is altered the question shall first be submitted to the qualified electors of the territory proposed to be taken from one county and given to another."

The "question" to be submitted is the alteration of the existing county line. The question of the alteration of a line cannot be submitted without defining the extent of the alteration. The election is held upon the question of altering the county line as thus defined. The election determines whether or not this particular defined alteration shall be approved, and all parties, including the General Assembly, are bound by the result. Section 643 (by reference in section 646) declares it to be the duty of the General Assembly at its next session to effectuate the result of the election. Of course, the General Assembly cannot be compelled to perform its duty, but it certainly is not authorized by the Constitution or any statute to exercise any legislative, judicial, or political power in conflict with the limitations contained in the section under review. To sanction the

exemption by it of a certain subarea, a part of the original area, from the result of the proceedings which have been regularly had, would be necessarily to sanction the alteration of the county line in a manner which had not been "first submitted to the qualified electors of the territory proposed to be taken from one county and given to another." If it had the power to diminish the area upon which the election had been had, it has the power to increase it, a power which we assume would not be claimed or conceded by any one. The majority who prevailed in the election are entitled to the fruits of their victory; they are entitled to the area as it was proposed and voted for, and not in a truncated form. It is impossible to say what would have been the result of an election upon the line as indicated by the exemption of the subarea. It is conceivable that an election would have been favorable to the original proposition and not to an amended one. Hence it cannot be said that the amended line has the approval of the electors; it certainly can be said that it has not been submitted to them as the Constitution requires.

It follows that the line as fixed in the survey of July 15, 1920, first described in the act of 1921, as per plat made by the surveyors named, and filed, is the county line, and that the proviso of the act purporting to exempt from the operation of this act certain territory therein described is void.

It is so adjudged.

GARY, C. J., and WATTS and FRASER, JJ., concur.

(116 S. C. 262)

STATE v. BROWNING. (No. 10629.)

(Supreme Court of South Carolina. June 30, 1921.)

1. Criminal law §913(1)—Order for new trial reversed where judge not within prohibited degree of relationship to deceased.

Where an order granting new trial to defendant convicted of murder was made on the sole ground that the trial judge was connected with deceased within six degrees by consanguinity or affinity, but, under Civ. Code 1912, § 3555, subd. 6, the judge was not within the sixth degree, but the seventh, the order must be reversed.

2. Jury §75(2)—Excuse of juror in capital case for business reasons not erroneous.

In a prosecution for murder, where the trial court, over the objection of defendant, excused a juror solely for business reasons, defendant's peremptory challenges being exhausted before the jury was complete, there was no reversible error in such erroneous exercise of discretion by the court.

Watts, J., dissenting in part.

Appeal from General Sessions Circuit Court of Orangeburg County; T. J. Mauldin, Judge.

James P. Browning was convicted of murder, and from order granting his motion for new trial, the State appeals. Order reversed, and judgment of conviction affirmed.

The order granting new trial, directed to be reported, follows:

This is a motion for a new trial, the defendant having been convicted of murder, with a recommendation to mercy at the September, 1919, term of the court of general sessions in and for the county of Orangeburg.

The motion is based upon certain grounds, herewith attached and made a part of this record and marked "Exhibit A."

This matter turns mainly upon the alleged relationship between Mrs. Sophie Fairey, the mother of the deceased, and the judge presiding at the trial, Hon. Hayne F. Rice.

It is admitted by the state that the mother of the deceased is related in the sixth degree to the judge who tried the case and that the deceased was related within the seventh degree to the trial judge.

I know that Judge Rice was not cognizant of this fact during the trial, and if he had been he would not have heard the case. It appears that the state was assisted in the prosecution of the case by Thomas M. Raysor, Esq., of the Orangeburg bar, but was employed by Mrs. Laurie D. Fairey, the widow of the deceased, and paid by her as administratrix of the estate of the deceased.

This case impresses me with the conviction that my duty under the facts revealed before me is to grant a new trial, however much I regret the necessity therefor.

It is therefore ordered: That a new trial be, and the same hereby is, granted.

A. J. Hydrick and T. M. Raysor, both of Orangeburg, for the State.

Wolfe & Berry and A. H. Moss, all of Orangeburg, for respondent.

WATTS, J. The respondent was convicted of murder with a recommendation to mercy before Judge Rice and a jury at the September term of court, 1919, for Orangeburg county, and sentenced by the judge to life imprisonment. From this judgment and sentence defendant appealed.

Later, to wit, September, 1920, a motion was made in the court of general sessions before Judge Mauldin, for a new trial, which was granted. Thereupon the state appealed and challenges the correctness of this order granting a new trial. This order should be set out in the report of the case.

The moving papers in the case show conclusively that the motion was made solely on the question of relationship of Judge Rice to the deceased, the contention being that they were connected within six degrees by consanguinity or affinity, and Judge Mauldin based his order on this.

It is true that he uses the language, "under the facts revealed before me"; but no reference can be drawn that he acted other than on the question of relationship, and did not exercise his discretion in granting a new trial on after-discovered testimony. That was not before him and was not considered by him, and the question solely to be considered by this court is: Was he in error in granting the new trial on the question of connection by affinity of Judge Rice and the deceased, and the widow of the deceased?

Under the showing made, Judge Rice is not within the prohibited degree; he is not related within the sixth degree. When he tried the case, he did not know of any relationship or affinity; the order of Judge Mauldin shows that.

[1] It is absurd to hold that because a judge is related to one who employs a lawyer to prosecute a criminal case he is disqualified to try the case. It will be seen by the exhibits in the case that Judge Rice, under section 3555, subd. 6, vol. 1, Code of Laws 1912, was not within the sixth degree, but seventh, and the order must be reversed, for this reason, and also under the opinion of Mr. Justice Gary (now Chief Justice) in *Ex parte Hilton*, 64 S. C. 205, 41 S. E. 978, 92 Am. St. Rep. 800, and authorities therein cited. The appeal from Judge Rice involves two questions: Was it error in excusing the juror Jernigan without legal ground or excuse over and against the objection of the defendant, and alleged error in the charge of his honor?

[2] The first will have to be sustained. His honor was in error in excusing the juror. Under the affidavit submitted it did not show that he was excused, under the statute; it did not show that he was sick, but solely for business reasons. Ordinarily a judge can excuse in the exercise of his wise discretion, although he ought to be careful and not allow private interests to prevail over public good; a public duty to serve on the jury is more important to good citizenship than to inconvenience a private enterprise, by having one of its employees absent serving on the jury, thereby temporarily inconveniencing the business.

The statute says who shall be excused, leaving the other excuses to the wise discretion of the judge, and ordinarily that will not be interfered with. But in the instant case the defendant acting within his rights, being tried for a capital offense, protested and objected to the juror being excused. His peremptory challenges were exhausted before the jury was complete, and he was prejudiced, possibly, thereby. This is not on all fours with *State v. Tidwell*, 100 S. C. 248, 84 S. E. 778, but the reasoning of the case is applicable here, and the excusing of Jernigan, against the objection of the defendant, was an erroneous exercise of discretion and is

a reversible error. This exception should be sustained. The other exception is overruled, being without merit. The order of Judge Mauldin is reversed. Judgment of circuit court is affirmed, that being the conclusion of the majority of the court.

Affirmed.

GARY, C. J. I concur in reversing the order of Judge Mauldin, but dissent as to the reversal of the judgment on the ground of error in excusing the juror Jernigan.

FRASER, J., concurs.

COTHRAN, J. I concur in the dissenting opinion of the Chief Justice in both propositions announced by him.

1. It is questionable whether the deceased in a homicide case should be considered a "party to the cause" (a criminal prosecution of the slayer), within the purview of article 5, § 6, of the Constitution, to such an extent as to disqualify the presiding judge on account of his relationship to him; though delicacy would suggest the exercise of his discretion in respecting the spirit of the provision. In no possible aspect could the mother of the deceased be so regarded. It appears here that the deceased was related to the presiding judge in the seventh degree; the mother, of course, in the sixth degree. Judge Mauldin was in error therefore in holding that Judge Rice was disqualified by reason of his relationship to the mother of the deceased.

2. As to the action of Judge Rice in excusing the juror Jernigan: That was an incident in the conduct of the court within the sound discretion of the presiding judge, and cannot be assigned as reversible error, if error at all, unless it be shown, as it has not been, that this discretion was abused and that the defendant was actually prejudiced thereby.

"The court may in the exercise of its discretion excuse jurors for reasons which constitute no legal grounds of disqualification or exemption but which are purely personal to the juror, such as * * * when his business interests would be materially injured. * * * It is uniformly held that whether a juror shall be excused is a matter resting within the sound discretion of the court, the exercise of which will not be interfered with unless it is clearly shown to have been abused to the actual prejudice of the complaining party." 24 Cyc. 260; *State v. Whitman*, 14 Rich. 113; *State v. Gill*, 14 S. C. 410.

In the last-named case the court says:

"It does not appear that his right of peremptory challenge, which, it must be remembered, is a right to reject and not to select jurors (*State v. Wise & Johnson*, 7 Rich. 412), was in any way abridged, and we are at a loss to conceive how the discharge of these jurors, even if it had been illegal or irregular, could

(108 S.E.)

operate to the prejudice of any of the rights of the defendant."

The case of Omaha R. Co. v. Beeson, 36 Neb. 361, 54 N. W. 557, is referred to in 24 Oyc. 261, as announcing the principle in very clear terms:

"There is a wide distinction between the retention of an incompetent juror and the excusing of one who is competent. In the former case the law presumes prejudice to the complaining party, but in the latter it will be presumed that the jurors who tried the case possessed all of the necessary qualifications and that action of the court, if erroneous, was without prejudice."

The judgment of this court in my opinion should be a reversal of the order of Judge Mauldin in the appeal instituted by the state and an affirmation of the judgment of the circuit court in the appeal instituted by the defendant.

(116. S. C. 263)

BAILEY v. FREE AND ACCEPTED MASONS OF SOUTH CAROLINA.
(No. 10639.)

(Supreme Court of South Carolina. June 30, 1921.)

1. Specific performance ⇨ 28(2)—Indefinite contract to make lease not specifically enforced.

A contract to make a lease, indefinite as to when the lease was to commence, as to the period of the lease, and as to everything except the amount to be paid per month, could not be specifically enforced.

2. Associations ⇨ 18—One trustee cannot make contract unless other trustees approve or confirm it.

One of several trustees of a fraternal organization cannot make a contract to execute a lease unless the other trustees approve or confirm it.

Appeal from Richland County Court; M. S. Whaley, Judge.

Action by J. W. Bailey against the Free and Accepted Masons of South Carolina. Decree for defendant, and plaintiff appeals. Affirmed.

The letters referred to in the opinion are as follows:

"Bennettsville, S. C., Aug. 26, 1919.

"J. W. Bailey, Columbia, S. C.—My Dear Sir: Your letter of the 7th inst. was not overlooked, but, on the contrary, received the most careful consideration. I delayed my reply in order to confer with other trustees before giving you an answer. I have not yet heard from all, but am satisfied from information at hand that three things are reasonably certain:

"1st. They will ask more rent for your store.
"2d. They will give you preference, provided you are willing to pay as much as others are

offering. (We have a reliable offer to lease for 1, 2 or 3 years at \$75.)

"3d. They will give you a lease for one, two or three years at \$75 per month.

"You have been prompt in your payments, and a very satisfactory tenant in every way, but the trustees cannot, in justice to the Masons of the state, whose agents they are, continue your rent at \$50 longer, since they have a written offer from a responsible person of \$75.

"I trust you may see your way clear to increase your rent. Seventy-five dollars does not mean so much now as fifty did when you moved into the building.

"In case you are not willing to pay the increased rent, consider your notice to vacate from this date, and we shall expect the from the expiration of the time allowed you by law. On the other hand, if you desire to pay the \$75, you may go ahead and make the changes you expect to make, and they, the trustees, will give you a written lease for the desired time, as soon as practical.

"Trusting that I have made the position of myself and the trustees plain, I am, with best wishes,

"Yours respectfully, E. J. Sawyer,

"G. Sec. for the Trustees."

"Columbia, S. C., Sept. 2, 1919.

"Mr. E. J. Sawyer, Bennettsville, S. C.—Dear Sir: Your recent letter in reference to the renting of the property which I now occupy has been received. Replying, would say that I am exceedingly sorry that you find it necessary to raise the rent when my present time is out, and especially so because of the fact that another man would try to get possession by offering a higher figure. I have had it pretty hard during the and the war, but have always, as you know, paid the rent promptly.

"I have worked hard to build up a business, and now, or at the end of my present contract, to move would be disastrous. Under the circumstances. I will have to accept your offer, and do accept the same at a higher rental—the figures named, \$75 per month.

"I hope that when your board meets, it will take my case under consideration and if possible made a reduction, especially as it would have a prompt and reliable tenant. Any consideration that the board might make would be very much appreciated by

"Yours very truly,

J. W. Bailey."

"Columbia, S. C., March 1, 1920.

"Mr. E. J. Sawyer, Bennettsville, S. C.—Dear Sir: Inclosed find check, fifty dollars (\$50.00), rent for store for the month of February. According to our contract made some time ago, whereby I am to get a lease for a period of not over three years, paying therefor as rent seventy-five dollars (\$75.00) per month, I am now asking that you have the said lease made out and executed for the period of three years. The payment of seventy-five dollars per month is in case I be given the lease. Unless the lease is given, as I understand, I would only have to pay fifty dollars per month until the year ends. However, I am asking for a fulfillment of the contract heretofore agreed upon, viz. a three years' lease at the rate of

seventy-five dollars per month. Please attend to this matter as soon as possible.

"Your very truly, J. W. Bailey."

Notice to vacate at end of year was given by letter dated April 20, 1920, as follows (omitting addressees, etc.):

"This is to notify you that the Free and Accepted Masons of South Carolina will wish possession of their premises now occupied by you on Washington street, Columbia, S. C., at the expiration of the calendar year, and this is to notify you to vacate said premises on or before December 31, 1920, so that we may secure possession of same on January 1, 1921.

"We are giving you notice now, so that you may have ample time to make arrangements to secure other premises should you so desire.

"Yours very truly, E. J. Sawyer,

"Gen. Sec. F. & A. M. of S. C."

"March 17, 1920.

"Yours of the 1st instant inclosing check for \$50.00, which you state is rent for the month of February, duly received.

"By reference to our correspondence, particularly my letter of August 28, 1919, you will see that you were advised that the rent would be \$75.00 per month after the termination of your lease on December 31, 1919. This proposition was accepted by you in letters to me of date September 2d and 6th.

"Unquestionably your tenancy would have expired December 31, 1919, except for our agreement to allow you to continue in the building at \$75.00 per month. This rental of \$75.00 per month is for one year only. In my letter of August 28th, above referred to, I advised you that we had a reliable offer to lease for one, two or three years at \$75.00 per month, and stated that I felt reasonably certain that the trustees would give you a lease for one, two or three years at \$75 per month. I had no authority to make the lease without the sanction of the trustees and your letter of reply stated no specific time, but expressed your willingness to pay \$75.00 per month.

"Your rent at \$75.00 per month began January 1st. You have made two remittances of \$50.00 each through error or misapprehension on your part, and there is now due a balance on account of rent of \$50.00, and \$75.00 will be due April 1st as rent for the month of March.

"Unless you let us have promptly check for \$50.00 covering the arrearage in rent in accordance with the above we will be forced to take steps to protect the Free and Accepted Masons of South Carolina, whom we represent. In addition to the correspondence above referred to, on or about the 5th of November I saw you personally and advised you that the matter of renting the building had been taken up by the full board of trustees, that they had an offer from Mr. I. S. Leevy, of Columbia, S. C., at \$180.00 per month for the first and second floors of the building, with the exception of a portion of the first floor now occupied by a barber shop, and also the small brick building in the rear, and that the trustees had decided to give you the refusal of the building at the rental of \$180.00 per month for a term of one, two or three years. This proposition you declined.

"On November 7th I notified you in writing that the trustees had leased the store occupied by you to Mr. I. S. Leevy, and they desired you to give him possession by January 1, 1920, and that this was in addition to previous notice.

"As you declined to vacate the building we have given the matter further consideration and as your tenancy may have ripened into one from year to year, we prefer for the present to make no issue, but to allow you to retain the store during the present calendar year at what you claim to be the agreed rental of \$75.00 per month.

"I will thank you to let me have a reply at once, together with check to cover the balance due.

"Yours very truly, E. J. Sawyer, G. Sec."

"March 19, 1920.

"[Omitting address.]

"Yours of the 17th inst. to hand. Replying would say that I find that the time of the beginning of my lease is as you say, the first day of January, 1920. I am, therefore, in accordance with your request inclosing my check for the difference due you—\$50.00.

"Now, as to the length of my lease, you are in error in saying that it is only for one year. In your offer of date August 28, 1919, you distinctly stated that if I accepted your offer 'the trustees (for whom you were acting) will give you a written lease for desired time, as soon as practical.' In the same letter, and as your third condition of the offer, you said, 'They will give you a lease for 1, 2 or 3 years,' giving me by that the option of saying what length of time the lease should be. You will remember in the presence of three persons, in November, I told you that I would take a lease for three years, and was ready to sign. One of the three persons referred to was the Reverend N. F. Haygood. But you have never submitted a lease for me to sign, and I wrote you that I wanted a lease made out for three years. Your offer of the 28th of August never having been withdrawn, I having accepted the said offer, had the right to name the time. I am contending for the three years' lease, as you offered, and hope that you will, without further delay, present the same for my signature, so that I may have same recorded, although your letters and mine show without a doubt that I am entitled to the place for three years, and that was and is my understanding from the offer you made and which I accepted.

"Really, I cannot understand your attitude as gathered from your last letter. I mean to carry out to the letter my promises and cannot understand why you would now try to side-step your definite propositions. Business men can only proceed along definite lines, if they hope to succeed. Hoping that I have made my position clear as to my determination and what I shall expect of you in the carrying out of your contract, I am,

"Yours truly,

J. W. Bailey."

Letter dated March 24th:

"Yours of the 19th inst., inclosing check for \$50.00 balance on rent of store for the months of Ja. and Feb., 1920, has been received. Replying to what you said about a three years' lease, I wish simply to say that I made you no offer of a lease for any time, in my letter of

August 26, 1919, nor at any other time. In that letter I made it plain that I had no power to lease the building without the authority of the board of trustees, and then told you what I thought was 'reasonably certain' they would do. Soon after I told you that I had made a mistake about the reliable offer of \$75.00, that it was more, and advised you against making any expensive improvements, as I did not know what action the trustees would take. Yes, I remember distinctly that the first conversation I had with you in Nov. was on the occasion when I presented to you in writing the conditions on which the trustees had agreed the night before to give you a three years' lease, which lease you declined, and Mr. I. S. Leevy accepted. Is that not business men proceeding along definite lines? I am sorry that you cannot understand my attitude as secretary of the trustees. I have tried to make it plain, but as I am not in the brain-furnishing business, I shall have to remain,
Your misunderstood friend,
"E. J. Sawyer, Secy."

Letter of October 24, 1919:

"Mr. E. J. Sawyer—My Dear Sir: Your very kind letter of the 21st inst. received. I have no proposition to make to them. I have not had any dealings with the trustees; don't know who the trustees are—all my business transactions have been with you and I accepted your proposition for a \$75.00 per month rental some time ago. Now, if you think that you can make some reduction on the price agreed upon, and that my presence would help you in this matter, I will be very glad to be on hand. Any consideration you may give me in this matter will be highly appreciated by
"Yours truly,
J. W. Bailey."

The exceptions referred to in the opinion are as follows:

The plaintiff now appeals, on the following exceptions:

(1) Because his honor Judge Whaley erred in confirming the finding of the master that the appellant did not accept in its entirety the offer of respondent as made in its letter of August 26, 1919, in that the letter of appellant dated September 2, 1919, shows on its face an unconditional and absolute acceptance.

(2) Because his honor erred in confirming the finding of the master that appellant did not attempt to accept the other condition until March 1, 1920, and that was too late to have effect. When the appellant, by his letter, demanded a three-year lease, the error being:

(a) No such defense was pleaded.

(b) Respondent was not and could not have been injured by such delay, even were it true, the evidence being that the demand was made orally in November, 1919.

(c) That appellant was of the opinion that the contract to pay \$75.00 per month for a term of years begun March 1, 1920, in which case he deemed demand for such lease of that date the proper time to make demand.

(3) His honor erred in holding, further, that the letter of E. J. Sawyer of August 26, 1919, did not contain an unqualified offer, but was subject to the ratification of the trustees, the error being:

(a) In that the letter itself shows that it was the act of the trustees, through its secretary, and not one of the trustees has ever repudiated his act.

(b) In that it contained an unqualified offer to rent the building, and that the letter of acceptance made a binding contract.

(c) In that the letter of E. J. Sawyer and the answer thereto of J. W. Bailey made an absolute contract, and his honor erred in not so holding.

(4) Because the letter of E. J. Sawyer was substantially to its acceptance by the appellant, ratified by the trustees, in accepting the \$75.00 per month, and said board of trustees are now estopped from claiming that there was no contract.

N. J. Frederick and W. N. Graydon, both of Columbia, for appellant.

Nelson, Gettys & Mullins, of Columbia, for respondent.

WATTS, J. This is an appeal from a decree of County Court Judge Whaley on the following statement:

"This action was commenced in the Richland county court on the 4th day of August, 1920, by J. W. Bailey, the appellant herein, against Free and Accepted Masons of South Carolina, for the specific performance of a contract to make a lease, which contract was entered into by the appellant and respondent, by letters set forth herein. Respondent, Free and Accepted Masons of South Carolina, by its answer, denied making the contract.

"The cause was referred to the master of the court, to hear and determine all the issues of law and fact, and report the same to the court. The master found against the appellant. Exceptions were duly taken by the appellant from the findings and rulings of the master, which exceptions are hereinafter set out.

"The exceptions were heard by his honor Judge Whaley, who by his decree, dated November 12, 1920, overruled appellant's exceptions, sustained the master's findings, and went further and found that there was no contract at all between the parties."

The exceptions, four in number, impute error and ask reversal. All of the exceptions are overruled.

[1, 2] The contract relied on and for which specific performance is sought is indefinite as to everything, except as to the amount to be paid per month; indefinite as to when it was to commence. There was not a meeting of minds on this. It is silent as to the length of the lease, and one trustee could not make such a contract unless the other trustees approved or confirmed it. There is no evidence in the case that this was done, and the facts all show that his honor's decree is correct.

Affirmed.

GARY, C. J., and FRASER and COTH-RAN, JJ., concur.

(116 S. C. 277)

WILLIAMS v. METROPOLITAN LIFE INS. CO. (No. 10644.)

(Supreme Court of South Carolina. June 30, 1921.)

1. Evidence \S 334(4)—Death certificate admissible to establish facts stated therein except where plainly not within knowledge of person making certificate.

A certificate of insured's death consisting of local registrar's certificate of death under the Vital Statistics Act of 1914 and certificate of physician who attended insured in his last illness, or a certified copy of such certificate of death, is admissible in action upon the policy to establish matters therein required to be recorded when within the knowledge of the person making the certificate, but is not admissible to establish matters not within the knowledge of such person and plainly appearing to have been impossible to have been within his knowledge; the evidence in such case being hearsay.

2. Evidence \S 334(4)—Physician's certificate inadmissible to establish duration of disease shown by certificate not to have been within physician's knowledge.

In action on life policy, medical certificate signed by physician who attended insured in his last illness was not admissible to establish duration of the disease where the certificate showed that such fact could not have been within such physician's knowledge.

Appeal from Common Pleas Circuit Court of Spartanburg County; R. W. Memminger, Judge.

Action by T. J. L. Williams, as administrator of the estate of Lizzie Harland, deceased, against the Metropolitan Life Insurance Company. Judgment for defendant, and plaintiff appeals. Reversed, and new trial ordered.

Carson & Tinsley, of Spartanburg, for appellant.

Carlisle & Carlisle, of Spartanburg, for respondent.

COTHRAN, J. Action by plaintiff, as administrator of the estate of Lizzie Harland, to recover the amount of a policy of insurance upon the life of her husband, Harvey Harland, she being the beneficiary named in the policy and having died after the death of the insured.

The defense was fraudulent representations by the insured in reference to his health and treatment by a physician. The particular point of attack was that the insured had had for a period of several years a chronic disease of the kidneys, interstitial nephritis, and in his application for insurance had stated to the contrary.

[1, 2] The defendant offered in evidence a certain certificate purporting to be a record of the death of the insured, which was made up of a certificate of death signed by

the local registrar under the Vital Statistics Act of 1914 (29 Stat. [Ex. Sess.] p. 29) and a medical certificate of death signed by the physician who attended the insured in his last illness. This certificate, compound of the two certificates as stated, is such as is required by the acts and the regulations of the State Board of Health. It, or a certified copy, is admissible in evidence to establish the matters therein required to be recorded when within the knowledge of the person making the certificate. Matters not within his knowledge and plainly appearing impossible to have been within his knowledge are subject to the objection applicable to all hearsay evidence. In the medical certificate the physician who was called in on November 18th and attended the insured until his death on November 30th certifies to the duration of the alleged disease, a fact which the certificate shows could not have been within his knowledge. This matter being a vital point in the controversy, the circuit judge was in error in allowing the statement of the physician as to the duration of the disease to go to the jury.

The judgment of this court is that the judgment of the circuit court be reversed, and a new trial ordered.

GARY, C. J., and WATTS and FRASER, JJ., concur.

(116 S. C. 272)

MORGAN v. MORGAN et al. (No. 10642.)

(Supreme Court of South Carolina. June 30, 1921.)

1. Deeds \S 54—Retained by grantor ineffective for want of delivery.

Where father, who had executed deeds conveying land to his children, retained possession of the land and continued to exercise the rights of proprietorship over it, and continued to hold deeds, the deeds were ineffective; there having been no delivery.

2. Deeds \S 59(4)—Held not delivered notwithstanding recordation.

Where father executed deeds conveying land to children, delivered deeds to son-in-law with directions to send them to a clerk for recordation, with instructions that deeds with bill for recording be returned to the father, and where deeds after recordation were in fact returned to the father, who kept deeds and remained in possession of the land, there was no delivery, notwithstanding recordation, it being apparent under the circumstances that the father did not intend the deeds to become effective until after his death.

3. Deeds \S 194(5)—Record of deed presumptive evidence of delivery.

The record of a deed is presumptive evidence of delivery, but such presumption may be rebutted.

4. Deeds \Leftrightarrow 58(2)—Delivery a matter of intention.

The delivery of a deed is a matter of intention.

Appeal from Common Pleas Circuit Court of Lancaster County; Edward McIver, Judge.

Action by Adam Morgan against W. L. Morgan and others. Judgment for plaintiff, and defendants appeal. Affirmed.

The following is the decree referred to in opinion:

The plaintiff sues to set aside four deeds, one to each of the defendants, his children. His cause of action is that they are clouds on his title to land described therein; that the record interferes with his management of his financial affairs; that they discriminate against other children of his by his present wife, and against her, and he asks the court to clear the record of them. They were made on November 22, 1913, and entered of record October 21, 1914. The plaintiff, who can neither read nor write, says he does not know how they got on the record; that his son, W. L. Morgan, one of the defendants, at that time was his bookkeeper, attended to his correspondence, sent his papers to the clerk for record, issued and signed his bank checks, etc. They are recorded, however, and one of the defenses of the defendants is that plaintiff had them recorded as an evidence of his intention to deliver them. At the time of the commencement of this action, and before the referee, the plaintiff had the deeds; he offered them in evidence, and swore that he found them in his trunk, where he had put them a few days before after their execution.

[1] He said he had never authorized any one to take them from the trunk and record them; that whoever did so acted without authority. There is no attempt to contradict his evidence that he never parted with the possession of any of the land, but always exercised every right of proprietorship over it, always paying the taxes, though in the name of the defendants. It is also uncontradicted that, although three of the defendants, W. L. Morgan, Edna Morgan Mungo, and Bessie Faile, are all married and for periods ranging from three to eight years, have lived away from plaintiff, none of them, even after their anger at their father for his second marriage, ever demanded possession of the land or rents thereon until their answer in this case. Therefore they were not in possession of the land; they were not in possession of the deeds. Did the plaintiff intend to deliver the deeds? Did he intend to part with title to his land, and deprive himself of his sovereignty over it as owner? The witness Gardner swears as to what he said at the time the deeds were made. In substance it was: "I am a sick man; I am accustomed to having these spells; one of them may prove fatal; I want to arrange my affairs so that if such fatality occurs it will not be necessary for surveyors to be running lines over my lands, so I am going to make these deeds to my four children in order that a plan may exist for the division of my land." The deeds were made; nothing was paid him; he took them in his pos-

session; he has them in his possession now. None of the facts are contradicted. What do they prove? What inferences must be drawn from them? I only hold one, and that to be that he was executing the deeds with the common understanding among the laity they might operate as a will at his death, and that he did not deliver them.

[2] Did he subsequently do so? The defendants undertake to prove so by L. M. Mungo, the husband of the defendant, Edna Morgan Mungo. What did he say? That in 1915—clearly an error, because the deeds were recorded in 1914—the plaintiff after some preliminary remarks told him (Mungo) "to take the deeds and send them to Paul Moore, clerk, and tell him to record them and send them, and the bill for recording back to me" that he (Mungo) took the deeds, sent them to Paul Moore, and directed them to send them back to plaintiff, and that he had not seen them since. Bessie Faile, another of the defendants, says she was at her father's house when the deeds came back to him, and he instructed her to tell W. L. Morgan to send Mr. Moore a check for the recording fees. The plaintiff denies so instructing Mungo, as well as the statement of Bessie, but, admitting them to be true, what do they prove? Only that plaintiff made of Mungo his agent for sending the deeds to the clerk to be returned to him after they were recorded. They were returned to him; therefore this testimony negatives any idea of any intention on the part of the plaintiff to deliver the deeds to the defendants.

[3,4] The deeds were recorded, it is true, and the record of a deed is presumptive evidence of delivery, but it is subject to rebuttal, and when the party claiming the delivery of a deed because it is recorded explains the matter in which the deed was entered of record, and his explanation shows that the grantor did not intend to deliver the deed, the presumption ought not to be allowed to avail him because he knew that the grantor did not intend to deliver the deeds by entering them of record. In this instance Mungo knew plaintiff had not relinquished control of the deeds, because he ordered them returned to him and they were returned. Here there was no act of delivery, unless the recording be so held. Did the plaintiff intend to deliver the deeds and part with the title to his lands? Delivery is a matter of intention; it cannot be in the absence of it. The plaintiff testified that he was 50 years old. In 1913, when the deeds were executed, 7 years ago, he was 44. Did he at that age intend to deprive himself of his entire property, worth \$50,000 according to him, and leave himself bereft? I cannot think so; therefore I hold that there was no intention to deliver the deeds, and that they were never delivered. Such parts of his pleadings in the case of Carson Company against Adam Morgan et al. as contradict his evidence here as competent is properly before the court. They seem to have been stricken out; the case was never tried; therefore no formal examination of him was had. If they are out of the record, they are not a part of it; if he made a contradictory statement, it could be proven by the person in whose presence he made it. He swore that the alleged pleadings were not read to him. L. M. Mungo, the notary appearing

to probate, testified after Morgan, and did not say that he read or explained the paper to him; therefore there is doubt if Morgan knew what was in the paper to which he made his mark. But if he did, it was, at most, a contradictory statement made in legal terms, the significance of which he likely did not know, and in preparing his defense in another case, and cannot overcome the evidence in his favor here. My conclusion is that there was no delivery of the deeds, and that the record should be expunged of them. *Shute v. Shute*, 82 S. C. 264, 64 S. E. 145; *Johnson v. Johnson*, 44 S. C. 364, 22 S. E. 419. It is therefore, on motion of Harry Hines, Esq., plaintiff's attorney, ordered, adjudged, and decreed that the deeds of Adam Morgan, the plaintiff, to W. L. Morgan, Ora Morgan, Bessie Morgan, now Bessie Morgan Faile, and Edna Morgan, now Edna Morgan Mungo, recorded in the office of the register of mesne conveyances for Lancaster county on the 21st day of October, 1914, in Deed Book M, pages 386, 385, 386, and 387, respectively, be, and the same are hereby, canceled and set aside and adjudged to be of no legal force and effect, and the clerk of court is directed to mutilate said deeds, and write upon the books where they are recorded the declaration that the said deeds were mutilated, and that their record shall be of no force whatsoever.

R. El Wylie, of Lancaster, for appellants.
Harry Hines, of Lancaster, for respondent.

WATTS, J. For the reasons assigned by his honor, Judge McIver, it is the judgment of this court that the judgment of the circuit court be affirmed.

GARY, C. J., and FRASER and COTHRAN, JJ., concur.

(116 S. C. 280)

STATE v. CASEY. (No. 10650.)

(Supreme Court of South Carolina. June 30, 1921.)

Criminal law §94(2)—Denial of new trial for newly discovered evidence held error.

In prosecution for murder, denial of new trial on the ground of newly discovered evidence that deceased made threats against defendant while on the way to defendant's house and that at such time he had a pistol on his person held error; such testimony not being merely cumulative, and being of a character that might have affected the jury in its consideration of the case.

Appeal from General Sessions Circuit Court of Spartanburg County; Thomas S. Sease, Judge.

Dwynell Casey was convicted of murder, and from the judgment and sentence and from order denying motion for new trial, he appeals. Order reversed, and new trial granted.

Nicholls & Wyche and Bomar, Osborne & Brown, all of Spartanburg, for appellant.

I. O. Blackwood, of Spartanburg, for the State.

WATTS, J. The defendant was indicted, tried, and convicted of murder with recommendation to mercy at the April term of court for Spartanburg county, 1920, before Judge Sease and a jury, and sentenced to life imprisonment. The defendant-appellant thereafter made a motion before Presiding Judge McIver for a new trial on after-discovered testimony, which motion was overruled. From this order and from the judgment and sentence, appellant appeals. The exceptions question the correctness of Judge Sease's charge and the order of Judge McIver.

By the order of Judge McIver he finds:

"That the defendant and his counsel used due diligence, that they did not at the former trial have notice of the testimony now desired to be offered, and that the testimony is material. I am, however, of the opinion that the evidence submitted is largely cumulative, and would not probably have changed the verdict of the former trial, and for this reason it is ordered that the motion for a new trial be, and the same is hereby, overruled."

In view of the facts developed at the trial before Judge Sease and the nature and character of the new testimony, it is more than merely cumulative. It is material to the issue. It shows the mental attitude of the deceased, and substantiates and corroborates the defendant and his witnesses as to whether deceased was armed or not at the time he was on the premises of the defendant when the killing occurred.

It is of vital importance in the case, and might have vitally affected the jury in the consideration of the case, if it had been presented for their consideration at the trial. It might have influenced and probably might have changed their view, taking into consideration other facts and circumstances. As to whether or not deceased made threats while on his way to defendant's home, and whether or not he then had a pistol on his person, is evidence now of newly developed facts, and not merely cumulative, as held by his honor, and, even if merely cumulative, might have changed the result if submitted to the jury.

His honor was in error in not granting a new trial.

The exceptions from the trial before Judge Sease are not considered. The exceptions from the order of Judge McIver refusing a new trial are sustained, and his order reversed, and new trial granted.

New trial.

GARY, C. J., and FRASER, J., concur.
COTHRAN, J., disqualified, having been of counsel in the case.

(151 Ga. 732)

BOOTH et al. v. FLOYD. (No. 2358.)

(Supreme Court of Georgia. July 15, 1921.)

(Syllabus by the Court.)

1. Trial \S 193(2), 253(8)—Wills \S 324(3)—Issue of undue influence properly withdrawn, in absence of evidence of undue influence; instruction withdrawing issue of undue influence not expression of opinion that will was executed; instruction held not to withdraw evidence of mental incapacity.

The court did not err in withdrawing from the jury the question whether the mind of the testatrix was unduly influenced in making the will, as there was no evidence tending to show that it was.

(a) Nor was the language of the court in withdrawing such issue error, as being "an undue expression of opinion on the execution of the will." There was no evidence to authorize a finding that the will was not executed according to the provisions of Civ. Code 1910, \S 3846.

2. Evidence \S 322(1) — General reputation that testatrix was addicted to drug habit held hearsay.

Nor was it error to exclude evidence offered as to the general reputation of the testatrix as being addicted to a drug habit.

3. Sufficiency of evidence.

There was ample evidence to authorize the jury to find that the mental capacity of the testatrix at the time the will was executed was such as to enable her to have a decided and rational desire as to the disposition of her property.

4. Refusal of new trial proper.

A new trial was properly refused.

Error from Superior Court, Walton County; Andrew J. Cobb, Judge.

Proceeding by Charles S. Floyd, executor, to probate will of Margie A. Harris to which Mrs. M. L. Booth and another filed a caveat. Judgment for the proponent, and the caveators bring error. Affirmed.

Charles S. Floyd, as the nominated executor in an instrument purporting to be the last will of Mrs. Margie A. Harris, deceased, after having the document probated in common form, was cited at the instance of Mrs. M. L. Booth and Mrs. Emma Bird, heirs at law of Mrs. Harris, to probate the same in solemn form. He duly undertook to do this, and Mrs. Booth and Mrs. Bird filed a caveat on the grounds:

(a) Mrs. Harris, "at the time of making said pretended will, was not of sound and disposing mind and memory."

(b) She "did not execute the said pretended will freely and voluntarily, but was moved thereby by undue influence and persuasion over her by Mrs. Alice Rockmore; and it is therefore not the will of the deceased."

(c) "For that also said pretended will was not executed in the manner required by law."

(d) "Said will is null and void, in that it disposes of land belonging to the estate of James B. Harris, deceased, in which the said Margie Harris had only a life estate."

The purported will was executed in November, 1916, and Mrs. Harris died in April, 1917. In the second item of the instrument she gave one-fourth of her entire estate, after the payment of debts and expenses of administration, to the six named children of her deceased son. The third item was as follows:

"I hereby give and bequeath to my beloved daughter, Alice Rockmore, who has cared for me during the declining years of my life, all the residue of my estate, or three-fourths of the same after payment of the debts and expenses of administration."

The document was probated in solemn form in the court of ordinary at the May term, 1918, and an appeal was entered by Mrs. Booth and Mrs. Bird to the superior court, where, upon the issues submitted to the jury, a verdict was rendered in favor of the propounder, setting up the writing to be the last will of Mrs. Harris. Mrs. Booth and Mrs. Bird moved for a new trial on the following grounds:

(1-3) That the verdict was contrary to evidence, without evidence to support it, etc.

(4) "Because the court erred in withdrawing from the consideration of the jury the question of undue influence, and limiting the jury in their investigations to the objections that the will was not executed in the manner prescribed by law, and that Mrs. Harris at the time she made the will did not have sufficient mind to make the will."

(5) "Because the court charged the jury as follows: 'I charge you, gentlemen of the jury, that under the view of the evidence as it appears to me, there is not sufficient evidence for you to sustain the objection of undue influence; and therefore you will limit your investigation to objections that the will was not executed in the manner prescribed by law, and that Mrs. Harris, at the time she made the will, did not have sufficient mind to make the will.'"

(6) "Because the court erred in ruling out of evidence, or not permitting the same to be read to the jury, the depositions of Annie Couch and Dr. F. P. Hudson that said witnesses knew the reputation of Mrs. Margie Harris as a morphine eater, or one addicted to the habit. This evidence, as movants claim, would show the extent of the morphia habit [the reputation of it?] reaching as far as six to eight miles, and the propounder having shown by some of his witnesses that they were right there close in Loganville, and had not even heard that there was such a thing as the testatrix taking morphine; this being contradictory and in rebuttal."

A new trial was refused, and the movants accepted.

J. H. Felker, of Monroe, for plaintiffs in error.

R. L. & H. C. Cox, of Monroe, for defendant in error.

FISH, C. J. (after stating the facts as above). [1] 1. Even if the fourth ground of the motion for new trial was good as to form, a careful examination of the evidence in the record clearly shows that the court did not err in excluding from the jury the issue as to undue influence alleged to have been brought to bear upon the testatrix and causing her to execute the will. There was no evidence submitted that would authorize the jury to find in favor of the contention of the objectors that the will was executed by reason of undue influence.

2. In excluding the objection of undue influence for lack of evidence to support it, the court used this language:

"You will limit your investigation to objections that the will was not executed in the manner prescribed by law, and that Mrs. Harris, at the time she made the will, did not have sufficient mind to make the will."

In the fifth ground of the motion it is complained:

"That the use of the words, 'at the time she made the will,' was an undue expression of opinion to the jury on the execution of the will, and had a tendency to cause the jury to believe that the court considered that the will was properly executed."

The point here raised is not meritorious. There is no evidence in the record which would have authorized the jury to find that the paper was not executed according to the formalities prescribed by the statute in this state (Civil Code 1910, § 3846) for the execution of wills. The uncontradicted evidence showed that Mrs. Harris signed the writing as her will, and that it was attested and subscribed in her presence by three competent witnesses. It follows that, even if the language used by the court was inapt, it was not cause for a new trial.

Nor did the instruction here excepted to tend to exclude from the consideration of the jury all evidence of the condition of the mind of Mrs. Harris when the paper was executed.

[2] 3. The court did not err in refusing to permit to be read to the jury the "depositions" of certain witnesses referred to in the sixth ground of the motion, as to the reputation that Mrs. Harris was addicted to a drug habit. Such depositions were inadmissible as being hearsay, if for no other reason.

[3, 4] 4. While there was evidence tending to show that Mrs. Harris "was not of sound and disposing mind and memory" at the time the will was executed, there was abundant evidence to the contrary, and the fact in that respect was for the jury's deci-

sion; and the court did not err in refusing to set aside their verdict in favor of the proponent.

Judgment affirmed.

All the Justices concur.

(151 Ga. 706)

BLACKSTONE v. NELSON, Warden.
(No. 2457.)

(Supreme Court of Georgia. July 13, 1921.)

(Syllabus by the Court.)

1. Habeas corpus ~~§~~4—Cannot be substituted for motion for new trial, writ of error, or other remedial procedure.

"The writ of habeas corpus cannot be substituted for a motion for new trial, writ of error, or other remedial procedure, or be used as a remedy for the review of alleged errors in the trial court." Especially is this true where the issues raised in the habeas corpus case are the same as raised and passed upon at the trial, and no exception is taken thereto.

2. Habeas corpus ~~§~~32—Judgment overruling demurrer in criminal case, when not excepted to, held the law of the case on habeas corpus.

Where one was indicted under a statute which by demurrer was assailed as unconstitutional and void, and the demurrer is overruled, and no exception is filed to such judgment, and where the defendant on conviction and sentence filed a motion for new trial, which he subsequently voluntarily withdrew, and where later he presented a petition for habeas corpus, attacking the statute under which the indictment was found, on the same grounds as set up in the demurrer to the indictment, the court did not err on the hearing, under the pleadings and the evidence, in remanding the defendant to the custody of the officer having him in charge.

Error from Superior Court, Tift County; R. Eve, Judge.

Habeas corpus by Edwin Blackstone against Green Nelson, Warden of the Chain Gang. Judgment remanding petitioner to custody of the Warden, and the petitioner brings error. Affirmed.

John Henry Poole, of Tifton, for plaintiff in error.

R. S. Foy, of Sylvester, for defendant in error.

HILL, J. [1, 2] Edwin Blackstone was indicted, tried, and convicted of a misdemeanor, under an act approved August 17, 1918 (Acts 1918, p. 275), known as an act relating to venereal diseases. The particular provision of the act alleged to have been violated was as follows:

"It shall be unlawful for any one infected with these diseases, or any of them, to expose another to infection."

When the case was called for trial in the lower court, the defendant filed a demurrer to the indictment, attacking the act of 1918 as unconstitutional and void, for a number of reasons set out in the demurrer. The demurrer was overruled, and this judgment was unexcepted to. The case proceeded to trial, and the defendant was convicted and sentenced by the court to imprisonment in the chain gang for a period of six months. The defendant made a motion for new trial, which was dismissed on the movant's own motion.

In the present case Blackstone filed his petition for habeas corpus against Green Nelson, warden of the chain gang of Tift county, alleging that Nelson had the plaintiff confined in the chain gang by virtue of an invalid judgment and sentence. The indictment and the statute upon which it was based were attacked upon substantially the same grounds as set up in the demurrer to the indictment. Nelson answered that Blackstone had demurred to the indictment at the time he was tried, and that the demurrer was overruled and no exception was taken to that ruling. The dismissal of the motion for new trial was prior to the filing of the petition for habeas corpus. The foregoing facts were supported by proof and admitted by Blackstone. After hearing evidence the judge of the trial court remanded Blackstone to the custody of Nelson, the warden of the chain gang. To that judgment the plaintiff excepted.

The plaintiff relies upon the case of State Board of Medical Examiners v. Lewis, 149 Ga. 716, 102 S. E. 24, as sustaining his proposition that the judgment overruling his demurrer to the indictment is not binding in this case; but the facts of that case are different from the present one. In the present case there has been a solemn adjudication of the question raised by the demurrer that the act of 1918, *supra*, was not constitutional for the reasons alleged in the demurrer, which reasons are the same as set up in the present petition for habeas corpus, and that judgment was unexcepted to, and is therefore the law of the case. In such circumstances the defendant is bound by the former judgment, which has never been reversed (compare *Griffin v. Eaves*, 114 Ga. 65, 66, 39 S. E. 913), and he cannot now substitute the writ of habeas corpus for a motion for new trial, or other similar remedial procedure, to be used as a remedy for the review of errors alleged to have been committed by the trial court. *Harrell v. Avera*, 139 Ga. 340, 77 S. E. 160. Only in cases where the judgment of conviction is void can it be attacked by habeas corpus. The plaintiff has had his day in court, where it was adjudged that the act which he now attacks for the second time as being unconstitutional was held to be constitutional and valid.

In the cases relied on by him no attack

was made on the statute under which the defendants were convicted, as being void, as in the present case, and no judgment was rendered in those cases holding that the statute was valid. The defendant had an available remedy, by motion for new trial (which he voluntarily withdrew), of testing the constitutionality of the act of 1918, and having failed to pursue the remedy which he had for that purpose, and permitted the judgment of the court, holding the act to be valid, to stand unreversed, he will not be permitted now to proceed by habeas corpus to again test the question as to whether the act of 1918 is invalid or not.

Under the pleadings and the evidence in the case, we see no error in the judgment remanding the plaintiff to the custody of the warden of the chain gang of Tift county.

Judgment affirmed.

All the Justices concur.

ATKINSON and GEORGE, JJ., concur in the judgment of affirmance, on the ground that the law is not unconstitutional for any of the reasons assigned.

(27 Ga. App. 313)

HOWARD v. STATE. (No. 12542.)

(Court of Appeals of Georgia, Division No. 1.
July 26, 1921.)

(Syllabus by the Court.)

1. Criminal law \S 938(1) — New trial not granted for new evidence not likely to change result which could have been procured by due diligence.

The alleged newly discovered evidence is not of such a character as would probably produce a different verdict upon another trial of the case. Furthermore, it appears from all the facts of the case, as disclosed by the record, that this evidence could have been secured before the case was submitted to the jury, by the exercise of due diligence on the part of the accused and her counsel.

2. Criminal law \S 918(10, 11) — Prejudicial remarks of court not ground of new trial when mistrial not moved for.

Conceding, but not deciding, that the remarks of the court, addressed to the defendant while she was making her statement to the jury, tended to prejudice the jury against the accused, such remarks cannot be made a ground of a motion for a new trial. A motion for a mistrial should have been made, and, if the judge had overruled the motion, that ruling would have been subject to review. *Grigg v. State*, 22 Ga. App. 637 (2), 96 S. E. 1049, and citations.

3. Criminal law \S 1160 — Court of Appeals cannot interfere with verdict authorized by evidence and approved by trial judge.

The issues in the case were clearly and fairly presented to the jury by the charge of

the court, and, the verdict being authorized by the evidence and approved by the trial judge, this court is without authority to interfere.

Error from Superior Court, Muscogee County; John D. Humphries, Judge.

Augusta Howard was convicted of an offense, and she brings error. Affirmed.

T. T. Miller, of Columbus, for plaintiff in error.

C. F. McLaughlin, Sol. Gen., of Columbus, for the State.

BROYLES, C. J. Judgment affirmed.

LUKE and BLOODWORTH, JJ., concur.

(27 Ga. App. 315)

JOHNSON v. STATE. (No. 12561.)

(Court of Appeals of Georgia, Division No. 1.
July 26, 1921.)

(Syllabus by the Court.)

1. Criminal law §1129(3)—Assignment of error, not setting out charge complained of, fatally defective.

An assignment of error in these words: "Because upon the trial of said case the court erred in his charge to the jury in all its parts by referring to both defendants as though their joint action in the whole matter had been fully established by the evidence. Because his honor's charge throughout led the jury to believe that if either of the defendants took the car, or if either of the defendants had possession of the car and that possession was not explained, that both defendants were guilty of taking the car and having it in their possession"—is fatally defective, in that it fails to set forth the language of the charge to which exception is taken, and it cannot be considered. *Beaudrot v. State*, 128 Ga. 579, 55 S. E. 592; *Sullivan v. State*, 14 Ga. App. 762, 82 S. E. 814.

2. Instruction not erroneous.

The excerpt from the charge of the court, complained of in the second ground of the amendment to the motion for a new trial, when considered in the light of the entire charge and the facts of the case, is not error for any reason assigned.

3. Criminal law §828—Failure to charge on admissions and confessions without written request not cause for new trial.

The ground that the court erred in failing to charge "the law of inculpatory admissions and confessions," is without merit, since it is well settled that, even if the evidence authorized such a charge, the failure to instruct the jury on that subject, in the absence of an appropriate written request, is not cause for a new trial. *McArthur v. State*, 19 Ga. App. 747 (2), 92 S. E. 234, and cases cited.

4. Criminal law §1160—Verdict, supported by evidence and approved by trial judge, not disturbed.

There was some slight evidence which authorized the defendant's conviction, and, the finding of the jury having been approved by the trial judge, this court is without authority to interfere.

Error from Superior Court, Polk County; F. A. Irwin, Judge.

Cave Johnson was convicted of an offense, and he brings error. Affirmed.

Mundy & Watkins, of Cedartown, for plaintiff in error.

J. R. Hutcheson, Sol. Gen., of Douglasville, for the State.

BROYLES, C. J. Judgment affirmed.

LUKE and BLOODWORTH, JJ., concur.

(27 Ga. App. 184)

TILLMAN v. STATE. (No. 12376.)

(Court of Appeals of Georgia, Division No. 1.
June 14, 1921.)

(Syllabus by the Court.)

Vagrancy §3—Evidence insufficient to support conviction.

The evidence in this case does not authorize the verdict. It was error to overrule the motion for a new trial.

Error from City Court of Swainsboro; Geo. Kirkland, Jr., Judge.

Ted Tillman was convicted of vagrancy, and he brings error. Reversed.

The marshal of Summit testified that defendant had been around Summit for three or four weeks; that during that time he had worked about an hour and a half; that he spoke to him about going to work, and defendant said he was sick; that he got defendant a job with one Hicks; that defendant was tried in mayor's court on the same charge and made a confession saying that he had not worked much because he was sick; that defendant worked about an hour and a half, but he did not know that he did not work any more. On cross-examination he testified that he saw defendant every day; that defendant did not work for Hicks two days; that he saw him at Ellen Connor's house in the negro quarter; that he arrested him on Saturday, and saw him on the Monday before, but did not see him on Wednesday, and did not think he saw him on Thursday; that he might have been working or might have been sick; that when he saw defendant, he was not in bed, but in the house; that he might have made enough the time he worked

to support himself the rest of the time. On redirect examination he testified that he did not think defendant had any property or other means of support, but was not positive. A physician testified that defendant had syphilis, but that he considered him able to work. On cross-examination he testified that he could not say that defendant was not sick or was able to work at times other than the time of his examination, and that he did not examine him until after he was tried in the mayor's court. Defendant stated he was sick when he came to Summit; that he worked for Hicks two days, and then got sick and had to quit; that he had some money, and made enough to pay his board; and that he would have been working if he had not been sick.—Statement by editor.

A. S. Bradley, of Swainsboro, for plaintiff in error.

I. W. Rountree, Sol., of Swainsboro, for the State.

LUKE, J. Judgment reversed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(27 Ga. App. 188)

PRICE v. STATE. (No. 12382.)

(Court of Appeals of Georgia, Division No. 1.
June 14, 1921.)

(Syllabus by the Court.)

1. Criminal law §824(3)—Failure to charge on receiving stolen goods without request held reversible error.

Under the facts of the case, it was reversible error for the court to fail to instruct the jury upon the law of receiving stolen goods, even in the absence of a request so to charge.

2. Other grounds of motion.

The other grounds of the amendment to the motion for a new trial are without substantial merit.

3. Sufficiency of evidence.

The question as to the sufficiency of the evidence to sustain the verdict is not passed upon.

Error from City Court of Wrightsville; B. H. Moye, Judge.

J. P. Price was convicted of simple larceny, and he brings error. Reversed.

The evidence for the state tended to show that the prosecutor, Fulford, had been losing seed cotton, and that he left two sheets of cotton in the field one night and found them the next day in the house of one Curvin, a negro. That night Fulford, a deputy sheriff, and a number of others watched Curvin's house and saw defendant with another man

drive up and ask for water for his car. Defendant and Curvin had a conversation which the witnesses for the state could not hear, and then one or both brought the two sheets of seed cotton from the house and put it in the car, whereupon they were arrested. Fulford testified that he saw the tracks of the parties who carried the cotton away, and was satisfied that Curvin was one and Rufus Belmas the other. Defendant's statement and the testimony of his witness, Frost, who was with him at the time of his arrest, was to the effect that defendant was taking Frost to a certain place and passed Curvin's house on the way and stopped for water. Defendant stated that Curvin asked him (defendant) to make a short trip for him, stating that he had two sheets of seed cotton to carry and would pay defendant for the trip; that Curvin brought the cotton out of the house and defendant helped him to put it in the car. Curvin was not locked up, but later gave bond, which had been forfeited, and he did not testify, though defendant said he had made every effort to locate him. It was evidently defendant's theory that Curvin and some or all of those present at the time of his arrest set a trap for him, and he stated that Curvin had so admitted in the presence of a witness.—Statement by editor.

B. B. Blount, of Wrightsville, for plaintiff in error.

W. C. Brinson, Sol., and E. L. Stephens, Sol. Gen., both of Wrightsville, for the State.

BROYLES, C. J. Judgment reversed.

LUKE and BLOODWORTH, JJ., concur.

(26 Ga. App. 772)

KNOX v. HARRELL et al. (No. 12015.)

(Court of Appeals of Georgia, Division No. 2.
Aug. 9, 1921.)

Dissenting opinion.

For majority opinion, see 107 S. E. 594.

JENKINS, P. J. (dissenting). In my opinion, the evidence in this case demanded a verdict in favor of the plaintiff. In *Hull v. Sullivan*, 63 Ga. 127, it was held that—

"Where a person having property for sale, such as land and a steam sawmill, agreed upon the price with one wishing to buy, but who could not consummate the purchase on his own account, because some of the security required belonged to his wife, and thereupon the husband induced his wife to become the purchaser through him, and the contract was thus consummated, the conveyance of the property being made directly to the wife, and she giving her notes and mortgage for the purchase money, the mortgage embracing not only the property

then conveyed to her, but also other property constituting her separate estate, she is bound as purchaser and mortgagor, if the seller and mortgagee committed no fraud upon her nor knew of any committed by the husband."

This principle of law was restated in *McDonald v. Bluthenthal & Bickart*, 117 Ga. 120, 45 S. E. 422, as follows:

"The fact that the owner refuses to sell the husband because of his inability to give security does not prevent an immediate sale of the same property to the wife; and if title to the property is, with her knowledge, conveyed to her and she executes a mortgage thereon and on other property belonging to her, to secure the purchase money notes, she does not assume the debt of her husband, nor is she surety for him, but is liable as principal and purchaser."

See also, *Simmons v. International Harvester Co.*, 22 Ga. App. 358 (5), 96 S. E. 9.

All of these cases are based upon the principle laid down in *Schofield v. Jones*, 85 Ga. 816, 819, 11 S. E. 1032, that, where a creditor at the time the debt is created really and in good faith intends to extend the credit to the wife, and not to the husband, and the consideration for her promise passes legally and morally to her, the transaction will be treated as a valid one, provided the seller committed no fraud on her and knew of none committed by the husband. See, also, *Longley v. Bank of Parrott*, 18 Ga. App. 701, 92 S. E. 232.

Thus the mere fact that in the instant case there had been previous negotiations between the vendor of the corporate stock and the husband, whereby it had been originally proposed that the husband would become the purchaser thereof, would not prevent a subsequent valid and binding sale between the vendor and the wife, provided her contract of purchase was not induced by fraud or duress perpetrated upon her by the vendor, or by another with his knowledge. There is not the slightest evidence going to show that the vendor made any statement or resorted to any sort of artifice calculated to mislead the wife as to the true nature and character of the papers she was about to sign. It is absolutely clear and undisputed that the vendor and the husband had by mutual consent abandoned the original plan of procedure, whereby the husband was to become the purchaser. If, therefore, there was any fraud practiced upon the wife, the husband must necessarily have been the guilty party. As to this, the husband testified as follows:

"When she got down to the office, no new proposition was made Mrs. Harrell. She saw she was buying the stock, probably so. She signed the paper. I knew she was buying the stock. I did tell her the truth. As to whether I told her she was buying the stock or concealed the fact—I didn't conceal anything from her. I don't think I told her she was buying the stock."

While it is true that the wife in her testimony states that she did not in fact understand the nature of the transaction at the time she signed the note for the purchase of her stock, and that she then and there thought and understood that she was merely becoming surety for her husband, there is, nevertheless, no denial by her of the unqualified statement of Knox, the vendor, that her husband fully explained to her the nature of the transaction. The rule is well settled that—

"One able to read, who executed a written contract without reading it, cannot avoid liability thereon because he signed without knowing the contents of the contract, when his so doing was not induced by any action or representation amounting to fraud on the part of the person with whom he was dealing." *Georgia Medicine Co. v. Hyman & Co.*, 117 Ga. 851, 45 S. E. 288; *Tinsley v. Gullett Gin Co.*, 21 Ga. App. 512 (2), 516, 94 S. E. 892.

In the instant case, not only did the defendant sign a note for the purchase of the stock, but, in order to pledge the stock as collateral, she also had to, and actually did, transfer and assign the stock certificate itself; all this in the absence of any testimony whatever going to show any word or act on the part of either the vendor or the husband that could be calculated to mislead or deceive. As indicating knowledge of the transaction on her part, she afterwards, as a stockholder, attended two separate stockholders' meetings of the corporation; and she held the stock for a period of at least 13 months after she admits she fully understood the nature of the transaction, without any effort on her part to repudiate or rescind. It was during this period of admitted knowledge on her part that she attended one of the stockholders' meetings. It thus appears that during all of this period she was willing to receive the benefit of any enhancement of the value of the stock. In fact, in her testimony in reply to a question on cross-examination, she herself admits, "If I had gotten dividends, I suppose I would have felt differently about the investment."

It therefore appears to the writer that, in the absence of any proved fraud on the part of either the vendor or the husband, her contract of purchase and her act in assigning the certificate of stock constituted a legal and bona fide transaction, especially in view of her subsequent conduct in treating herself as its owner; and that she should not be permitted at this late day to repudiate and rescind her contract of purchase, which not only appears to have been originally bona fide, but which, by her acts and conduct, she has ratified and confirmed. In this connection see: *Civil Code* 1910, § 4305; *Hunt v. Hardwick*, 68 Ga. 100 (3a); *Smith v. Estey Organ Co.*, 100 Ga. 628, 630, 631, 28 S. E. 892.

(27 Ga. App. 314)

BURKE v. STATE. (No. 12560.)(Court of Appeals of Georgia, Division No. 1.
July 26, 1921.)*(Syllabus by the Court.)*

1. Larceny ¶43—Motion to exclude testimony concerning constable's levy, because he was not lawful constable, properly refused.

The accused was convicted of larceny from the house, stealing cotton seed. A witness swore on direct examination: "I am the constable of the justice court of the 601st district G. M., said county. On the — day of September, 1920, I levied a justice court *fi. fa.* issued from the justice court of the 601st district G. M., this county, in favor of Jos. A. Rhodes against John Will Burke. I levied it on 60 bushels of short staple cotton seed. I took the seed into my possession by my levy." On cross-examination this witness swore: "I was made a constable of this district by Uncle Joe Mann. He was justice of the peace. He appointed me constable before he died. He appointed me constable in the spring of 1920. He died in June of 1920. He just appointed me verbally." The defendant moved to rule out the evidence developed on direct examination, because on cross-examination "it appeared from the testimony of the witness himself that he was not a lawful constable, and that there had not been a lawful levy, and that the cotton seed were not lawfully in his possession, custody, or control. The court properly refused to exclude this evidence.

2. Execution ¶123—Sheriffs and constables ¶9—Death of justice of peace appointing constable does not affect appointment; levy by one whose appointment or qualification is irregular is good.

Under certain contingencies a justice of the peace has the right to appoint a constable. Civ. Code 1910, § 4682. Where such an appointment is made by a justice of the peace, his death would in no way affect the appointment. See, in this connection, *Gunn v. Tackett*, 67 Ga. 725 (1, a). Where a levy is made by one who assumes to act as an officer having authority to make such levy, the levy is good, even though the appointment or qualification of the person purporting to act as such officer be irregular, since his acts would be those of a *de facto* officer. *Southern States Phosphate Co. v. Clark*, 19 Ga. App. 380 (1), 91 S. E. 573, and cases cited. See, also, *Harrison v. Richardson*, 99 Ga. 763 (1), 27 S. E. 173.

3. Criminal law ¶918(1)—Failure to declare mistrial because of solicitor's argument held not cause for new trial.

Under the facts of this case, the failure of the court to declare a mistrial is not cause for a new trial, as the court "instructed the solicitor general to confine himself to the evidence, and instructed the jury to go by the evidence and not by the argument." Had this been error, it would have been harmless, as the evidence of guilt was positive, and defendant's statement was practically an admission of what was proven by the state.

Error from Superior Court, Tallahassee County; E. T. Shurley, Judge.

J. W. Burke was convicted of larceny from a house, and he brings error. Affirmed.

Alvin G. Golucke, of Crawfordville, for plaintiff in error.

M. L. Felts, Sol. Gen., of Warrenton, for the State.

BLOODWORTH, J. Judgment affirmed.

BROYLES, C. J., and LUKE, J., concur.

(27 Ga. App. 276)

BARWICK v. AMERICAN MFG. CO. (No. 11742.)(Court of Appeals of Georgia, Division No. 1.
July 12, 1921.)*(Syllabus by the Court.)*

1. Appeal and error ¶667—Supreme Court cannot try traverse to return of service of bill of exceptions, or refer issue to trial court.

"The Supreme Court has no jurisdiction to hear contradictory evidence impeaching the verity of a record from the trial court. In the absence of any statutory provision, this court has no authority to try a traverse to a return of service of a bill of exceptions, or to refer to the trial court the issue of fact as to the truth or falsity of such return. The bill of exceptions and entries thereon showing jurisdiction of the Supreme Court, the writ of error will not be dismissed." Ga., Fla. & Ala. Ry. Co. v. Lassetter, 122 Ga. 679 (1), 51 S. E. 15. Under the above ruling, there is no merit in the motion to dismiss the bill of exceptions in this case.

2. Abatement and revival ¶84—New trial ¶172—Plea to jurisdiction over the person waived by going to trial on the merits without insisting on it; plea to jurisdiction, waived on first trial, cannot be insisted upon on second trial.

Where there was a plea to the jurisdiction of the person and one to the merits, and the case was tried on its merits without reference to the plea to the jurisdiction, the defendants, by going into the trial on the merits without insisting upon the plea to the jurisdiction, waived all the rights it had under the plea to the jurisdiction.

(a) A new trial having been granted, the defendant was estopped upon the second trial from insisting upon the plea to the jurisdiction, by having waived it on the first trial.

3. Pleading ¶110—Error in permitting plea to jurisdiction to be amended, and in refusing to strike it, rendered subsequent proceedings nugatory.

The error of the judge in allowing the plea to the jurisdiction to be amended on the second trial, and in then refusing to strike the plea as amended, rendered all the subsequent proceedings nugatory, and the court erred in overruling the motion for a new trial.

Error from Superior Court, Thomas County; W. E. Thomas, Judge.

Action by J. W. Barwick against the American Manufacturing Company. Judgment for defendant, and plaintiff brings error. Reversed.

Hines, Hardwick & Jordan, of Atlanta, and Hay, Joiner & Hammond, of Thomasville, for plaintiff in error.

Titus, Dekle & Hopkins, of Thomasville, for defendant in error.

BLOODWORTH, J. [1-3] We will discuss only the matter ruled upon in the second headnote. J. W. Barwick had an attachment issued against the American Manufacturing Company, "a foreign corporation and resident out of the state of Georgia." The attachment was levied by serving a summons of garnishment. A declaration in attachment was filed, and at the first term the defendant filed a plea to the jurisdiction of the person and one to the merits. At a subsequent term the case was tried on its merits, no reference whatever being made to the jurisdiction. At that trial a verdict for the plaintiff was rendered. The defendant made a motion for a new trial, which was granted. When the case was called for the second trial, the defendant offered to amend the plea to the jurisdiction, by adding thereto a verification, and by stating additional reasons why the court had no jurisdiction of the person of the defendant. The trial judge allowed the amendment, over the objection of the plaintiff, and then refused to strike the amended plea, and the plaintiff excepted.

That the defendant, by not insisting upon his plea to the jurisdiction at the first trial, waived all rights he had at that trial under this plea, is self-evident. Civil Code 1910, § 5664. In *Macon & Birmingham Railroad Co. v. Gibson*, 85 Ga. p. 2 (8), 11 S. E. 442, 21 Am. St. Rep. 135, it was said:

"Nothing appears to show that the judge erred in entertaining jurisdiction of the cause. Any objection founded on the nonresidence of the principal defendants in the county could be waived, and was waived if these defendants answered without raising *and urging* that objection." (*Italics ours.*)

The real question now to be determined is whether or not this waiver extended to the second trial. This seems never to have been passed upon by the appellate courts of this state. In *Stevens v. Lee*, 70 Tex. 279, 8 S. W. 40, Judge Acker said:

"On a former trial, Mrs. Stevens interposed a plea in abatement to the cross bill of appellee, which plea was also interposed by appellants on the last trial. It appears from the opinions, as well as the record on the former appeal, that the court did not act on the plea in abatement

at the first trial. On the last trial the court overruled the plea, and this ruling is complained of as error. * * * The failure of Mrs. Stevens to have the court act upon the plea in abatement on the first trial was an abandonment or waiver of the plea, and appellants could not afterwards renew it."

Accepting the above ruling as a precedent we are constrained to hold that the waiver of the plea to the jurisdiction at the first trial amounted to an abandonment of this plea, and the court erred in allowing it to be amended, and in refusing to strike it after it was amended.

Judgment reversed.

BROYLES, C. J., concurs.

LUKE, J., disqualified.

(27 Ga. App. 295)

SUTTON v. STATE. (No. 12504.)

(Court of Appeals of Georgia, Division No. 1.
July 13, 1921.)

(*Syllabus by the Court.*)

1. Discretion not abused in refusing continuance.

In view of the showing made as to the defendant's diligence to procure the absent witness, this court cannot say that the trial judge abused his discretion in refusing to continue the case.

2. Criminal law § 828—Failure to charge on confessions without request not error.

The ground of the amendment to the motion for a new trial, that the trial judge "nowhere in his charge instructed the jury as to the law of confessions," is without merit; "since it is well settled that, even if the evidence authorized a charge on the law of confessions, the failure to instruct the jury on that subject, in the absence of an appropriate written request so to do, is not cause for a new trial." *McArthur v. State*, 19 Ga. App. 747 (2), 92 S. E. 234, and cases cited.

3. Criminal law § 935(1)—New trial properly denied, when there was some evidence to authorize conviction.

There was some evidence to authorize the defendant's conviction, and the court did not err in overruling the motion for a new trial.

Error from City Court of Swainsboro; George Kirkland, Jr., Judge.

Clyde Sutton was convicted of an offense, and he brings error. Affirmed.

T. N. Brown, of Swainsboro, for plaintiff in error.

I. W. Rountree, Sol., of Swainsboro, for the State.

LUKE, J. Judgment affirmed.

BROYLES, C. J., and **BLOODWORTH, J.**, concur.

(27 Ga. App. 280)

ATLANTA JOURNAL v. POWER.
(No. 11901.)(Court of Appeals of Georgia, Division No. 1.
July 12, 1921.)

(Syllabus by Editorial Staff.)

Evidence ¶443(2) — Plea, settling up oral agreement that notes should be open to subsequent adjustment, should be stricken on motion.

In an action on notes, a plea alleging that the notes were signed on the payee's agreement that, if it subsequently developed that they were given for too much, they would be open to adjustment accordingly, should have been stricken on plaintiff's motion, as parol evidence of such an oral agreement would be inadmissible, as contradicting the writing.

Error from City Court of La Grange; Duke Davis, Judge.

Action by the Atlanta Journal against J. G. Power. Judgment for defendant, and plaintiff brings error. Reversed.

The action was on two notes. Defendant's answer alleged that, when the notes were executed, there was a dispute between him and plaintiff as to the amount due, and that plaintiff stated to him in substance that, if he would sign the notes and it afterwards developed that they were taken for too much, they would be open to adjustment accordingly, and that he executed the notes as accord only, and not as accord and satisfaction; that he had since found that the notes were taken for \$58.25 more than was due, this sum having been paid on a date specified on the account for which the notes were given, and not credited thereon. Plaintiff moved to strike this plea on the grounds that it did not set up anything that was a legal defense, and that it sought to add to, change, or vary the terms of the written contract.—Statement by editor.

E. T. Moon, of La Grange, for plaintiff in error.

M. U. Mooty, of La Grange, for defendant in error.

BROYLES, C. J. "Parol evidence (especially of the debtor himself) that a settlement closed up by absolute notes and mortgages was, by oral agreement of the parties, to be revised by the debtor, and the notes and mortgages reduced by crediting down all errors, contradicts the writings, and is inadmissible." *Dyar v. Walton*, 79 Ga. 466 (1), 7 S. E. 220. Under this ruling and the facts in the instant case, the court erred in refusing to strike, on motion of the plaintiff, the defendant's plea. This ruling is not in conflict with the decision in *McLendon v. Wilson*, 52 Ga. 41, relied on by the defendant in error, for in that case there was no mo-

tion to strike the defendant's plea, and evidence in support of the plea was admitted without objection, and the Supreme Court said:

"All that we do decide is that the court erred in its charge, in saying to the jury that: 'If you believe from the evidence that the defendant, with such knowledge as I have charged you, signed and delivered the notes, then he waived any defense he might have had, if any, to the accounts exhibited by the plaintiffs to defendant.' This charge of the court excluded from the consideration of the jury the defendant's evidence as to what he says was the intention and understanding of the parties at the time the drafts were executed. This evidence being before the jury, the defendant had the right to have had it considered by them for what it was worth in contradiction of the plaintiff's evidence as to that question in the case."

If in the instant case there had been no motion to strike the defendant's plea, and if evidence sustaining the plea had been introduced without objection, and if the court in its charge had excluded that evidence from the consideration of the jury, the two cases would have been on all fours, and the decision in the *McLendon* Case would be controlling in this case. The facts of the two cases clearly distinguish the one from the other.

The error in the ruling on the defendant's plea rendered the further proceeding in the case nugatory.

Judgment reversed.

LUKE and BLOODWORTH, JJ., concur.

(27 Ga. App. 270)

SMITH v. STATE. (No. 12474.)

(Court of Appeals of Georgia, Division No. 1.
July 12, 1921.)

(Syllabus by the Court.)

Criminal law ¶274—Refusal to allow withdrawal of plea of guilty after sentence held not error.

The matter of allowing a plea of guilty to be withdrawn after sentence is imposed being discretionary with the trial court, the judge properly refused, under the particular facts of the instant case, to allow the plea withdrawn, since the defendant did not prove, as it was incumbent upon him to do, that the judge, or solicitor, or some other court official misled him or induced him to plead guilty (*Foster v. State*, 22 Ga. App. 110, 95 S. E. 529), but merely proved that his plea of guilty was entered because of the statement of two policemen that he would get off with a light fine.

Moreover, the policemen testified that they did not induce or mislead the defendant into pleading guilty, but that the plea was freely and voluntarily made, and, this evidence being before the judge, this court cannot say, as a

matter of law, that he abused his discretion in refusing to allow a withdrawal of the plea. *Jackson v. State*, 99 Ga. 209, 25 S. E. 177.

Error from City Court of Albany; Clayton Jones, Judge.

Eugene Smith pleaded guilty of an offense, and, his application for leave to withdraw his plea having been denied, he brings error. Affirmed.

Lippitt & Burt, of Albany, for plaintiff in error.

Cruiger Westbrook, Sol., of Albany, for the State.

LUKE, J. Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(27 Ga. App. 288)

DALTON v. STATE. (No. 12432.)

(Court of Appeals of Georgia, Division No. 1.
July 12, 1921.)

(Syllabus by the Court.)

1. Criminal law §958(2)—Motion for new trial not considered, when no affidavit of counsel's ignorance of the newly discovered evidence before trial.

The ground of the motion for a new trial based upon alleged newly discovered evidence cannot be considered, since there is no affidavit by the movant's counsel that they did not, before the trial, know of the existence of such evidence, and that it could not have been discovered by the exercise of ordinary diligence.

2. Rape §59(23)—Assault and battery properly submitted, when evidence does not demand finding of intent to rape.

The charge of the court was full and fair, and was not subject to the exception taken.

3. Criminal law §935(1)—New trial properly denied when evidence sufficient.

The verdict was amply authorized by the evidence, and the refusal to grant a new trial was not error.

Bloodworth, J., dissenting.

Error from Superior Court, Catoosa County; M. C. Tarver, Judge.

John Dalton was convicted of an offense, and he brings error. Affirmed.

Wm. E. Mann, and Gordon Mann, both of Dalton, for plaintiff in error.

Joe M. Lang, Sol. Gen., of Calhoun, for the State.

BROYLES, C. J. [1-3] The indictment in this case charged an assault and battery with intent to commit rape, and this case is therefore distinguished from *Owens v. State*, 9 Ga. App. 441, 71 S. E. 680, cited and relied on by counsel for the plaintiff in error, for in that case no battery was charged, and this court held that, as no battery was charged in the indictment, the accused could not be convicted of an assault and battery.

Upon the trial the evidence adduced amply authorized a finding that an assault and battery had been committed by the accused, and did not demand a finding that it had been committed with intent to rape. The court, therefore, did not err in submitting to the jury the question whether the accused was guilty of an assault with intent to rape, or merely of an assault and battery. While it is true, as was stated by Judge Russell in *Gibson v. State*, 10 Ga. App. 117, 72 S. E. 944, that "an assault with intent to induce consent to sexual intercourse on the part of a female child under the age of consent is not assault and battery but assault with intent to rape," it is also obviously true that, if the assault and battery was made by the accused on the female child without the intent to induce her consent to sexual intercourse, but merely with intent to gratify his passions by rubbing his private parts upon some portion of her person, he would be guilty of an assault and battery, and not of an assault with intent to rape. These questions were properly submitted to the jury in the charge of the court, and the verdict of assault and battery was amply authorized by the evidence.

Judgment affirmed.

LUKE, J., concurs.

BLOODWORTH, J., dissents.

BLOODWORTH, J. I cannot agree with the majority of the court in their opinion in this case, except as to the ruling stated in the first headnote. The evidence for the state was uncontradicted and unimpeached, and, if believed, demanded a verdict of guilty as charged. If the statement of the defendant was true, he should have been acquitted. There is no middle ground, and, in my opinion, it was error requiring the grant of a new trial for the judge to charge the jury on assault and battery. *Gibson v. State*, 10 Ga. App. 117, 72 S. E. 944.

(27 Ga. App. 290)

(108 S.E.)

WESTBROOK v. GRIFFIN. (No. 12436.)(Court of Appeals of Georgia, Division No. 1.
July 12, 1921.)*(Syllabus by the Court.)*

1. Judgment \Rightarrow 572(2)—Unreversed judgment sustaining general demurrer bars subsequent suit; demurrer held special, and judgment not res judicata.

Where a petition is met with a general demurrer, which sets out that no cause of action is shown by the petition, the judgment sustaining the demurrer, if not reversed, is a bar to any subsequent suit by the plaintiff against the defendant on the claim or demand set forth in the petition, either upon the ground set forth therein, or upon any other grounds which could have been added thereto by amendment. *Satterfield v. Spier*, 114 Ga. 127, 132, 39 S. E. 930; *McElmurray v. Blodgett*, 120 Ga. 9, 15, 47 S. E. 531. However, a demurrer, which states that "defendant demurs to the petition because the same does not clearly, fully, and distinctly set forth any cause of action against defendant," is really a special demurrer, since it points out a defect in form rather than a defect in substance. *Kemp v. Central Ry. Co.*, 122 Ga. 559, 561, 50 S. E. 465. It is a general demurrer only in the sense that it goes to the whole case, and results in the dismissal of the entire action, and such a demurrer may be sustained without creating a res adjudicata. *Wolfe v. Georgia Ry. & Electric Co.*, 6 Ga. App. 410, 413, 65 S. E. 62.

2. Plea in bar erroneously sustained.

Under the above ruling, the dismissal of the plaintiff's former action against the defendant on demurrer was not a bar to the present suit, and the court erred in sustaining the defendant's special plea in bar and in dismissing the case.

Luke, J., dissenting.

Error from City Court of Americus; W. M. Harper, Judge.

Action by T. B. Westbrook against F. W. Griffin. Judgment for defendant, and plaintiff brings error. Reversed.

See, also, 24 Ga. App. 808, 102 S. E. 453.

H. B. Williams and R. L. Maynard, both of Americus, for plaintiff in error.

Wallis & Fort, of Americus, for defendant in error.

BROYLES, O. J. Judgment reversed.

BLOODWORTH, J., concurs.

LUKE, J. (dissenting). I cannot agree that the demurrer, which was sustained by the trial court and referred to in the majority opinion, was nothing more than a special demurrer. The judgment of the court gen-

erally sustained the demurrer, and the demurrer interposed was as follows:

"Defendant demurs to the petition because the same does not clearly, fully, and distinctly set forth any cause of action against defendant."

It is clear to me that all parties understood the demurrer to be both general and special. The demurrer, having been generally sustained, had the effect of dismissing the plaintiff's case, for the reason that the petition set forth no cause of action. Upon the facts of the case as disclosed by the record, I cannot see that the court erred in sustaining the defendant's special plea in bar and in dismissing the case.

(27 Ga. App. 309)

LEONARD v. STATE. (No. 12530.)(Court of Appeals of Georgia, Division No. 1.
July 28, 1921.)*(Syllabus by the Court.)*

Criminal law \Rightarrow 134(1)—Change of venue properly denied, when evidence authorizes finding that impartial jury can be obtained and that there is no danger of lynching.

The evidence before the judge on the motion to change the venue authorized a finding that a fair and impartial jury could be obtained in the county where the crime was alleged to have been committed, and that there was no probability or danger of lynching or other violence to the accused. Accordingly it was not erroneous to refuse the motion for a change of venue. *Shepherd v. State*, 141 Ga. 527, 81 S. E. 441; *Crawley v. State*, 24 Ga. App. 33 (2), 99 S. E. 705; *Davis v. State*, 23 Ga. App. 223, 98 S. E. 111, and cases cited. This is true, although the act of 1911 (Laws 1911, p. 74 [Park's Pen. Code, § 964]) contains the following: "And if the evidence submitted shall reasonably show that there is probability or danger of lynching, or other violence, then it shall be mandatory on said judge to change the venue to such county in the state, as in his judgment, will avoid such lynching." See *Wilburn v. State*, 140 Ga. 138, 141 (2), 78 S. E. 519.

Error from Superior Court, Paulding County; F. A. Irwin, Judge.

R. D. Leonard was convicted of an offense, and brings error. Affirmed.

R. E. L. Whitworth, of Dallas, Barry Wright, of Rome, and Bunn & Trawick, of Cedartown, for plaintiff in error.

J. R. Hutcheson, Sol. Gen., of Douglasville, and Porter & Mebane, of Rome, for the State.

BLOODWORTH, J. Judgment affirmed.

BROYLES, C. J., and **LUKE, J.**, concur.

(27 Ga. App. 321)

STRICKLAND v. STATE. (No. 12577.)(Court of Appeals of Georgia, Division No. 1.
July 26, 1921.)*(Syllabus by the Court.)***1. Provisions of statute.**

It is unlawful for any person to knowingly permit or allow any one to possess or locate on his premises any apparatus for the distilling or manufacturing of intoxicating liquors. The finding of any such apparatus upon a person's premises is prima facie evidence that the person in actual possession of the premises had knowledge of the existence of the apparatus upon the premises, and the burden of proof is upon him to show the want of such knowledge. Act March 28, 1917 (Laws Ex. Sess. 1917, p. 18); § 22.

2. Intoxicating liquors § 137—State need not prove that complete apparatus for manufacturing was found on premises.

In order to convict a person of knowingly having upon his premises any apparatus for the distilling or manufacturing of intoxicating liquors, it is not necessary for the state to prove, unless it is so charged in the indictment, that a complete apparatus, or all the apparatus necessary for the making of whisky, was found upon the premises. *Strickland v. State*, 25 Ga. App. 1, 102 S. E. 383.

3. Affirmance of judgment.

Under the above ruling, the defendant's conviction in the instant case was authorized by the evidence, and, the verdict having been approved by the trial judge and the motion for a new trial containing only the usual general grounds, the judgment is affirmed.

Error from City Court of Douglas; T. N. Henson, Judge.

George Strickland was convicted of knowingly having upon his premises apparatus for the distilling or manufacturing of intoxicating liquors, and he brings error. Affirmed.

R. B. Chastain, of Douglas, for plaintiff in error.

J. A. Roberts, Sol., of Douglas, for the State.

BROYLES, C. J. Affirmed.

LUKE and BLOODWORTH, JJ., concur.

(27 Ga. App. 291)

EDENFIELD v. STATE. (No. 12438.)(Court of Appeals of Georgia, Division No. 1.
July 12, 1921.)*(Syllabus by the Court.)***1. Criminal law § 554, 823(10)—Instructions that circumstances surrounding killing must be gathered from testimony and statement erroneous; erroneous instruction not cured by correct instruction.**

It was reversible error for the court to charge the jury that "the defendant has made

a statement in which he tells you that he shot the deceased to save his own life, to prevent a felony from being committed upon him. *The circumstances surrounding him at the time he shot you must gather from the testimony and the defendant's statement*" (italics ours), since the jury had the right to believe the statement of the defendant in preference to the sworn testimony. *Rouse v. State*, 135 Ga. 227(3), 60 S. E. 180.

(a) While the court elsewhere in the charge correctly instructed the jury upon this subject, "the harmful effect of such an erroneous instruction cannot be obviated merely by a correct instruction upon the same subject; the attention of the jury must be specifically called to the previous error, and it must be expressly and explicitly withdrawn." *Western & Atlantic R. Co. v. Sellers*, 15 Ga. App. 369 (1b), 83 S. E. 445.

2. Other grounds of motion.

The other special grounds of the motion for a new trial are either without substantial merit, or the alleged errors are not likely to recur on another trial, and the judgment overruling the motion for a new trial is reversed solely on account of the error dealt with in the preceding note.

Error from Superior Court, Coffee County; J. I. Summerall, Judge.

D. S. Edenfield was convicted of homicide, and he brings error. Reversed.

O. A. Ward and Dickerson & Kelley, all of Douglas, for plaintiff in error.

A. B. Spence, Sol. Gen., of Waycross, for the State.

LUKE, J. Judgment reversed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(27 Ga. App. 293)

CALLAWAY v. STATE. (No. 12459.)(Court of Appeals of Georgia, Division No. 1.
July 12, 1921.)*(Syllabus by the Court.)***Criminal law § 1160—Verdict authorized by evidence and approved by trial judge not disturbed.**

In this case the motion for a new trial contained only the usual general grounds. There was ample evidence to authorize the verdict, which has the approval of the trial judge, and this court is powerless to interfere.

Error from City Court of Miller County; W. I. Geer, Judge.

Action by the state against L. Z. Callaway. Judgment for the State, and defendant brings error. Affirmed.

N. L. Stapleton, of Colquitt, for plaintiff in error.

P. D. Rich, Sol., of Colquitt, for the State.

LUKE, J. Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(27 Ga. App. 309)

CREWS v. STATE. (No. 12529.)(Court of Appeals of Georgia, Division No. 1.
July 26, 1921.)*(Syllabus by the Court.)***Criminal law** ⚡1075—Writ of error dismissed when costs not paid.

This case having been entertained only upon the condition that the costs be paid within 10 days, and the costs not having been paid within the time limited by this court, the writ of error must be dismissed. Civ. Code 1910, § 6341.

Error from Superior Court, Toombs County; R. N. Hardeman, Judge.

Proceeding by the State against Eugene (alias Fink) Crews. Judgment for the State, and defendant brings error. Writ of error dismissed.

Williams & Corblitt, of Lyons, for plaintiff in error.

W. F. Grey, Sol. Gen., of Swainsboro, and Lankford & Rogers, of Lyons, for the State.

LUKE, J. Writ of error dismissed.

BROYLES, C. J., and BLOODWORTH, J., concur.

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(27 Ga. App. 310)

LANDERS v. TOUCHSTONE. (No. 12534.)(Court of Appeals of Georgia, Division No. 1.
July 26, 1921.)*(Syllabus by the Court.)***Landlord and tenant** ⚡328(2)—No lien for money loaned with which to pay for fertilizers purchased on tenant's credit.

The evidence in this case demanded a finding that the landlord had no lien for supplies, since the supplies were furnished to his tenant by a third person on the tenant's credit, and the mere furnishing of the money, three or four weeks thereafter, by the landlord to enable the tenant to pay promptly for the fertilizer already purchased and partly used, was not necessary to make the crop; and, the judgment of the trial judge, who tried the case without a jury, in favor of the landlord, is contrary to law and the evidence.

Error from City Court of Floyd County; W. J. Nunnally, Judge.

Suit by W. C. Touchstone against H. B. Landers. Judgment for plaintiff, and defendant brings error. Reversed.

Lee J. Langley, of Rome, for plaintiff in error.

Deeny & Wright, of Rome, for defendant in error.

BROYLES, C. J. W. C. Touchstone foreclosed his alleged special lien as landlord

for supplies furnished his tenant, H. B. Landers, which was levied upon crops grown upon the rented lands. Landers in due time filed his counter affidavit, setting forth that no such lien as that alleged in favor of the plaintiff existed, and that the obligation proceeded upon was a common-law debt for borrowed money, evidenced by a promissory note. Subsequently, and before the trial was entered upon, Landers, by way of further defense, filed an additional affidavit, setting up that he had been adjudicated a bankrupt and had received his final discharge in bankruptcy from Hon. S. H. Sibley, Judge of the United States District Court for the Northern District of Georgia, and that the debt proceeded upon was one dischargeable in bankruptcy, and that the indebtedness had been fully satisfied canceled by operation of law. It was agreed by both parties that the judge should pass upon these questions without the aid of a jury, and, after hearing evidence, he rendered judgment setting up the lien and giving judgment against the property levied upon. The case comes to this court upon exceptions to this judgment.

As we view the case, it is unnecessary to decide the question as to whether the debt was one dischargeable in bankruptcy, etc., since a review of the evidence shows conclusively that the landlord did not have a special lien upon the crops raised upon the rented lands, by virtue of Civil Code 1910, § 8348, which gives a special lien to a landlord for supplies, money, etc., furnished by the landlord to make the crop. The evidence adduced upon the trial shows that in March, 1920, the tenant purchased, on his own credit, from the Farmers' Union, \$250 worth of guano, to be used in making the crops on the rented land. Subsequently, on May 8, after a portion of the fertilizer had been used, the tenant obtained or borrowed from his landlord \$250 to pay for the guano, giving to the landlord his plain unconditional promissory note for this sum. The tenant was a member of the Farmers' Union, the landlord was not. These facts were not contradicted. The undisputed evidence of the tenant, as well as that of another witness, was that only members of the Union could buy fertilizer therefrom. The tenant, testified also without contradiction, that he purchased the fertilizer upon his own credit. The landlord testified:

"Landers [the tenant] did not buy the guano from me, nor did I buy it for him, but I furnished the money to pay for it with. He bought the guano from or through the Farmers' Union. I was not a member of the Farmers' Union. I let Landers have the money to pay for the guano on the 8th day of May, 1920. The guano was bought three or four weeks before that, I think, but am not sure just when it was bought."

The facts narrated above were, in substance, the evidence upon which the court, sitting without the intervention of a jury, found that the landlord had a special lien on the crops. We think the evidence was legally insufficient to support such a finding.

"Liens in favor of landlords furnishing supplies arise by operation of law from the relation of landlord and tenant, as well as by special contract in writing, whenever the landlord furnishes the articles enumerated in section 3348, or any one of them, 'to the tenant for the purpose therein named.' Civil Code, § 3348, par. 1. The use of supplies furnished for the purpose of making the crop need not be proved, as it is sufficient to show that the landlord actually furnished the supplies and intended them to be so used. (Italics ours.) Nash v. Orr, 9 Ga. App. 33 (70 S. E. 194)." Burton v. Hickman, 18 Ga. App. 260(1), 89 S. E. 330.

In the instant case the landlord merely furnished the money to pay for the guano after the tenant had purchased the same from the Farmers' Union on his own credit, and after a portion of the fertilizer had been used. It cannot therefore be said that the landlord actually furnished the money for the purpose of making the crop, or that the furnishing of the money was necessary to make the crop. In the case of Leonard v. Fields, 143 Ga. 480, 85 S. E. 315, it is said:

"It appears from the evidence that the landlord sold the tenants a mule, in October, 1910, reserving title to himself, and about two months thereafter the tenants disposed of the mule. The evidence does not show that the landlord sold the tenants the mule for the purpose of making the crop of the ensuing year, or that the furnishing of a mule was necessary to make the crop. In other words, the evidence is insufficient to show that the landlord had a special lien upon the crop raised upon the rented premises, by virtue of Civil Code, § 3348, which gives a special lien to a landlord for supplies, mules, etc., furnished to make the crop; and this indebtedness must be treated as unsecured by lien on the crop." (Italics ours.)

Also, the uncontradicted evidence shows conclusively that the tenant purchased the guano from or through the Farmers' Union on his own credit. This being true, the landlord had no special lien, for, as was held in Elliott v. Parker, 94 Ga. 620, 20 S. E. 106:

"A landlord cannot take a lien for supplies already furnished to his tenant by a third person on the tenant's credit."

See, also, the case of Brimberry v. Mansfield, 86 Ga. 792, 13 S. E. 132, in which it was held:

"A landlord has no lien for supplies which his tenant purchased from a merchant and for which he stood the tenant's security; nor will the fact that he paid the note given for the supplies, after it became due, entitle him to such lien. If he ordered the supplies upon his own credit, and in that manner furnished them to his tenant, he would be entitled to a lien therefor."

Likewise, see Scott v. Pound, 61 Ga. 579, where it was said:

"If the tenant is the real purchaser [of the supplies] in the first instance, not deriving title through the landlord, there is no lien."

The case of Rodgers v. Black, 99 Ga. 139, 25 S. E. 23, is also authority for the proposition that the landlord has a lien if he was the real purchaser, but otherwise if the tenant is the real purchaser.

While it is true that such a question is generally one for determination by a jury, the uncontradicted facts in the case under review demanded a finding that the tenant was the real purchaser of the fertilizer in question, since he bought it from the Farmers' Union on his own credit; and the furnishing of the money, three or four weeks thereafter, by the landlord, to enable the tenant to pay promptly for the guano, was not necessary to make the crop; and therefore the finding in favor of the landlord was contrary to law and the evidence.

Judgment reversed.

LUKE and BLOODWORTH, JJ., concur.

(27 Ga. App. 309)

MORGAN v. STATE. (No. 12527.)

(Court of Appeals of Georgia, Division No. 1.
July 26, 1921.)

(Syllabus by the Court.)

Verdict authorized by evidence.

The verdict was authorized by the evidence and approved by the judge, and the motion for a new trial contained only the usual general grounds.

Error from City Court of Dawson; M. C. Edwards, Judge.

Seab Morgan was convicted of an offense, and brings error. Affirmed.

R. R. Marlin, of Dawson, for plaintiff in error.

W. H. Gurr, Sol., of Dawson, for the State.

BROYLES, C. J. Judgment affirmed.

LUKE and BLOODWORTH, JJ., concur.

(27 Ga. App. 326)

FRIED v. SULLIVAN et al. (No. 12084.)(Court of Appeals of Georgia, Division No. 1.
July 28, 1921.)*(Syllabus by the Court.)***Receivers** ⇨ 174(1)—Cannot be sued for personal injuries to nonemployee without leave.

Without first obtaining leave from the court which appointed them, suit cannot be brought against the receivers of a railroad company to recover damages arising from personal injuries to one not an employee of the receivers and caused by the operation of the railroad by the receivers.

Error from City Court of Waynesboro; Wm. H. Davis, Judge.

Action by Bertha Fried against W. R. Sullivan and others, receivers. Judgment for defendants on demurrer, and plaintiff brings error. Affirmed.

Jones, Park & Johnston, of Macon, for plaintiff in error.

Barrett & Hull, of Augusta, for defendants in error.

BLOODWORTH, J. Suit was brought by Mrs. Bertha Fried against the receivers of the Georgia & Florida Railway for personal injuries received by her, caused by the operation of the railway. The defendants demurred upon the ground that the petition did not show that permission to bring the suit had been obtained from the superior court of Richmond county, the receivers having been appointed by that court. The demurrer was sustained, and the petition dismissed, and the plaintiff excepted.

From the foregoing statement it will be seen that the record in this case presents but one question for determination, and that is, without first obtaining leave from the court which appointed them, can suit be brought against the receivers to recover damages arising from personal injuries to one not an employee of the receivers, which injuries were caused by the operation of the railroad by the receivers? To this question we answer, No. While the courts are not all agreed in holding that leave to sue a receiver is jurisdictional, and, where not obtained, fatal to maintaining an action, this is not an open question in Georgia. This court and the Supreme Court of this state adhere to the general rule as laid down in *High on Receivers* (4th Ed.) 293, 294, as follows:

"A receiver being an officer of the court, acting under its direction, and in all things subject to its authority, it is contrary to the established doctrine of courts of equity to permit him to be made a party defendant to litigation, unless by consent of the court appointing him. And it is in all cases necessary that a person desiring to bring suit against a receiver in his

official capacity should first obtain leave of the court by which he was appointed, since the courts will not permit the possession of their receivers to be disturbed by suit or otherwise, without their consent and permission."

See *Harrell v. Atkinson*, 9 Ga. App. 152, 70 S. E. 954; *Stephens v. Augusta Tel. & Elec. Co.*, 120 Ga. 1082, 1083, 48 S. E. 433; *Vestel v. Tasker*, 123 Ga. 213 (1), 51 S. E. 300; *Jones v. Cosby*, 70 Ga. 726.

It is also said in *High on Receivers* (4th Ed.) 296:

"And it is necessary to aver in the complaint or declaration against the receiver that leave of court has been granted to bring the action, and the absence of such an averment is fatal upon demurrer."

An exception to this general rule is found in sections 2788, 2789, of the Civil Code of 1910. Counsel for the plaintiff in error insist that this exception is applicable to the case sub judice. In this contention we cannot agree with the learned counsel. Section 2788 is in part as follows:

"The liability of receivers, trustees, assignees, and other like officers operating railroads in this state, * * * for injuries and damages to persons in their employ, caused by the negligence of coemployees, or for injuries or damages to personal property, shall be the same as the liability now fixed by the law governing the operation of railroad corporations in this state for like injuries and damages."

It will be noted that this section applies only to injuries and damages to persons in the employ of certain officers, "caused by the negligence of coemployees, or for injuries or damages to personal property." Section 2789 is as follows:

"Suits may be brought against either of such officers in the same county, and service may be perfected by serving them or their agents in the same manner, as if the suit had been brought against the corporation whose property or franchise is being operated by them, and all such suits may be brought without first having obtained leave to sue from any court."

The two sections above referred to, so far as applicable to this case, were codified from the act approved December 16, 1895 (Ga. L. 1895, p. 103), and the words "either of such officers," in section 2789, evidently refer to the officers named in section 2788, to wit, "receivers, trustees, assignees and other like officers." It is equally clear that "suits," "the suit," and "such suits," as used in section 2789, apply only to suits brought under section 2788 against the "officers operating railroads in this state, or partially in this state, for injuries and damages to persons in their employ, caused by the negligence of coemployees, or for injuries or damages to personal property." Under this ruling the court

did not err in sustaining the demurrer to the petition and dismissing it.
Judgment affirmed.

BROYLES, C. J., and LUKE, J., concur.

(27 Ga. App. 185)

PLUMMER v. STATE. (No. 12379.)

(Court of Appeals of Georgia, Division No. 1.
June 14, 1921. Rehearing Denied
June 30, 1921.)

(Syllabus by the Court.)

1. Criminal law ~~§~~828—Failure to charge on circumstantial evidence, without written request, not error, when evidence not wholly circumstantial.

The defendant's conviction not depending wholly upon circumstantial evidence, the court did not err, in the absence of an appropriate written request, in failing to instruct the jury upon the law of circumstantial evidence.

2. Criminal law ~~§~~918(5)—Judges ~~§~~49(2)—Judge's statement that verdict was correct not ground for new trial, and did not disqualify judge to pass on motion.

There is no merit in those special grounds of the motion for a new trial that assigned error because the judge, after the verdict had been returned and before passing sentence on the defendant, stated from the bench that he thought the verdict was "eminently correct." Nor did such expression disqualify the judge from passing upon the defendant's motion for a new trial.

3. Criminal law ~~§~~781(6), 922(5) — Charge that uncorroborated confession was insufficient should be given, but failure to give not ground for new trial.

The remaining special grounds of the motion for a new trial are without substantial merit.

4. Adultery ~~§~~14—Fornication ~~§~~9—Modes of proving marriage specified.

The defendant was convicted of the offense of adultery and fornication. While the evidence did not demand a finding that she was a married woman at the time of the commission of the offense charged, it was ample to authorize that finding. Such a fact may be shown, either directly or circumstantially. "The fact of the marriage may be at least prima facie shown by any of the following methods: By proof of general repute in family (Civil Code 1910, § 5764); by proof of general reputation in the community (Drawdy v. Hesters, 130 Ga. 161[1], 60 S. E. 451, 15 L. R. A. [N. S.] 190; Clark v. Cassidy, 62 Ga. 407; Wood v. State, 62 Ga. 406); by proof of the fact that the man or the woman, as the case may be, lives together with a person of the opposite sex, as his or her spouse, with general recognition in the community of their being married to each other (Clark v. Cassidy, supra)." Miller v. State, 9 Ga. App. 827, 72 S. E. 279.

The verdict was authorized by the evidence,

and the court did not err in overruling the motion for a new trial.

Error from City Court of Dublin; S. W. Sturgis, Judge.

Georgia Plummer was convicted of an offense, and she brings error. Affirmed.

S. P. New, of Dublin, for plaintiff in error.
William Brunson, of Dublin, for defendant in error.

BROYLES, C. J. Judgment affirmed.

LUKE and BLOODWORTH, JJ., concur.

On Motion for Rehearing.

BROYLES, C. J. The plaintiff in error makes a motion for a rehearing of this case upon the ground that this court inadvertently overlooked the twelfth ground of the amendment to the motion for a new trial, and the decision in Lucas v. State, 110 Ga. 753, 36 S. E. 87. That ground of the motion was included in the third division of the decision of this court, which was as follows:

"3. The remaining special grounds of the motion for a new trial are without substantial merit."

The twelfth ground of the motion complained that the court charged that "all confessions should be scanned with care and should be received with great caution." There were several exceptions to this charge, but the only one argued by counsel for the plaintiff in error, in his motion for a rehearing, is that the court erred in not charging that an uncorroborated confession was not of itself sufficient in law to warrant a conviction. We agree with counsel that the court should have so charged; but, under all the particular facts of the case, we do not think this error requires a new trial. While in Lucas v. State, supra, the broad and sweeping statement is made, that such a charge "is an essential and vital part of the law as to confessions, and without it no charge on this subject can be fair and complete," the court further on in its opinion says that—

"The evidence relied on by the state as corroborative of this alleged confession was by no means strong, and it is impossible for us to know that the jury did not disregard this evidence altogether, and base their verdict exclusively upon the testimony relating to the confession. The case, at best, is close and doubtful, and it is by no means clear that the evidence warranted a conviction. It was therefore essential to the fairness of the trial that the jury should have distinctly understood that they could not lawfully convict upon the confession alone, and that it was incumbent upon them to pass on and determine the all-important question whether or not the confession, if proved to their satisfaction, was corroborated

by other evidence which, in connection with the confession itself, was sufficiently strong and convincing to satisfy their minds beyond a reasonable doubt of the guilt of the accused." (*Italics ours.*)

It is well settled that a decision of the Supreme Court should be construed in its entirety and in the light of the particular facts of the case then under review, and that a broad and sweeping ruling, applicable to all cases, is obiter, and not binding on this court, if such ruling was not necessary for the determination of the case. When the decision in the Lucas Case is so construed, it merely appears that, *under the specific facts of that case*, the failure of the judge to charge the principle of law referred to was reversible error, and that the broad general ruling, to the effect that it would be such an error in *any* case, was obiter, and not binding on this court. See, also, Rucker v. State, 2 Ga. App. 140, 58 S. E. 295, where it was held that, where the state depended *entirely* upon a confession to authorize a conviction, it was reversible error for the court to fail to instruct the jury that a conviction was not authorized unless the confession was corroborated. The instant case was not "close and doubtful," as was the Lucas Case, and the state did not "depend entirely upon a confession to authorize a conviction," as in the Rucker Case. On the contrary, the evidence in the present case, *with the defendant's confession excluded*, amply authorized, if it did not demand, beyond a reasonable doubt the verdict of guilty. It is therefore our opinion that the failure of the judge to charge as complained of does not require another trial of the case.

Rehearing denied.

LUKE and BLOODWORTH, JJ., concur.

(27 Ga. App. 316)

EVANS v. STATE. (No. 12565.)

(Court of Appeals of Georgia, Division No. 1.
July 28, 1921.)

(*Syllabus by the Court.*)

1. Criminal law §§511(2), 741(5), 789(2)—Instructions on "reasonable doubt" and corroboration of accomplice not erroneous.

There is no error in the instructions defining a "reasonable doubt," or in those relating to corroboration of an accomplice, of which complaint is made in the motion for a new trial.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Reasonable Doubt.]

2. Criminal law §§1159(5) — Appellate court cannot hold verdict contrary to evidence when there is slight evidence to corroborate testimony of accomplice.

"The sufficiency of the corroboration of the testimony of the accomplice to produce con-

viction of the defendant's guilt is peculiarly a matter for the jury to determine. If the verdict is founded on slight evidence of corroboration connecting the defendant with the crime, it cannot be said, as a matter of law, that the verdict is contrary to the evidence."

Error from Superior Court, Talliaferro County; E. T. Shurley, Judge.

Robert Evans was convicted of an offense, and he brings error. Affirmed.

J. A. Mitchell, of Crawfordville, for plaintiff in error.

M. L. Felts, Sol. Gen., of Warrenton, for the State.

BLOODWORTH, J. [1] 1. The court did not err in charging the jury:

(a) "A reasonable doubt is such a doubt as would arise in the mind of an honest juror seeking to do his duty, seeking the truth of the transaction, seeking to do justice between the state and the accused, and would not be such a doubt as would arise in the mind of a dishonest juror or who would go into the jury box for the purpose of discharging the defendant."

(b) "I charge you that it is not essential that the testimony shall of itself be sufficient to warrant a verdict of guilty—that is corroborating evidence, or that the corroborating testimony of the accomplice shall be corroborated in every particular—but is necessary, in addition to the corroboration of an accomplice, that the testimony shall be of itself sufficient to raise the inference of the defendant's guilt, and sufficient to connect the defendant with the perpetration of the crime, and tend to show his guilt, and the sufficiency of the corroboration is a question for you to determine."

[2] 2. The chief witness against plaintiff in error was his coindictor, who, in the briefs of counsel for both the state and the defendant, is admitted to be an accomplice. In Hargrove v. State, 125 Ga. 274, 54 S. E. 166, Justice Evans said:

"It is necessary that the testimony of an accomplice be corroborated by evidence connecting the defendant with the perpetration of the offense, in order to authorize a conviction. It is not required that this corroboration shall of itself be sufficient to warrant a verdict, or that the testimony of the accomplice be corroborated in every material particular. Taylor v. State, 110 Ga. 151; Dixon v. State, 116 Ga. 186. Slight evidence from an extraneous source identifying the accused as a participator in the criminal act will be sufficient corroboration of the accomplice to support a verdict. Evans v. State, 78 Ga. 351; Roberts v. State, 55 Ga. 220. The sufficiency of the corroboration of the testimony of the accomplice to produce conviction of the defendant's guilt is peculiarly a matter for the jury to determine. If the verdict is founded on slight evidence of corroboration connecting the defendant with the crime, it cannot be said, as a matter of law, that the verdict is contrary to the evidence. Chapman v. State, 109 Ga. 165."

The conviction in the case under consideration "is founded on slight evidence of corroboration connecting the defendant with the crime," and the jury by their verdict having said that this corroboration was sufficient to authorize a conviction, and their finding having been approved by the trial judge, this court cannot, as a matter of law, say that the verdict is contrary to the evidence. See, also, *Anglin v. State*, 14 Ga. App. 566, 81 S. E. 804.

Judgment affirmed.

BROYLES, O. J., and LUKE, J., concur.

(27 Ga. App. 282)

BOATRIGHT v. STATE. (No. 12453.)

(Court of Appeals of Georgia, Division No. 1.
July 12, 1921.)

(Syllabus by the Court.)

1. Criminal law §1151—Decision on application for continuance not reversed except for abuse of discretion.

"All applications for continuances are addressed to the sound legal discretion of the trial judge (Penal Code, § 992), and his decision thereon will not be reversed unless there has been a plain, palpable, and flagrant abuse of this discretion. *Curry v. State*, 17 Ga. App. 377, 87 S. E. 685, and cases there cited." *Smith v. State*, 21 Ga. App. 237 (1), 94 S. E. 265.

2. Criminal law §594(4)—Denial of continuance for sickness of witness held not abuse of discretion.

Under the foregoing ruling, and the facts of the instant case, including the note of the trial judge that "she [the witness on account of whose alleged illness the continuance was asked] was placed upon the stand and subjected to a lengthy examination, and, after seeing her upon the stand and hearing her testify, the court reached the conclusion that she was not too ill for the case to proceed," this court cannot say, as a matter of law, that the judge abused his discretion in denying the continuance.

3. Criminal law §753(1)—Refusal to direct verdict not error.

Under repeated rulings of this court and of the Supreme Court, it is never error for the court to refuse to direct a verdict.

4. Motion for new trial properly overruled.

There was evidence to support the verdict, which has the approval of the trial judge, and

for no reason assigned did the court err in overruling the motion for a new trial.

Error from Superior Court, Bacon County; J. I. Summerall, Judge.

Wyley Boatright was convicted of an offense, and brings error. Affirmed.

H. L. Causey and E. H. Williams, both of Alma, for plaintiff in error.

A. B. Spence, Sol. Gen., of Waycross, for the State.

LUKE, J. Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(27 Ga. App. 318)

SMITH v. STATE. (No. 12566.)

(Court of Appeals of Georgia, Division No. 1.
July 26, 1921.)

(Syllabus by the Court.)

1. Master and servant §67—Intent to defraud at execution of contract essential to offense.

Before one can lawfully be convicted of a violation of the "labor contract act" of 1903 (Pen. Code 1910, § 715), it must be proved that at the time of the execution of the contract he had formed the intent to defraud. Proof of facts indicating that he formed a fraudulent intent after the advances were made is not sufficient to authorize a conviction. *Redwine v. State*, 17 Ga. App. 560, 87 S. E. 829.

2. Conviction unauthorized by evidence.

Under this ruling and the facts of the instant case, the conviction of the accused was unauthorized by the evidence, and the court erred in overruling the motion for a new trial.

Error from City Court of Morgan; E. L. Smith, Judge.

Ben Smith was convicted of an offense, and he brings error. Reversed.

J. H. Dorsey, of Morgan, and W. I. Geer, of Colquitt, for plaintiff in error.

A. L. Miller, Sol. pro tem., of Edison, for the State.

BROYLES, C. J. Judgment reversed.

LUKE and BLOODWORTH, JJ., concur.

(27 Ga. App. 238)

HENNON et al. v. MITCHELL. (No. 12433.)(Court of Appeals of Georgia, Division No. 1.
July 18, 1921.)*(Syllabus by the Court.)***1. Instruction not erroneous.**

None of the excerpts from the charge of the court, set out in the motion for a new trial, when considered in the light of the entire charge and the facts of the case, contains reversible error.

2. Appeal and error \S 302(3)—Ground of motion not considered when the evidence objected to not set forth or attached.

The ground of the motion for a new trial complaining of the admission of certain documentary evidence cannot be considered, as the evidence is not set forth in the ground, either literally or in substance, nor attached thereto as an exhibit.

3. Landlord and tenant \S 310(1)—Landlord entitled to double rent without proving demand when issue not raised by counter affidavit.

Upon the trial the plaintiff landlord did not prove any demand for the possession of the premises in dispute, but the tenant did not raise this issue in his counter affidavit, and therefore the plaintiff was entitled to recover double rent, if entitled to recover any rent, from the date of the issuance of the dispossessory warrant.

4. Motion for new trial properly overruled.

The verdict was authorized by the evidence, and the court did not err in overruling the motion for a new trial.

Error from City Court of Floyd County; W. J. Nunnally, Judge.

Action by Lillie Mitchell against Jeff Hennon and others. Judgment for plaintiff, and defendants bring error. Affirmed.

Harris & Harris, of Rome, for plaintiffs in error.

Max Meyerhardt, of Rome, for defendant in error.

BROYLES, C. J. [1-4] The third headnote above needs elaboration. The plaintiff landlord swore out a dispossessory warrant against the defendants on November 17, 1919, in which she alleged that they had failed to pay the rent for the year 1919, which was due on November 15, 1919, and that she desired possession of the land, and that the defendants had refused to give her such possession. The defendants filed a counter affidavit and gave the required bond. Upon the trial the plaintiff asked for double rent, and the judge charged the jury that, if they found any amount for her, they should double that amount. A verdict in favor of the plaintiff for \$372.34 and the possession of the premises

was returned, and the defendants' motion for a new trial was overruled, and they excepted.

Counsel for the plaintiffs in error contend that, as no demand for the possession of the premises was shown on the trial, the plaintiff was not entitled to recover double rent. Such is the general rule. However, where, as in this case, the question as to demand is not raised in the counter affidavit, "it will be presumed to have been made as a prerequisite to the issuance of the warrant," and "the plaintiff would be entitled to recover from the tenant double rent from the date of the issuance of the dispossessory warrant." *Hindman v. Raper*, 143 Ga. 643 (2), 85 S. E. 843; *Bowling v. Hathcock*, 26 Ga. App. —, 107 S. E. 384.

Judgment affirmed.

LUKE and BLOODWORTH, JJ., concur.

(27 Ga. App. 284)

DAVENPORT v. STATE. (No. 12410.)(Court of Appeals of Georgia, Division No. 1.
July 12, 1921.)*(Syllabus by the Court.)***1. Burglary \S 4 — Criminal law \S 29 — "Place of business" includes sheriff's place of business in courthouse; that defendant also guilty of larceny from house does not affect guilt of burglary from place of business.**

The words "place of business," as used in the statute defining burglary, mean any house occupied as a place of business by another, in which valuable goods are contained, and this is so regardless of whether such place of business be located in a private or public building.

[Ed. Note.—For other definitions, see *Words and Phrases*, First and Second Series, *Place of Business*.]

2. Motion for new trial properly denied.

The several special grounds of the motion for a new trial are without merit, and, under the foregoing ruling and the facts of the instant case, the trial court did not err in denying a new trial.

Error from Superior Court, Glynn County; J. P. Highsmith, Judge.

Charlie Davenport was convicted of burglary, and he brings error. Affirmed.

R. W. Durden and Henry O. Farr, both of Brunswick, for plaintiff in error.

A. V. Sellers, Sol. Gen., of Baxley, for the State.

LUKE, J. [1] The defendant was indicted for and convicted of burglary. The indictment charged him with breaking and entering, with intent to commit a larceny, the office of R. S. Pyles, sheriff of Glynn county, the same being the latter's place of business,

where valuable goods, wares, and articles were contained. Upon the trial the evidence adduced showed that the sheriff's office was located in the courthouse, and was his place of business, and that valuable articles were stored therein. There was also evidence of both a breaking and an entering. The other necessary elements of burglary were proved.

The only contention of the defendant that warrants any discussion is that the verdict finding him guilty is contrary to law, since he could not be legally convicted of burglarizing a public building. Section 146 of the Penal Code of 1910 defines burglary to be:

"The breaking and entering into the dwelling, mansion, or storehouse, or other place of business of another, where valuable goods, wares, produce, or any other article of value are contained or stored, with intent to commit a felony or larceny." (Italics ours.)

The italicized clause, "other place of business of another," was the provision of the above Code section under which the defendant was indicted and convicted. Had he been indicted for and convicted of burglary of the courthouse, the defendant's contention might be meritorious. However, the mere fact that the place of business burglarized was situated in the courthouse, a public building, would make the offense none the less burglary. Nor would the mere fact that under section 180 of the Penal Code the accused may also have been guilty of larceny from the house prevent him from being legally tried and convicted of burglary, where, as in the instant case, all the necessary elements of burglary were proved. In *Keenan v. State*, 10 Ga. App. 792, 793, 74 S. E. 297, it was held:

"This statute [Penal Code, § 146] enlarges the common-law definition of burglary; for burglary at common law was the breaking and entering a mansion or dwelling house with intent to commit a felony or larceny therein. This section of the Code includes, not only a dwelling house or mansion, but any storehouse or other place of business where valuable goods of any character are contained or stored. The words 'other place of business,' considered with the context, clearly mean a house used as a place of business, but are not intended to be restricted to a house used as a storehouse or of the nature of a storehouse. They include any house used as a place of business by another, where valuable goods are contained, whether it be a storehouse or not." (Italics ours.)

This decision is clearly authority for the proposition that one may be convicted of burglarizing the place of business of another, regardless of the nature of the house in which the place of business is located.

[2] The several special grounds of the motion for a new trial are without merit, and, under the foregoing ruling, and the facts

adduced on the trial, the lower court did not err in denying the defendant a new trial.

Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(27 Ga. App. 286)

DAVENPORT v. STATE. (No. 12411.)

(Court of Appeals of Georgia, Division No. 1.
July 12, 1921.)

(Syllabus by the Court.)

1. Criminal law § 828—Fuller or more specific instructions should be requested in writing.

None of the grounds of the amendment to the motion for a new trial contains reversible error; they all relate to the charge of the court, and the portions thereof excepted to are correct statements of the law applicable to the facts of the case; and, if the defendant desired any fuller or more specific instructions, he should have presented to the court a written request therefor.

2. Sufficiency of evidence.

The evidence authorized the verdict, and, no error of law appearing, the judgment overruling the motion for a new trial must be affirmed.

Error from Superior Court, Glynn County; J. P. Highsmith, Judge.

Charlie Davenport was convicted of an offense, and he brings error. Affirmed.

R. W. Durden and Henry O. Farr, both of Brunswick, for plaintiff in error.

A. V. Sellers, Sol. Gen., of Baxley, for the State.

LUKE, J. Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(27 Ga. App. 286)

DAVENPORT v. STATE. (No. 12412.)

(Court of Appeals of Georgia, Division No. 1.
July 12, 1921.)

(Syllabus by the Court.)

1. Criminal law § 822(1)—Instructions complained of should be considered in light of evidence and entire charge.

When considered in connection with the entire charge of the court and in the light of the evidence, the excerpts from the charge of which complaint is made in the motion for a new trial are not erroneous for any reason assigned.

2. Sufficiency of evidence.

The evidence amply authorized the verdict, which has the approval of the trial, and the court did not err in overruling the motion for new trial.

Error from Superior Court, Glynn County; J. P. Highsmith, Judge.

Charlie Davenport was convicted of an offense, and he brings error. Affirmed.

R. W. Durden and Henry O. Farr, both of Brunswick, for plaintiff in error.

A. V. Sellers, Sol. Gen., of Baxley, for the State.

LUKE, J. Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(27 Ga. App. 277)

WILKINSON v. BRAY. (No. 11886.)

(Court of Appeals of Georgia, Division No. 1. July 12, 1921.)

(Syllabus by the Court.)

1. Negligence \S 93(1)—Automobile driver's negligence not imputed to guest.

On the trial of a suit for damages on account of personal injuries resulting from a collision of two automobiles, when the plaintiff was riding in one of them as an invited guest of its driver, the court erred in rejecting evidence that the driver was not in the plaintiff's employ, and not her agent, and that she had no control over the car. This is true because the negligence of the driver of a private vehicle is not imputable to a person riding in it as an invited guest, where that person had no right, or was under no duty, to control or influence the driver's conduct.

2. Appeal and error \S 302(1)—Ground of motion for new trial requiring reference to other grounds not considered.

Grounds of a motion for a new trial should be complete in themselves; and, when a particular ground is under consideration, reference to other grounds should not be required in order to understand the assignments of error.

3. Highways \S 175(1)—Municipal corporations \S 705(4)—Violation of penal statute regulating automobiles on streets and highways is negligence per se.

The violation of a penal statute proximately causing an injury is negligence per se, and the court may so instruct the jury.

Error from City Court of Valdosta; J. G. Cranford, Judge.

Action by Mrs. J. M. Wilkinson against C. W. Bray. Judgment for defendant and plaintiff brings error. Reversed.

G. A. Whitaker, of Valdosta, and Dorsey, Shelton & Dorsey, of Atlanta, for plaintiff in error.

E. K. Wilcox, of Valdosta, for defendant in error.

BLOODWORTH, J. Mrs. J. M. Wilkinson brought suit against C. W. Bray for damages on account of personal injuries resulting from a collision of the defendant's automobile with an automobile driven by W. E. French, in which she was riding, the plaintiff alleging that the collision was caused by negligence of the defendant in various particulars. The defendant filed an answer denying liability, and alleging that "said collision and all of its consequences, if attributable to the fault of any one, was attributable to the fault and negligence of W. E. French, who was at the time in charge of and driving the automobile in which plaintiff was riding;" the answer containing specific allegations of negligence on the part of French. There was a verdict for the defendant. The plaintiff's motion for a new trial was overruled, and she excepted.

[1] 1. On the trial of the case it was shown that at the time of the accident the plaintiff was riding in the car of French as his guest. She offered evidence to show that French had no interest whatever in the mission on which she was going, that he was not her agent or in her employ, and that she had no control over the movements of his car. On objection that this evidence was irrelevant and immaterial, it was rejected. We think this was such an error as to require the grant of a new trial. Section 3475 of the Civil Code of 1910 is, in part, as follows:

"For the negligence of one person to be properly imputable to another, the one to whom it is imputed must stand in such a relation or privity to the negligent person as to create the relation of principal and agent."

In Roach v. W. & A. Railroad Co., 93 Ga. 785 (4), 21 S. E. 67, the Supreme Court held:

"The negligence of the driver and owner of a private vehicle who, by such negligence, contributes to causing a collision with a locomotive, is not imputable to another person riding by invitation in the vehicle, unless that person had some right, or was under some duty, to control or influence the driver's conduct. Such right might arise by reason of the two being engaged at the time in a joint enterprise for their common benefit; and if this were not so, the duty might arise from obvious or known incompetency of the driver, resulting from drunkenness or other cause."

In Metropolitan Railroad Co. v. Powell, 89 Ga. 601 (7), 16 S. E. 118, it was held:

"If the plaintiff herself was free from negligence and her injury was due to the concurrent negligence of the railroad company and the person with whom she was riding in a wagon, he not being her servant, and it not appearing that she was the owner of the horse or wagon, or that she had any agency or concern in procuring or in driving the same, and nothing appearing which tends to show that she was aware of any incompetency in the driver, the company is liable to her for all the damages consequent upon the injury, and can take no

credit as to any part thereof on account of the contributory negligence of the driver of the wagon."

Chief Judge Hill in *Adamson v. McEwen*, 12 Ga. App. 510, 77 S. E. 591, said:

"Where a person riding with another as the latter's guest or companion is injured by the negligence of a third person, 'contributory negligence of the driver is not imputable to the injured person, unless the injured person was in a position to exercise authority or control over the driver, or failed to exercise such care as he could and should have exercised under the particular circumstances, to protect himself.' *Colorado & Southern Ry. Co. v. Thomas*, 33 Colo. 519, 81 Pac. 803, 70 L. R. A. 681, 3 Ann. Cas. 700. Under this principle, Boykin, who was simply the guest and companion of Adamson, could not be chargeable with the negligence of the driver who was running Adamson's automobile; for, being simply a guest, he had no control or authority over the driver. In the case of *Dale v. Denver City Tramway Co.*, 173 Fed. 789, 97 C. C. A. 511, 19 Ann. Cas. 1223, it is held that the negligence of a chauffeur driving an automobile is not imputable to a person riding in the automobile but having no control over it. See, in this connection, the case of *Little v. Hackett*, 116 U. S. 366, 6 Sup. Ct. 391, 29 L. Ed. 652. In the case of *Clarke v. Connecticut Co.*, 83 Conn. 219, 76 Atl. 523, it is said: 'A gratuitous passenger, in no matter what vehicle, is not expected, ordinarily, to give advice or direction as to its control and management.' We deduce from these authorities, as well as from the general principle on the subject, that where one is injured by the negligent conduct of the driver of an automobile, a person who is riding in the automobile simply as an invited guest, and who has no control or management of the machine or of the driver, and no interest in the automobile, cannot be held liable for the negligent conduct of the chauffeur; that in riding in the automobile under these circumstances he is not engaged in a common or joint enterprise with the owner or the chauffeur; and the fact that the guest has agreed to pay the expenses of the party after they have arrived at their destination does not alter the legal conclusion to be drawn from the facts above stated."

See, also, *Southern Ry. Co. v. King*, 128 Ga. 383, 57 S. E. 687, 11 L. R. A. (N. S.) 829, 119 Am. St. Rep. 390; *Seaboard Air Line Ry. v. Barrow*, 18 Ga. App. 261 (5), 89 S. E. 383. The foregoing rulings clearly support the position we take that the court erred in rejecting the evidence referred to above.

[2] 2. This court is not called upon to consider the eighth ground of the motion for a new trial, because it cannot be understood without reference to another ground of the motion.

"Grounds of a motion for a new trial should be complete in themselves; and, when a particular ground is under consideration, reference to other grounds should not be required in order to understand the assignments of error."

Bowen v. Smith-Hall Grocery Co., 146 Ga. 157(4), 91 S. E. 32.

[3] 3. Certain other grounds of the amendment to the motion for a new trial complain of errors in excerpts from the charge. The chief objection to these portions of the charge is that the court failed to instruct the jury that the—

"failure on the part of the defendant to observe the rules and requirements of the law referred to in said portion of the charge (the law relative to the running and controlling of automobiles) constituted negligence per se."

The tenth ground alleges error—

"because the court failed to submit to the jury at any time an appropriate charge on the doctrine of negligence per se, and failed to charge the jury with reference to the several allegations of negligence per se."

As under the ruling in the preceding portion of this opinion, a new trial is to be had with evidence different from that at the former trial, the judge who presides must adjust his charge to the case made, and, should the evidence show that the defendant had failed to comply with any portion of the law regulating the use of automobiles upon the streets and highways, and in so doing had violated a penal statute, he would of course charge the jury that this act would be negligence per se.

"The violation of a penal statute proximately causing an injury is negligence per se, and the court may so instruct the jury." *L. & N. Railroad Co. v. Hames*, 135 Ga. 67 (4), 68 S. E. 805.

Judgment reversed.

BROYLES, O. J., and LUKE, J., concur.

(27 Ga. App. 255)

WALL v. HAWKER POTTERY CO.
(No. 12416.)

(Court of Appeals of Georgia, Division No. 1.
June 30, 1921.)

(Syllabus by the Court.)

1. Demurrer not well taken.

The suit was upon an open count, and, as amended, was not subject to the demurrer interposed.

2. Certiorari \S 59 — Assignments of error must point out error; assignment that ruling was error insufficient.

Assignments of error must be specific, whether contained in a bill of exceptions or in a petition for certiorari, and, when based upon a decision of the trial court, must specifically point out the reason why the decision is error. *Civil Code* 1910, \S 5183 and 6139; *Warren v. Oliver*, 111 Ga. 308(1), 35 S. E. 673; *Callaway v. Atlanta*, 6 Ga. App. 354, 64 S. E. 1105.
(a) In the instant case the petition for cer-

(193 S.E.)

tiorari complained that the trial court disallowed an amendment to the defendant's answer, but the assignment of error upon this ruling was merely that it "was error." This assignment of error was not sufficient in that it did not point out why the ruling excepted to was error. *Palmer v. Ingram*, 2 Ga. App. 200, 58 S. E. 362.

3. Pleading \S 380 — Evidence to support amendment disallowed properly rejected.

After the amendment to the defendant's answer had been disallowed, it was not error to reject evidence offered in support of the amendment.

4. Sufficiency of evidence.

The verdict was amply authorized by the evidence, and the judge of the superior court did not err in overruling the certiorari.

Error from Superior Court, McDuffie County; H. C. Hammond, Judge.

Action by the Hawker Pottery Company against J. C. Wall. Judgment for plaintiff. Certiorari overruled by the superior court, and defendant brings error. Affirmed.

B. J. Stevens, of Thomson, for plaintiff in error.

P. B. Johnson, of Thomson, for defendant in error.

BROYLES, C. J. Judgment affirmed.

LUKE and BLOODWORTH, JJ., concur.

(27 Ga. App. 132)

WOODS v. STATE. (No. 12369.)

(Court of Appeals of Georgia, Division No. 1. June 14, 1921.)

(Syllabus by the Court.)

Larceny \S 55—Evidence insufficient to support conviction.

In this case the conviction of the defendant was not authorized by the evidence, and it was error for the court to overrule the motion for a new trial.

Error from City Court of Tifton; J. H. Price, Judge.

Harrison Woods was convicted of larceny, and he brings error. Reversed.

The prosecuting witness, Rowland, testified that when he hired defendant as the chopper defendant said he did not have a crosscut saw, broad axe, or club axe; that he got them and turned them over to defendant; that he bought a saw and gave it to defendant, and gave him orders to get the two axes; that he had never seen the tools since; that he only loaned the tools to defendant, and did not charge them up to him; that defendant left after working two or three weeks, and went to work for another

person; and that defendant owed him \$30 when he quit which he had been unable to collect. Defendant's witness Edwards testified that when defendant was working for one Harrell before going to work for Rowland he had a broad axe and a club axe, and had them when he went to work for Rowland; that when he left Rowland he left a crosscut saw in the house of the witness, and it was still there; that he saw defendant buy a club axe, and have it charged to himself. Defendant's witness, Williams, testified that when defendant went to work for Rowland he borrowed a crosscut saw from the witness, and that he then had a broad axe and a club axe, and they were not new tools. Defendant stated that when he went to work for Rowland he had a broad axe and a club axe, and borrowed a crosscut saw from Williams; that he later bought another club axe of a different size, and had it charged to himself, and later paid for it; that when he left Rowland he took all his tools except the saw, which he left with Edwards; that Rowland never loaned him any tools, and he had never taken anything of Rowland's; and that Rowland let him go after one Branch had promised to pay the \$30 defendant owed Rowland.—Statement by editor.

Murrow & Bennet, of Tifton, for plaintiff in error.

R. E. Dinsmore, Sol., of Tifton, for the State.

BROYLES, C. J. Judgment reversed.

LUKE and BLOODWORTH, JJ., concur.

(27 Ga. App. 260)

BROOKE et al. v. FARMERS' & MERCHANTS' BANK OF CUMMING. (No. 11933.)

(Court of Appeals of Georgia, Division No. 1. June 30, 1921.)

(Syllabus by the Court.)

1. Motion to dismiss denied.

The motion to dismiss the bill of exceptions is denied.

2. Judgment \S 509—Cannot be collaterally attacked except for fraud or collusion, or defect apparent on face of record.

An unreversed judgment of a competent court cannot be collaterally attacked except for fraud or collusion, or for some defect apparent upon the face of the record or pleadings. Civil Code 1910, §§ 3218 and 5966; *Hammock v. McBride*, 6 Ga. 178 (1); *Smith v. Cuyler*, 78 Ga. 654 (2), 3 S. E. 406; *Williams v. Lancaster*, 113 Ga. 1020 (6), 39 S. E. 471. See, also, in this connection, Civil Code 1910, §§ 4629, 4630, and 5965; *McArthur v. Matthewson*, 67 Ga. 134.

3. Judgment \S 501, 523—In money rule proceeding, where allegation of fraud insufficient, evidence properly excluded; allegation that judgment was taken for too great an amount does not show fraud; judgment cannot be attacked collaterally for accident or mistake as to amount.

In a money rule proceeding, where C. claims money in the hands of the sheriff, derived from the sale of certain property of B. sold by the sheriff under an execution in favor of A. against B., and A. intervenes and claims the fund, and C. alleges in his petition that the judgment in favor of A. (upon which the execution of A. was based) was obtained through fraud, but the facts as set forth in the petition are insufficient to constitute fraud, it is not error for the court to hold that C. could not go behind the judgment and show by extraneous evidence to the record that B. did not in fact owe A. the amount of the judgment, and to repel evidence offered by C. to support his allegations of fraud.

(a) In the instant case the judgment was collaterally attacked solely on the ground of fraud in its procurement, and the only allegation in the petition as to fraud was that the judgment was taken for too great an amount (the amount of the excess being stated), and was therefore fraudulent "to the extent of this excess." This allegation, if true, does not necessarily show fraud in the procurement of the judgment. The judgment may have been taken for too great an amount simply through accident or mistake, and a judgment cannot be collaterally attacked on the ground that it was procured through accident or mistake; and, furthermore, the judgment was not attacked on such a ground. The allegations in the petition being insufficient to show fraud, it was not error for the court to exclude the evidence offered to prove such allegations.

4. No errors committed.

The court, sitting by consent, without the intervention of a jury, committed no material error in its rulings upon the admissibility of evidence, and did not err in rendering the judgment excepted to.

Bloodworth, J., dissenting.

Error from Superior Court, Milton County; D. W. Blair, Judge.

Money rule proceeding between J. P. Brooke and others and the Farmers' & Merchants' Bank of Cumming. Judgment for the latter, and the former bring error. Affirmed.

N. A. Morris and Harold Hawkins, both of Marietta, for plaintiffs in error.

Geo. F. Gober, of Atlanta, and H. L. Patterson, of Cumming, for defendant in error.

PER CURIAM. Judgment affirmed.

BROYLES, C. J., and LUKE, J., concur.

BLOODWORTH, J. (dissenting). I think this court should pass an order directing the trial judge to so modify his judgment in this case as to allow the bank to collect from the

funds in the hands of the sheriff the principal of the debt, \$4,500, interest thereon at 8 per cent. from February 8, 1912, 10 per cent. attorney's fees, and costs. Of course I recognize the presumption in favor of a judgment rendered by a court of competent jurisdiction and unreversed, but this presumption may be overcome by proof of fraud. I shall not undertake to quote all the evidence in this case, but the evidence clearly shows that there was due on this indebtedness when the claim was transferred to the bank, only \$216 interest, and that this was all the interest the bank ever paid, and that when the bank bought the claim all the interest on the notes up to February 8, 1912, had been paid by R. J. Webb. M. W. Webb swore that he was cashier of the Farmers' & Merchants' Bank when these notes were bought from Mrs. Webb. He further swore:

"We paid what was due on the notes on that date, and \$4,716.00 was the amount we all recognized as involved in the deal at the time the notes were transferred to the bank by Mrs. Webb and at the time the deed was made from her to the bank." (Italics mine.)

This same cashier swore that he made the calculation on the notes upon which the judgment was taken, and the calculation shows that interest was calculated for several years prior to February 8, 1912. The judgment based upon this calculation had in it a total of \$949.63 of interest and attorney's fees more than was proper. The petition alleges the judgment—

"was taken for an excessive sum, and was for too great an amount, and was therefore fraudulent to the extent of this excess as against these claimants."

To allow the bank to collect this excess of interest and attorney's fees, while other creditors go without even the principal of their judgment, would be unjust, inequitable, and fraudulent. Both the bank and the law should be satisfied if it received what was justly and legally due. In *Hinton v. Burns*, 20 Ga. App. 469, 98 S. E. 121, Judge Jenkins said:

"A money rule is an equitable proceeding, and the court must, upon proper pleading, award the money in the hands of the officer to the person equitably entitled to it"

—and cited a number of decisions of this court and of the Supreme Court to support this well-recognized principle. The following sections of the Civil Code of 1910 will give us very material aid in determining the question at issue:

"Sec. 5965. The judgment of a court of competent jurisdiction may be set aside by a decree in chancery, for fraud, accident, or mistake, or the acts of the adverse party unmixed with the negligence or fault of the complainant."

"Sec. 4584. The judgment of a court of competent jurisdiction may be set aside by a decree, for fraud, accident, or mistake, or the acts of the adverse party unmixed with the negligence or fault of the petitioner."

"Sec. 4629. Fraud will authorize a court of equity to annul conveyances, however solemnly executed, and to relieve against awards, judgments, and decrees obtained by imposition."

"Sec. 5966. Creditors or bona fide purchasers may attack a judgment for any defect appearing on the face of the record or pleadings, or for fraud or collusion, whenever and wherever it interferes with their rights, either at law or in equity."

"Sec. 3218. Creditors may attack as fraudulent a judgment or conveyance, or any other arrangement interfering with their rights, either in law or in equity."

In *Hammock v. McBride*, 6 Ga. 178 (1), it is held that—

"Creditors or bona fide purchasers may attack a judgment fraudulently obtained, whenever it interferes with their rights, either at law or in equity."

In *Smith v. Gettinger*, 3 Ga. 140, it was held:

"A judgment in attachment may be set aside in a court of law, upon an issue suggesting fraud or want of consideration, tendered by a judgment creditor of the defendant in attachment."

In *Smith v. Oyler*, 78 Ga. on page 660, 3 S. E. on page 407, Chief Justice Bleckley said:

"Fraud is not a thing that can stand, even when robed in a judgment."

In *Williams v. Lancaster*, 113 Ga. 1020 (6), 39 S. E. 471, the Supreme Court said:

"A collateral attack upon a judgment may be made in any court upon the ground of fraud. Civil Code. §§ 5370, 4082" (Civil Code of 1910, §§ 5965, 4629).

Under the above rulings, I think the trial judge should have considered all the evidence offered for the purpose of showing that the judgment in favor of the bank was in excess of the amount actually due it, and when all the evidence in reference to this matter is considered, I think the court erred in holding that in this proceeding the bank should be allowed to collect the entire amount for which judgment was entered.

(27 Ga. App. 292)

SMITH v. STATE. (No. 12456.)

(Court of Appeals of Georgia, Division No. 1. July 12, 1921.)

(Syllabus by the Court.)

1. Criminal law § 825(1)—Fuller instructions should be requested.

The charge of the court was a correct presentation of the law applicable to the facts of

the case, and, if the defendant desired any fuller or more specific instructions, he should have so requested the court to charge.

2. Motion for new trial properly denied.

The evidence authorized the verdict, which has the approval of the trial judge, and for no reason assigned was it error for the court to overrule the motion for a new trial.

Error from City Court of Dublin.

Action by the State against Crawford Smith. Judgment for the State, and defendant brings error. Affirmed.

W. A. Dampier and Chas. S. Loden, both of Dublin, for plaintiff in error.

Wm. Brunson, Sol., of Dublin, for the State.

LUKE, J. Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(27 Ga. App. 282)

CHRISTOPHER v. HINES, Director General,
et al. (No. 11915.)

(Court of Appeals of Georgia, Division No. 1. July 12, 1921.)

(Syllabus by the Court.)

Railroads § 5½, New vol. 6A Key-No. Series —Employee not entitled to recover back time pay under Director General's order.

The court did not err in sustaining the demurrers to the petition and dismissing it.

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by Pink Christopher against W. D. Hines, Director General of Railroads, and the Central of Georgia Railway Company. Judgment for defendants on demurrer, and plaintiff brings error. Affirmed.

Plaintiff alleged that he began work for the railway company about October 1, 1917, in the capacity of machinist's helper, and worked in that capacity at a regular salary of 22 cents an hour until February 15, 1919, when he was discharged; that about January 1, 1918, the railway company was taken over by the United States government, and plaintiff, then being an employé of the railway company, continued his employment and service; that he was entitled to an increase from 22 cents to 45 cents an hour from January 1, 1918, under Supplement No. 4 to General Order No. 27 of the Director General of Railroads issued on July 25, 1918, being an increase of 23 cents an hour for what was known as back time; and that

he had demanded payment, but payment had not been made. The Director General demurred on the grounds that no cause of action was stated; that the agreement to pay an increase for back time was a pure gratuity, not legally enforceable; and that it nowhere appeared how much plaintiff claimed to be due from the date of such Supplement to General Order No. 27. The railway company demurred on the same grounds, and on the further ground that no contract or obligation of the company was set out because it was not at the times in question in possession of its properties, operating them or employing persons to work thereon.—Statement by the editor.

C. J. Moore and T. G. Lewis, both of Atlanta, for plaintiff in error.

Little, Powell, Smith & Goldstein, of Atlanta, for defendants in error.

BLOODWORTH, J. Judgment affirmed.

BROYLES, C. J., and LUKE, J., concur.

(27 Ga. App. 304)

ROBERTS v. WILLYS-OVERLAND, Inc.
(No. 12524.)

(Court of Appeals of Georgia, Division No. 1.
July 26, 1921.)

(Syllabus by the Court.)

Malicious prosecution §§10, 51—Process §§168, 171—Petition held not to state cause of action for malicious use or abuse of process; "malicious use of process" defined; "malicious abuse of process" defined.

The petition as amended did not set out a cause of action, and the court properly dismissed it on general demurrer.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Malicious Abuse of Process.]

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by Lella Roberts against Willys-Overland, Incorporated. Judgment for defendant on demurrer, and plaintiff brings error. Affirmed.

Miss Lella Roberts sued the Willys-Overland Corporation for damages, and in her petition alleged substantially the following facts: That on May 15, 1920, she purchased from the defendant an automobile, for which she paid in cash certain sums of money, and signed certain papers promising to pay other sums; that the defendant induced her to do this by certain representations and agreements, which it failed to carry out, and which she later found to be false and fraudulent;

that in the writing which she had been induced to sign the defendant reserved title to the automobile until payment of all the sums stipulated to be paid, and on her failure to make the payments the defendant had the right to sue in "trover" for the recovery of the automobile, although the plaintiff in a court of equity would have had the right to have the whole transaction set aside because of defendant's fraudulent representations; that, when the plaintiff failed to make certain payments as stipulated in the contract, instead of filing "merely a suit in trover" for the recovery of property, the defendant instituted a bail trover proceeding, making the necessary affidavit for the purpose, and as a result of said proceeding the plaintiff was on October 28, 1920, arrested by the marshal of the municipal court of Atlanta, taken in custody, and held for several hours, subject to the gaze of the public; that plaintiff would not have been arrested had the defendant been sued in trover instead of bail trover; that the affidavit made in the bail trover proceeding was maliciously and willfully issued, and was absolutely false, and was made for the sole purpose of humiliating the plaintiff; that the plaintiff is a woman 50 years of age, has resided in the city of Atlanta for a number of years, owns certain property, is highly respectable, and has never been arrested or held in custody before; that the property was not likely to be eloiigned or moved away, and this fact was well known to the defendant; that by reason of the above-stated acts, which were malicious and unwarranted, plaintiff has been damaged in the sum of \$10,000; that there were two alternatives whereby the plaintiff could have prevented the arrest, to wit, by giving bond for the forthcoming of the property or by surrendering possession of the same, but because certain parties were at the time of her arrest out of the city she could not give the required bond; and that she was unable to surrender the automobile, because it was in a garage undergoing repair.

The defendant filed a general and special demurrer to the petition, and upon the hearing of the demurrer the plaintiff filed an amendment, in which she alleged that the damage claimed was for the malicious abuse of legal process. After allowing this amendment, the trial judge sustained the general demurrer, and to this ruling the plaintiff excepted.

J. Walter Le Craw and Fred E. Harrison, both of Atlanta, for plaintiff in error.

Brandon & Hynds and V. B. Moore, all of Atlanta, for defendant in error.

BROYLES, C. J. (after stating the facts as above). Although the plaintiff, by amendment, alleged that her cause of action was for

the malicious abuse of legal process, it is very uncertain from the facts set forth in the petition whether she based her action upon the malicious use or the malicious abuse of legal process. However, in either event the judge properly sustained the defendant's general demurrer, since the facts alleged, when construed, as they must be, most strongly against the pleader, fail to show either a malicious use or a malicious abuse of legal process.

"Malicious use of legal process is where a plaintiff in a civil proceeding employs the court's process in order to execute the object which the law intends for such a process to subserve, but proceeds maliciously and without probable cause. In a suit for damages growing out of such malicious use of process, it must appear that the previous litigation has finally terminated against the plaintiff therein. Malicious abuse of legal process is where a plaintiff in a civil proceeding willfully misapplies the process of a court in order to obtain an object which such a process is not intended by law to effect. In a suit for damages growing out of such a perversion of the court's process, it is not necessary to show that the former litigation was without probable cause, or that it terminated prior to the institution of the suit for damages." *McElreath v. Gross*, 23 Ga. App. 287 (1 & 2), 98 S. E. 190.

See, also, *Georgia Loan & Trust Co. v. Johnston*, 116 Ga. 628, 43 S. E. 27. and *Brantley v. Rhodes-Haverty Furniture Co.*, 131 Ga. 276, 281, 62 S. E. 222, and cases cited. In the instant case the facts alleged were legally insufficient to constitute a cause of action for malicious use of process, since it was not alleged in the petition that the previous litigation had finally terminated against the plaintiff therein. Neither did the petition set out a cause of action for malicious abuse of process, since the facts alleged therein were legally insufficient to show that the bail trover proceeding was willfully misapplied or perverted to some use which the law did not intend that such a process should subserve. The petition admits that the title to the automobile was in the plaintiff in the trover proceeding, and that it had the right to sue petitioner in trover. The petition contains also an allegation that the plaintiff could have escaped arrest by either giving bond or surrendering the property, and the facts alleged why she did not take advantage of this right are wholly insufficient to constitute a legal excuse for her failure to do so. The purpose of a bail trover proceeding is to require the defendant to give bond for the forthcoming of the property, and the facts alleged in the petition fail to show that the proceedings in the instant case were instituted for any other purpose.

Judgment affirmed.

LUKE and BLOODWORTH, JJ., concur.

JORDAN v. DOUGLAS GROCERY CO.
(No. 12153.)

(Court of Appeals of Georgia, Division No. 1.
July 26, 1921.)

(Syllabus by the Court.)

1. Evidence \S 423(8)—That married woman executed note and mortgage as surety not admissible, where nobody else signed.

The court did not err in excluding the testimony of the defendant that the note sued on and the mortgage executed to secure it, which were signed by her alone, were signed by her as surety, and that she did not purchase the store and the goods for which the note was given.

2. Appeal and error \S 302(1)—New trial \S 41(2)—Admission of evidence not ground for new trial, where other evidence demanded directed verdict; ground of motion for new trial must be complete in itself.

"Though testimony be improperly admitted, yet if, in the opinion of the court, the other evidence is sufficient to authorize the verdict, which ought to have been as it was, independent of the testimony, a new trial should not be granted." *Jordan v. Pollock*, 14 Ga. 145(1).

3. Verdict properly directed.

The court properly directed a verdict for the plaintiff.

Error from City Court of Hazlehurst; Gordon Knox, Judge.

Action by the Douglas Grocery Company against Mrs. D. T. Jordan. Judgment for plaintiff, and defendant brings error. Affirmed.

S. D. Dell, of Hazlehurst, for plaintiff in error.

McDonald & Willingham, of Douglas, and Newton Gaskins, of Hazlehurst, for defendant in error.

BLOODWORTH, J. Mrs. D. T. Jordan gave the Douglas Grocery Company a promissory note, and at the same time executed a mortgage to secure the note. No other person signed either the note or the mortgage. When sued upon the note, she filed a plea denying liability, and alleging:

That, while her name appears as a principal, "she was in reality security or surety for Joe McDaniel, and that said fact was fully known to Douglas Grocery Company; that at that time she was a married woman, and could not become surety or security for any one; and that therefore she is not liable on said note."

On the trial she sought to prove that she signed the note and the mortgage as security, and that she did not purchase the store and goods for which the note was given. In her motion for a new trial she complains that

the judge rules out this evidence and directed a verdict against her.

[1] 1. For no reason assigned at the trial did the court err, under the pleadings in this case, either in rejecting the evidence that the defendant "signed said note as security and that she signed said mortgage as security," or in ruling out the evidence that "she did not purchase the store from plaintiff, and never ordered any goods from them, and did not owe them anything." The mortgage itself shows that the note was given for the purchase of a certain stock of goods. The only person who signed the note and the mortgage was the defendant. It is not claimed that any other person was to have signed these papers and by mistake or fraud was prevented from doing so, and the petition contained no allegation of mistake or fraud whatever. Section 8538 of the Civil Code of 1910 says:

"The contract of suretyship is that whereby one obligates himself to pay the debt of another in consideration of credit or indulgence, or other benefit given to his principal, *the principal remaining bound therefor.*" (Italics ours.)

The very essence of a contract of suretyship is that there should be some one liable as principal. This necessarily contemplates that, where such a note is given, there must be at least two parties who signed it and are liable for the payment thereof, the principal and the surety. As only one person signed the note sued on, that person must necessarily be the principal, and the court properly ruled out all evidence offered to show that she was surety. Moreover, the approved brief of evidence shows that practically all the evidence complained of as having been excluded was before the jury, and that it came from the defendant.

[2, 3] 2. The third ground of the amendment to the motion for new trial complains that the court erred in allowing a witness to testify:

"They [Mr. Jordan, Mr. Anderson, and Joe McDaniel] told me Mrs. Jordan would purchase the store."

As this ground of the motion is not complete and understandable within itself, we are not called upon to consider it. However, granting, but not conceding, that the admission of this evidence was error, it is not cause for new trial, because, independently of this testimony, the other evidence demanded the verdict directed by the court. *Jordan v. Pollock*, 14 Ga. 145 (1); *Daniel v. Frost*, 62 Ga. 697 (5).

3. The court did not err in overruling the motion for a new trial.

Judgment affirmed.

BROYLES, C. J., and LUKE, J., concur.

(116 S. C. 353)

DAY v. ATLANTA & C. A. L. RY. CO.
(No. 10667.)

(Supreme Court of South Carolina. June 30, 1921.)

Railroads ~~679~~—Action held one for invasion of abutting owner's inclosure, and not to try title under right of way deed.

An action by plaintiff whose fence was broken and whose close was entered by the servants of a railroad company, who claimed that by virtue of a right of way deed it had title to a portion of the land which abutted on a street, held one for invasion, and not for determination of title; hence the direction of a verdict for defendant on the theory that it established title to a portion of the property was error.

Appeal from Common Pleas Circuit Court of Pickens County; James E. Peurifoy, Judge.

Action by Elias Day against the Atlanta & Charlotte Air Line Railway Company. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

McSwain & Craig, of Pickens, for appellant.
Carey & Carey, of Pickens, for respondent.

GARY, O. J. The allegations of the complaint herein are as follows:

"(1) That defendant is a corporation duly chartered by and under the laws of the state of South Carolina, and has a line of railway in said county and state, operated by its agents, employees, and lessees, and said line of railway runs through the town of Easley, and in part through the property now belonging to plaintiff.

"(2) That plaintiff owns two dwelling houses facing and fronting on East Main street in the city of Easley, said county and state, and resides in one of said dwelling houses, and has maintained for a number of years yard fences inclosing the front yards.

"(3) Heretofore, on or about March 8, 1917, the defendant, its agents, servants, and lessees, entered upon the premises of plaintiff in defiance of written notice warning against trespass, and, over protest and disregard of the rights and feeling of plaintiff, did willfully and maliciously trespass on the land of plaintiff, tore down his yard fence, tore up shrubbery and flowers and the ground within said bound of fences, and left same in rough and dilapidated condition.

"(4) The plaintiff rebuilt said fences, and thereafter, on or about March 29, 1917, the defendant by its agents, servants, and lessees did again willfully and maliciously and in defiance, and over the protest of the plaintiff and in disregard of warning, entered upon said land of plaintiff and tore down said fences for the second time.

"(5) That by reason of the unlawful, willful, and malicious disregard of the rights of plaintiff the defendant has caused actual and punitive damage to plaintiff in the sum of \$6,000.

"Wherefore plaintiff prays judgment against defendant for the sum of \$6,000 and cost of this action."

The defendant, answering the complaint herein, alleges:

"(1) That it denies each and every allegation thereof except as herein admitted.

"(2) That it has constructed a double track of its line of railway through the city of Easley, but has done no acts connected therewith except upon its own right of way, and has not trespassed or entered upon any land belonging to the plaintiff."

Mrs. Lelia Day, for the plaintiff, sworn, says:

"I am the wife of the plaintiff, and was at home on March 8, 1917, when the agents and servants of the defendant came and started tearing down the yard fence, and Mr. Day stopped them by having the foreman arrested. Mr. Day went off somewhere, and later on the same day the hands of defendant, about 30, came back, and I heard a great fuss and noise, and saw that they were tearing down the fence, breaking down the post, pulling down the braces, cutting up the shrubbery and flowers and shade trees, and throwing the rubbish back to the door steps. When they finished they left, though I asked them not to do anything in Mr. Day's absence, but Mr. Steele, the foreman, was obdurate, and didn't treat me politely, I asked him not to disturb my flowers if the property was theirs, but to take it in a legal manner. After Mr. Day had put back the fence, the hands of the defendant came again on March 29th, and tore down the fence again while Mr. Day was sick in bed and unable to get up. I went, at Mr. Day's request, and served a written notice on the foreman, telling them to keep off the premises, but they tore down that part of the fence of the tenant lot. They put the rubbish all over my yard, and walked all over it, and put cigar stubs on my doorsteps."

A. D. Perkins, sworn for defendant, says:

"I am civil engineer, and made this plat of the property in question. It is 100 feet from the center of the right of way of the main line of the railroad, down to the two houses of Mr. Elias Day. It is 42 feet from these two houses, up to the present sidewalk. The railroad intended to widen this street in the direction of the Day houses, 8 feet. That would leave a frontage in each yard of 34 feet. When the second track was put down, it was laid on the south side of the old track. The width of this second track is 8 feet. There is 30 feet of roadway there now. The public uses it up to the railroad on both sides of the track."

Mr. F. Furlo, for defendant, sworn, says:

"I am a civil engineer for defendant, and know that this plat is correct, and when they laid the double track through Easley on the south side of the old main line track we had to take up a part of the street in front of Mr. Day's house, and when we were tearing down Mr. Day's fence we were taking 8 feet more on the other side of the street, so that the street

would not be any narrower than it was originally.

"The plat I refer to is the one made by Mr. Perkins, Exhibit F. In putting down the second track, we used 8 feet of what the town was using as a street, and it insisted that we give for a similar use 8 feet of our right of way on the other side. This was the purpose of opening up the 8. It was part of the construction work of laying the double track."

J. M. King, for defendant, sworn, says:

"I was mayor of the town when these things took place, and the town council required the railroad to leave South Main street in front of Mr. Day's house its original width, after laying down the second track, and occupying a part of the original street. We required the railroad to open up the 8 feet in front of Mr. Day's property, before we were willing for it to lay the double track. This was in lieu of that which had been taken by laying down the second double track. This street has been used ever since I can remember as a railroad right of way and a street on it. The city council passed an ordinance requiring anybody that did any work on the streets to first get a permit to do it. The railroad company got this permit when it laid its second track."

The defendant moved the court to direct a verdict in its favor upon the following grounds:

"(1) That under the deed from Jas. S. Smith to the Atlanta & Richmond Air Line Railway, the defendant owns for a right of way 100 feet on each side of the track, measuring from the center thereof.

"(2) That the recitals in said deed as to the matters to be done and not to be done are void, because repugnant to the estate previously granted, and also because the said deed is signed by Jas. S. Smith only, and the mere acceptance of said deed did not bind the grantee thereof or the defendant as to said recitals.

"(3) That the plaintiff cannot maintain this action, as he purchased his land subject to defendant's right of way created by the Smith deed.

"(4) That the recitals and statements in the Jas. S. Smith deed, if of any force, merely creates a personal covenant, of which only the said Smith, or his administrator or heirs at law, could take advantage, and this is true whether said words be a personal covenant or a conditional one. That the said words do not create a covenant running with the land, and if they did there is a want of privity as to the plaintiff, the covenant ceasing or running out upon the death of Joel Ellison, who took a life estate only under the deed to him by Elsie E. Smith and O. H. C. Smith.

"(5) That the plaintiff by his own evidence has shown that he had no title."

His Honor the presiding judge sustained the motion, and the plaintiff appealed upon the following exceptions:

"(1) That his honor erred in not holding that the action at bar is one of trespass quare clausum fregit, and that the testimony clearly showed that the defendant had trespassed within the

close of plaintiff by tearing down his fence three times and by digging up his trees and rosebushes.

"(2) That the presiding judge erred in not holding that the defendant railroad company was liable for such trespass, upon the private premises of plaintiff, inclosed by a fence, over the protest, both oral and written, of plaintiff, and that, assuming that the defendant had title for railroad purposes under its right of way deed to said land, yet it was the duty of the railroad company to recover said land by process of law, and not to take the same by force of arms.

"(3) That the presiding judge erred in not holding that the evidence plainly showed that the defendant was not taking possession of said land for railroad purposes, but merely for a street to carry out its bargain with the town council of Easley, and further erred in not holding that the railroad company had an easement in said land for railroad purposes only, and that the plaintiff might use said land for any purpose not inconsistent with the right of the railroad company, and that a public street is not a railroad purpose.

"(4) That the presiding judge erred in holding that the right of way deed in question is to be construed in the same way as was the deed construed in the case of *Hammond v. Railway Co.*, 15 S. C. 10, whereas the presiding judge should have held that the deed in question in the case at bar was not one based upon forfeiture, or the breach of a condition subsequent, but is a plain right of way deed, conferring an easement for railroad purposes only, and that such railroad company could not dispute the title of the plaintiff, or any other person found in possession of the land under color of title, with a house upon the land and with the fence around the house, and that the railroad company could only use said land, under any circumstances, for railroad purposes.

"(5) That the presiding judge erred in not holding that the absolute legal title in this case does vest in the plaintiff, who with his immediate grantors has been in possession of said land for more than 20 years under color of title, and residing on same; and, furthermore, that the presiding judge erred in not holding that the question of title is not in issue in this case, and that, even assuming that plaintiff does not have a perfect paper title to the land, yet the railroad company would have no right to take possession of said land, and to tear down plaintiff's yard fence and to dig up his trees and rosebushes, except and only for use by the railroad for railroad purposes, and that such railroad could take possession of said land for railroad purposes over the protest of one found in possession with a fence around it and living upon it, over the protest, both oral and written, only by resorting to the courts either for ejectment or for the recovery of so much of the land as might be needed by the railroad for railroad purposes."

Our construction of the complaint is that it sets forth cause of action for damages, on account of the alleged high-handed and lawless manner in which plaintiff's possession was invaded by the defendant, and not to

try the title to the land. Therefore there was error on the part of his honor the presiding judge in sustaining the motion for a directed verdict.

Having reached this conclusion, it becomes unnecessary to consider the other questions presented by the exceptions. Reversed and remanded for a new trial.

WATTS and FRASER, JJ., concur.
COTHRAN, J., disqualified, did not sit.

(116 S. C. 347)

LAWRENCE et al. v. BURNETT et al.
(No. 10845.)

(Supreme Court of South Carolina. June 30, 1921.)

Assignments 48—Instrument held insufficient as equitable assignment to convey equitable title, where possession not taken thereunder.

An instrument, "We * * * do hereby sign all our right, title and interest which we have, or may have, on one lot or parcel of sixty-one acres of land to G., his heirs or assigns," signed by the assignor, while insufficient to convey the legal title, would have been sufficient as an equitable assignment to convey the equitable title to G., had he taken possession thereunder, but was not sufficient to convey equitable title, where he took possession under another claim of right to the land.

Appeal from Common Pleas Circuit Court of Spartanburg County; Edward McIver, Judge.

Action by Enoch Lawrence and others against Gertrude E. Burnett and others. Judgment for defendants, and plaintiffs appeal. Reversed and remanded.

See, also, 104 S. E. 330.

Carson & Tinsley, of Spartanburg, for appellants.

R. B. Paslay, of Spartanburg, for respondents.

GARY, C. J. The facts are thus stated in the master's report:

"On December 9, 1897, Nancy N. Bishop, being the owner of an undivided one-seventh interest in the remainder in the property in question, executed and delivered to Wales P. Gowan, the instrument (Exhibit A), which reads as follows: 'State of South Carolina, County of Spartanburg. We, the undersigned parties named, do hereby sign all our right, title and interest which we have, or may have, on one lot or parcel of sixty-one acres of land to W. P. Gowan, his heirs or assigns. The said lot or parcel of land is the same piece or parcel of land which W. P. Gowan now owns, the same shall be binding on ourselves, our heirs, executors and administrators. Dated Dec. 9, 1897. N. N. Bishop.'

"Wales P. Gowan did not own the property, or any interest therein, at the time this paper was executed. On November 2, 1900, he acquired the life estate of Simeon Gowan in the property, by deed from W. A. Burnett, never recorded. Burnett had purchased Simeon Gowan's interest at sheriff's sale by deed recorded in Book Y. Y., at page 670, and dated November 1, 1886. Simeon Gowan's interest was a life estate and an undivided one-seventh interest in remainder fee.

"Wales P. Gowan went into possession of the property under the deed from W. A. Burnett, and continued to hold it until the death of Simeon Gowan, about 1909. Sarah Gowan, the wife of Simeon, owned a life estate in the property under the will of William Gowan, the father of Simeon, but subject to the life estate of Simeon Gowan. Upon the death of Simeon, Sarah Gowan went into possession of the property until her death, about August, 1915. Nancy N. Bishop had died previous to the death of Simeon in 1909.

"The property originally came from William Gowan, the father of Simeon, who had seven children. The history of the case is stated in the opinion of Mr. Justice Hydrick, upon the former appeal. See 109 S. C. 416, 96 S. E. 144. After the death of William, Simeon, Sarah, and Nancy N. Bishop, suit was brought for the partition of all the property which William had conveyed to Simeon. All the property was sold by the master, and the proceeds of sale have been disbursed for the most part.

"Under the instrument hereinbefore set forth. Wales P. Gowan is now claiming one-seventh part of the proceeds of the sale of the 61-acre tract of land. The heirs at law of Nancy N. Bishop are also claiming this part of the proceeds of the sale. In my former report I made no decision as to the instrument hereinabove quoted, deeming that it was unnecessary to the decision, in the view which I took of the case. But the judgment of the circuit court was reversed, and the case was sent back in order that this question might be passed upon: Was the instrument sufficient, under the rule announced in *Mathis v. Hammond*, 9 Rich. Eq. 137, and under the other cases cited by counsel for Wales P. Gowan, to convey the equitable title to Wales P. Gowan?

"After carefully examining the authority cited for the defendant Wales P. Gowan, I conclude that the instrument was entirely insufficient, since those citations do not furnish any authority, as it seems to me, to sustain the position taken by defendant. Wales P. Gowan. * * * The Nancy N. Bishop instrument lacks several of the requirements for a conveyance of land. It is not under seal, it is not witnessed, no consideration is stated, and no sufficient consideration to support such a conveyance of land proved.

"There is an effort by defendant, Wales P. Gowan, to prove a consideration. Carolina Gowan, the wife of Wales P. Gowan, was the stepdaughter of Nancy N. Bishop. She lived in the home of Mrs. Bishop from the time that she was 7 until her marriage at the age of 17. The effort is made to show that on account of the services rendered to Nancy N. Bishop by Carolina Gowan, and on account of her love and affection for her stepdaughter, she

made the conveyance to Wales P. Gowan, in order in some way to repay her stepdaughter for the services which she had performed. I think the defendant has shown that Carolina Gowan did render loving services to her stepmother, though whether the services were rendered prior to the execution of the instrument or afterward is not shown. I am satisfied that Nancy N. Bishop had a real and genuine affection for her stepdaughter, and that this affection was well founded. But the instrument quoted is entirely insufficient and inadequate to convey land. It does not estop the heirs at law of Nancy N. Bishop from claiming the proceeds."

So much of his honor the circuit judge's decree as is necessary for a proper understanding of the questions involved is as follows:

"The master reports the instrument hereinabove set out is entirely insufficient and inadequate to convey land. In this he is in error. It was insufficient to convey the legal title, but was sufficient as an equitable assignment to convey the equitable title to W. P. Gowan.

"Carrie Gowan (same as Carolina Gowan) was the wife of W. P. Gowan, and the stepdaughter of N. N. Bishop, who raised her since a girl of 7 years old, and N. N. Bishop felt towards her just as she did one of her own children, and Mrs. Carrie Gowan called her 'Ma' and rendered as great or greater service to her than her own children did.

"Mrs. N. N. Bishop had expressed a desire that Carrie Gowan would share in the division of her property as one of her own children, but she discovered under the title she had she could not do this. So she assigned whatever interest she had in the 61 acres to W. P. Gowan. The assignment was made, and W. P. Gowan held possession of this property under this paper and the Burnett paper for about 13 years, until the death of Simeon Gowan, 1909, when Simeon's widow, who took a life estate after Simeon's death under the will of William, took possession of the property and held during her life. Soon after Sarah Gowan's death this proceeding was instituted.

"It is ordered, adjudged, and decreed that the report of the master be, and the same is hereby, reversed in so far as said report finds the instrument of N. N. Bishop was insufficient to carry to W. P. Gowan her equitable interest in the 61 acres of land."

The appellant's exceptions are as follows:

"(1) Because the circuit court erred in sustaining the exceptions of the respondents to the master's report in reversing the master and in ruling and holding that the paper executed by Nancy N. Bishop was an equitable assignment of her undivided one-seventh interest in the 61 acres of land or the proceeds of the sale thereof, and that the heirs of Nancy N. Bishop had no interest in the property, and in not holding that Exhibit A was void and inoperative for the lack of consideration.

"(2) In holding and finding as a matter of fact that W. P. Gowan held possession of this property under the paper executed by Nancy

N. Bishop for 18 years, until the death of Simon Gowan in 1909."

In remanding the case on the former appeal Mr. Justice Hydrick in delivering the opinion of the court (109 S. C. 423, 96 S. E. 146) said in conclusion:

"Deeming it unnecessary to the decision, in the view which it took of the case, the circuit court did not consider the assignment of Nancy Bishop to appellant, and made no decision as to its sufficiency to convey her interest in the remainder, either at law or in equity. Clearly it was insufficient to convey the legal title, as it was not under seal or witnessed, as required by law. The case was presented upon an agreed statement of facts, and the record is insufficient to enable us to reach a satisfactory conclusion as to whether it was sufficient to convey the equitable title under the rule announced in *Mathis v. Hammond*, 9 Rich. Eq. 137, and in the cases cited by appellant, especially as we are not informed who, other than appellant, is claiming her interest, and upon what ground such claim is made. Therefore, upon that issue the case must go back for further consideration and decision."

The case of *Mathis v. Hammond*, supra, shows, that if W. P. Gowan had entered into possession of the land, under the instrument of writing executed by Nancy Bishop, it would have made the contract valid and enforceable. But he did not so enter. The master specifically finds that Wales P. Gowan went into possession of the property, under the deed from W. A. Burnett. The presiding judge does not find that W. P. Gowan entered into possession under the assignment in question, but, merely, that he held possession under the assignment and the Burnett paper. It can scarcely be supposed that the circuit judge intended to find that W. P. Gowan entered into possession under the assignment, as it would be contrary to the contention of

W. P. Gowan, as thus set forth in his fifth exception to the Master's report:

"Because the master erred in holding and finding that W. P. Gowan went into possession of the property under a deed from W. A. Burnett, and in not holding that W. P. Gowan was in possession of the property claiming it as his own before the deed of W. A. Burnett or the instrument of Nancy N. Bishop, and was so holding said property at the time the Nancy N. Bishop instrument was executed; same being held under bond for title given by W. A. Burnett to W. P. Gowan."

There is no testimony showing any other valuable consideration, which is essential to the validity and enforcement of the contract attempted to be created.

The judgment of the circuit court is reversed, and the case remanded to that court for such further proceedings as may be necessary to carry into effect the conclusions herein announced.

WATTS, FRASER, and COTHRAN, JJ., concur.

COTHRAN, J. I concur in the judgment, but am not to be understood as approving the implication that possession alone under a voluntary equitable assignment will perfect the legal title; a principle which appears to have been announced upon scant consideration in the case of *Mathis v. Hammond*, 9 Rich. Eq. 137.

My impression is that an equitable assignment is nothing more than an executory agreement, and can be given effect only upon the establishment of the elements essential to sustain an action for specific performance; possession alone is not sufficient, when the implied contract is without a valuable consideration. I prefer to reserve my opinion as to this matter.

(116 S. C. 360)

WATSON v. SOVEREIGN CAMP, W. O. W.
(No. 10673.)

(Supreme Court of South Carolina. June 30, 1921.)

1. Insurance ⇨791(1)—Draftee is "enlisted man" within terms of policy.

A draftee is an "enlisted man," within the purview of a life policy which allowed the insured to join the army, but required notice and payment of extra premium.

2. Insurance ⇨825(1) — Whether insurer waived extra premium held for the jury.

In an action on a life policy which allowed the insured to join the army and go out of the United States, but required an extra premium, the question whether the insurer, which was operating as a fraternal order, waived the extra premium held for the jury, even though the officers of the local branch of the order could not waive anything, it not appearing that the general authorities of the order directed the local clerk, whose duty it was to collect all the funds, to collect the war risk premium.

Cothran, J., dissenting.

Appeal from Common Pleas Circuit Court of Greenwood County; R. W. Memminger, Judge.

Action by Mrs. Mackie Watson against the Sovereign Camp, Woodmen of the World. From a judgment for defendant on directed verdict, plaintiff appeals. Reversed.

Grier, Park & Nicholson, of Greenwood, for appellant.

Dial & Todd, of Laurens, for respondent.

FRASER, J. Samuel C. Watson took out a policy of life insurance with the respondent. The policy was payable to the appellant, his wife. The insured was drafted as a soldier, was sent to France, and died there. The policy permitted the insured to join the army and go outside of the United States, but it required notice to the company, and the payment of an extra premium. After the deceased left, his wife went to the clerk of the local camp and talked to him about the payment of her husband's dues. Mrs. Watson was short of money, as the payments had not come from the government. Her purpose was to allow the policy to lapse by not paying the premiums. She was urged by the local clerk to keep up the payments. She consented to pay them, but had to borrow the money to do so. The defendant refused to pay the face of the policy, but tendered the sum of \$28.80, which it claimed was due under the terms of the policy. The payment of the full amount was refused, because the extra premium for an enlisted man had not been paid. The plaintiff claimed that her husband was not an enlisted man, but was a drafted man, and that the company had waived the payment of the

extra premium. The presiding judge ordered a verdict for the defendant. From the judgment entered upon that verdict, this appeal is taken.

[1] 1. The first point cannot be sustained. The deceased was an enlisted man, under the terms of the policy. See *McQueen v. Sovereign Camp, W. O. W.*, 106 S. E. 32, filed herewith.

[2] 2. The second point must be sustained. There was evidence of waiver, and the case should have been sent to the jury, under the case of *Crumley v. Sovereign Camp, W. O. W.*, 102 S. C. 386, 86 S. E. 954. It is true that the officers of the local camp cannot waive anything, but this clerk was also the agent of the Sovereign Camp, and his duty was to "remit all funds due and belonging to the Sovereign Camp to the Sovereign Clerk, as by law provided." It is also true that this extra war risk premium was to be paid to the Sovereign Clerk at the home office. The respondent says it was to be paid directly to the Sovereign Clerk at Omaha, Neb. The policy does not say it shall be paid directly. The other provision, that the local clerk shall remit all funds, is sufficient provision to cover the extra premium. It appears in the case that no notice of the extra premium was given to that officer, who was authorized to forward all funds. There is no intimation that there was any neglect by any individual agent of the company. There was no evidence or presumption that the beneficiary knew or had possession of the policy, and should have known of the required extra premium. Under these circumstances it was for the jury to say whether the company waived the payment of the extra premium or not.

The judgment is reversed.

GARY, C. J., and WATTS, J., concur.

COTHRAN, J. (dissenting). Action upon a beneficiary certificate issued by the defendant to Samuel C. Watson, September 24, 1917, payable, upon certain conditions, to his wife, the plaintiff, Mrs. Mackie Watson. The insured died in France while in the service of the United States army on October 18, 1918, having been drafted June 24, 1918, subsequently to the issuing of the certificate. The amount of the benefit was \$500 in the event of death during the first year of membership, \$750 if within the second year, and \$1,000 if after the second year. The insured having died within the second year, the benefit, if accrued, would be \$750, although the complaint is for \$1,000.

The certificate contains the following conditions and provisions material to the present inquiry, in substance:

1. If the insured should die outside the limits of the United States while serving in the army or navy, as an officer or an enlisted man,

the amount due should be such proportion of the benefit as the period he lived after becoming a member bears to his expectancy of life at the time of his initiation, which would be practically a nominal sum.

2. The insured was permitted to avoid this limited benefit, under the circumstances stated, and secure the full benefit provided for in the certificate by complying with these requirements: (a) The option must be executed within 30 days after entering the service. (b) He shall notify the Sovereign Clerk at the home office, Omaha, Neb., that he has entered the service. (c) He shall pay in advance to the Sovereign Clerk \$37.50 per \$1,000 of insurance per annum, in addition to the regular assessment, the installment payment of Sovereign Camp fund, for his age as provided in tables of rates in section 56 of the constitution and laws.

3. The insured, who complied with these requirements, was extended the further concession that in the event of his death within the limits of the United States, without having served outside, the total benefit should be paid, together with the war assessments which he may have paid.

These facts are conceded: (1) The insured entered the service of the army after he received his certificate. (2) The insured died in France, beyond the limits of the United States, while in the service. (3) The insured did not within 30 days after his enlistment notify the Sovereign Clerk, at the home office, Omaha, Neb., of that fact. (4) The insured did not pay to the Sovereign Clerk the war assessment provided for in his certificate.

It was also shown that from the date of his certificate, September 24, 1917, to the date of his enlistment, the insured duly paid the ordinary Sovereign Camp assessments, the local camp dues, and the war tax (not the war assessments) to the local clerk at Greenwood; that, after he went over seas, the beneficiary under the certificate, the plaintiff here, continued to make similar payments to the same officer, including the month of October, 1918, the month in which the insured died.

It was also shown that when payments were made to the local clerk he assured the beneficiary, who made the payments that "the full policy would be paid if she kept the dues paid." Section 55 of the rules requires the local clerk to collect the admission fees, the dues, and the Sovereign Camp fund assessments, and section 94 requires him to "remit all funds due and belonging to the Sovereign Camp to the Sovereign Clerk as by law provided." Both the clerk who was in office when the insured received his certificate and the clerk who was in office when the payments were made by the beneficiary, or by some one for her, testified that they knew nothing of the war assessment required; that they made no such collections from any member; that they were not requested by the Sovereign Camp to col-

lect them, and received no literature referring to them.

At the close of all the testimony the defendant moved for a directed verdict for the plaintiff for the amount \$28.80, admitted to be due under the condition numbered 1 above; this motion was made upon the grounds set out in the record, which should appear in the report of this case. The motion was granted, and from the judgment entered upon the verdict so directed, the plaintiff has appealed.

The opinion of Mr. Justice FRASER proposes to reverse the direction of a verdict, practically in favor of the defendant, upon the ground that there is sufficient evidence of a waiver by the insurer of the vital conditions in the certificate upon which they rely, by reason of the fact that the local clerk collected the monthly dues and assessments without notifying the insured or the beneficiary of the war assessments required; that the local clerk was authorized to receive and forward all funds due to the Sovereign Camp, which included the war assessments, and that his conduct in not calling the attention of the insured or the beneficiary to the war assessments, was evidence of a waiver by the Sovereign Camp of the necessity of such payments.

I do not concur at all in this view, and am of opinion that the verdict was rightly directed. An analysis of the limiting condition (which reduces the benefit to a very small proportion of its face value) shows that it affects only one class of certificate holders, those who enter and die abroad in the service; and their policies are affected only when these two contingencies concur; until they do concur, the policies are perfectly sound; a certificate holder, so long as he is not so unfortunate as to meet both, suffers no diminution of the benefit.

If Watson, without going abroad, (1) had remained in the service here, or (2) died in the service here, or (3) been discharged from the service, or (4) had returned from abroad and remained in the service here, or (5) died in the service here, or (6) been discharged from the service, his policy would have been perfectly good, from the date of the certificate, continuously against these six contingencies, so long as the dues and assessments ordinarily required were paid by or for him. The seventh contingency, that one which happened, he made no provision against. He had a perfect right to take his chances against it, and save the \$37.50 if he so desired. How could the defendant know that he had not determined to take this chance until he had done what he contracted to do in the event that they, and not he, were to assume the chance? The policy required that if the defendant was to assume that chance the insured should notify the home office within 30 days after his enlistment, and pay annually, while the increased risk lasted, the war

(108 S.M.)

assessment of \$37.50 per \$1,000 of insurance. This he did not do, and in my opinion cannot force upon the defendant a risk that they specifically contracted with him that they would not assume unless he complied with the conditions referred to.

It would have made no difference if the defendant had had positive knowledge that Watson had enlisted in the service, or if the ordinary dues and assessments had been paid directly to the home office; they could not possibly have known to a certainty that he would be sent overseas; Watson himself could not; doubtless he hoped that he would not be, and in that event the extra assessment would not be needed, for its only effect would have been to secure him against the contingency of dying in the service abroad. What the defendant was charged with knowing was that if Watson desired to be insured against that contingency he could secure it by giving the notice and paying the war assessment. He did neither, and the defendant had the right to assume that, not being willing to pay for it, he did not desire it.

The provisions of the certificate under consideration do not constitute or make conditions under which a forfeiture of the policy will be insisted upon; they simply provide for an exemption from liability on account of the death of the insured under the circumstances mentioned, in the service in a foreign land. That they had the right to impose this limitation as an increase of the hazard can no more be questioned than a provision against liability in case of suicide, which has never been suggested as a ground of forfeiture, but is recognized as a contractual exemption. That they could not constitute a ground of forfeiture is shown by the unquestionable right of the insured to pay the ordinary assessments and continue his insurance in full force, with the exception that it did not cover the contingency against which he had the contractual right to protect himself, but did not.

In *Mattox v. Insurance Co.* (Ga. App.) 103 S. E. 180, the policy provided that it should be void if the insured within five years engaged in military service in time of war without the written consent of the company; that, upon breach, the liability should be limited to a return of the premiums; but that the policy should cover such risks if the insured, within 31 days after enlistment, should pay to the company at its home office such extra premium as might be required. The insured paid the first premium in June, 1917, and arranged for the second in June, 1918; he enlisted in August, 1918, remained in camp until October 1st, and then sailed for France; on October 15th, he died at sea, not having notified the home office of his enlistment or paid the war assessment. The court decreed in favor of the defendant, holding:

"It was clearly understood by both parties to the contract that, if the insured thereafter

entered military service, he must pay an extra premium to keep the policy in force for any amount except for the premium which he had paid, and that it was incumbent upon the insured, if he desired to keep the policy in force for its full value, to notify the company of his intention to enter military service, so that the company would have an opportunity to demand of him the extra premium required, under the terms of the war clause, for such service."

I cannot conceive of a fairer proposition than that contained in the policy. This nation was at war; its resources and men were pledged to contribute to its successful conclusion; the company knew that some of its members would be called to the colors; common sense teaches that the entrance of a member into this service tremendously increases the hazard against which, in ordinary conditions, the company undertook to insure, and the basis on which the ordinary assessments were levied. With this increased hazard thrust upon them, the company had the right, and it was its duty, to make provision against it. It did so by contract solemnly entered into, and by which the insured was as much bound as the company.

The contract notified the insured that the company stood for liability upon every contingency except his death in the service upon foreign soil, when the war was actually being waged, and where, of course, the hazard was greatest. It notified him that he could extend the insurance to cover this solely excepted risk by complying with certain requirements which have been referred to. It guaranteed him further that, if he should comply with these requirements, and die in this country without having gone abroad, all of the war assessments paid should be returned. It is difficult to imagine a provision more reasonably calculated to protect the rights of the company and at the same time to make a generous concession to the insured, for, in strict justice, the payment of the war assessments would have been compensated for by the assumption of the increased hazard which was probable, and the company would have been under no obligation to have returned them.

As to the evidence of a waiver by the company of the right to insist upon exemption from liability under the excepted contingency which actually occurred, bear in mind that the engagement by contract was that the company would not be liable in the event that the insured died in the service abroad, unless he complied with the requirements essential to the assumption by the company of that particular risk. In other words, the compliance was made a condition precedent to such engagement by the company; there was no contract covering this risk until the condition precedent was met. It therefore does not present a case of forfeiture or one of waiver by the company of the condition.

In quite a similar case from Arkansas

(*Miller v. Ins. Co.*, 138 Ark. 442, 212 S. W. 310, 7 A. L. R. 378) the court declared:

"It will be observed that the provision of the policy now under consideration is not for a forfeiture, but is merely an exemption from liability on account of death occurring under certain circumstances. It is not a case where acceptance of premiums with knowledge of the forfeiture constitutes recognition of the continued, valid existence of the policy; nor does the case fall within the principle that a forfeiture is waived where an insurance company, when it enters into a contract, has knowledge through any of its authorized agents of facts which would work a forfeiture. * * *

"There was no forfeiture provided for at all, but the company had, as before stated, the right to stipulate under what circumstances it should be liable. The insured had the right to pay the premium and continue the policy in force while he was in the military service of the government, notwithstanding the exemption of the company from liability for death occurring during the period of that service."

This is a much stronger case for the plaintiff than the one at bar, for there the agent of the company not only knew of the provision in the policy relating to service, but accepted the ordinary premium under his construction that the exemption only affected death in battle. The court, however, held that it did not present a case of forfeiture or waiver of a forfeiture, and that the agent was without authority to project the company into a contract which they had not entered into. See, also, *Field v. Western Life Indemnity Co.* (Tex. Civ. App.) 227 S. W. 530; *American Nat. Ins. Co. v. Turner* (Tex. Civ. App.) 226 S. W. 487; *Mississippi Centennial Exp. Co. v. Luderbach*, 123 Miss. 828, 86 South. 517; *Long v. St. Joseph Life Ins. Co.* (Mo. App.) 225 S. W. 106; *Carter v. Sovereign Camp, Woodmen of the World* (Tex. Civ. App.) 220 S. W. 239; *Reld v. Am. Nat. Assur. Co.*, 204 Mo. App. 643, 218 S. W. 957; *Miller v. Illinois Banker's Life Ass'n*, 138 Ark. 442, 212 S. W. 310, 7 A. L. R. 378; *Slaughter v. Protective League Life Ins. Co.* (Mo. App.) 223 S. W. 819; and *Ruddock v. Detroit Life Ins. Co.* (Mich.) 177 N. W. 242.

It will be noted that the effect of the provision, primarily, is to exempt the company from liability under the stated contingency. It does not assume the risk at all until the conditions have been performed; a marked difference between it and a contract which assumes the stated risk primarily, and provides for relief under certain circumstances upon the happening of which a forfeiture convenes. In the one case there is no opening for a forfeiture; in the latter there is, which may be defeated by waiver. It is inconceivable to me that a party may be waived into a contract which it has not entered into, waived into the assumption of a risk which it expressly declines to assume except upon conditions which have not been performed.

A case may be imagined where the policy

would be of no effect at all unless it applied to certain exempted risks which were necessarily incident to the occupation of the insured, known to the company at the time the policy was issued, and upon which premiums were accepted. The company under the circumstances might well be held estopped from claiming the exemption; but, not constituting a forfeiture, there would be no applicability of the doctrine of waiver. Here, however, we have a case where the policy remains of force as to all contingencies but the excepted one, and the failure of the insured to provide for it may well be assumed by the company to have been intentional.

Assuming, however, that the doctrine of waiver is applicable to the case, the facts relied upon to produce a waiver by the insured are: (1) The knowledge of the local clerk that the insured had enlisted in the service. (2) The payment by or for the insured of the monthly dues and assessments. (3) The declaration of the local clerk that the policy would be paid if the monthly dues and assessments were kept up. An insuperable barrier to the benefit of a waiver are the terms of the statutes (§ 2755, vol. 1, Code of Laws 1912), as follows:

"No subordinate body, or any of its officers or members shall have the power or authority to waive any of the provisions of the laws and constitution of the association, and the same shall be binding upon the association, and each and every member thereof and their beneficiaries"

—which has been construed by this court in the following cases: *Ourrence v. Woodmen of the World*, 95 S. O. 61, 78 S. E. 442; *Crumley v. W. O. W.*, 102 S. O. 386, 86 S. E. 954; *Vant v. Grand Lodge*, 102 S. O. 413, 86 S. E. 677; *Outlaw v. National Council*, 107 S. O. 226, 92 S. E. 469; *Sternheimer v. United Commercial Travelers*, 107 S. O. 291, 98 S. E. 8; *Dillingham v. Junior Order*, 113 S. C. 430, 102 S. E. 721.

In addition to this, subdivision A of section 69 of the rules of the insurer, made by the terms of the application and certificate a part of the contract, provides:

"No officer, employee, or agent of the Sovereign Camp, or of any camp, has the power, right or authority to waive any of the conditions upon which beneficiary certificates are issued, or to change, vary, or waive any of the provisions of this constitution or these laws nor shall any custom on the part of any camp or any number of camps—with or without the knowledge of any sovereign officer—have the effect of so changing, modifying, waiving or foregoing such laws or requirements. Each and every beneficiary certificate is issued only upon the conditions stated in and subject to the constitution and laws then in force or thereafter enacted."

But if neither of these provisions could be invoked for the protection of the insurer, the evidence relied upon carries no probative

force whatever in establishing a waiver by the insurer of the exemption upon which it relies.

The knowledge by the local clerk of the fact that the insured had enlisted in the service could furnish no possible evidence of the waiver, for the apparent reason that the policy was good against all contingencies except the one under consideration. The local clerk, as well as the insurer, may well have assumed that the insured assumed that risk himself.

For the same reason the payment of the ordinary monthly dues and assessments may be assumed to have been made to keep the policy alive to all contingencies except the one that carried the exemption; the local clerk could not have refused to accept the payments as they were made, it would be illogical, therefore, to hold that the company is prejudiced by what the clerk had to do.

The declarations of the local clerk were clearly outside the scope of his employment, and in fact, as the testimony shows, were made without any knowledge whatever of the provisions requiring notice of enlistment and payment of the war assessments. Waiver is the voluntary relinquishment of a known right; it could hardly be held that the local clerk could waive a provision in the contract that he knew nothing of.

Local camp dues and the ordinary assessments payable monthly, necessary to maintain the beneficiary certificate in force and effect for any purpose whatever, were payable to local camp clerk. Neither the camp clerk nor any other local official had any duty in connection with the payment of the extra war assessment, which was an additional premium, payable for an extra hazard, which might obtain during the life of the policy. Therefore, no local camp official had any authority, real or apparent, to demand, collect, receive, and remit the additional war risk assessment; hence there could be no waiver of the notice and payment of the war risk assessment. The cases of Vant and of Sternheimer, cited above, are in point here.

I think that it is a strained construction to hold that because the local clerk was authorized to collect and remit funds due to the Sovereign Camp he was authorized to collect and remit the war assessments. There is nothing in the record to show that he was so authorized; nothing to show that he knew anything about such assessments; on the contrary he testified that he had never so much as heard of them; and the policy requires that the remittance be made to the Sovereign Clerk. It does not use the word "directly," but that is the evident purport. Even if this construction should be allowed, the insured utterly failed upon the other requirement of notice to the Sovereign Clerk at the home office of his enlistment.

To characterize the evidence relied upon as evidence of a waiver is a misnomer. There is no provision for a forfeiture, and there can therefore be no waiver. The effect appears to be to modify the terms of the written contract by parol testimony and to avoid the rule by denominating it a waiver.

I think, therefore, that the circuit judge was entirely right in directing the verdict as he did, and that the judgment below should be affirmed.

(116 S. C. 336)

BRADLEY v. VAN WYCK et al. (No. 10695.)

(Supreme Court of South Carolina. Aug. 1, 1921.)

Master and servant §276(1)—Nonsuit properly granted for failure to make case.

In an action for the death of an employee, where plaintiff failed to show how he was killed, to prove the specifications of negligence alleged, or to show any actionable negligence on the part of defendants, a nonsuit was properly granted.

Appeal from Common Pleas Circuit Court of Greenville County; George E. Prince, Judge.

Action by Solomon Bradley, as administrator, etc., of Pickens Bradley, deceased, against O. P. Van Wyck, trading as the Greenville Mattress & Manufacturing Company, and others. From an order granting a nonsuit, plaintiff appeals. Affirmed.

Bonham & Price and B. F. Perry, all of Greenville, for appellant.

Martin & Blythe, of Greenville, for respondents.

WATTS, J. This is an appeal from an order of Judge Prince granting a nonsuit. The action was brought for the death of Pickens Bradley. He was in the employment of the respondent. He was a mattress filler, and worked in the mattress factory, in what is known as the basement. The allegations of negligence in the complaint were:

"That the master failed to furnish the plaintiff a safe place in which to do his work and failed to furnish safe and suitable appliances; and, second, that the master failed to warn and instruct the deceased as to the danger of the electricity on that particular day."

After all the testimony was in, his honor granted a nonsuit upon the ground that there was no evidence tending to show that the deceased was in the performance of any duty required of him at the time he met his death. The appellant appeals and by six exceptions alleges error in his honor's ruling.

The exceptions are overruled. The appellant failed to show how deceased was killed, and the appellant failed to prove the

specifications of negligence as alleged in the complaint, and failed utterly to show any actionable negligence on the part of the respondent. The evidence shows, at the time the deceased was killed, the machine was not in operation, but he was filling the mattress by hand.

Judgment affirmed.

GARY, C. J., and FRASER and COTHRAN, JJ., concur.

(116 S. C. 375)

HAYES v. MCGILL. (No. 10676.)

(Supreme Court of South Carolina. June 30, 1921.)

Appeal and error §722(1)—Each exception must contain complete assignment.

Under Rule 5 of the Supreme Court (90 S. E. vii) each exception must contain a complete assignment of error, and a mere reference therein to any other exception then or previously taken, or requested charge, will not be considered.

Fraser, J., dissenting.

Appeal from Common Pleas Circuit Court of York County; Edward McIven, Judge.

Action by W. C. Hayes against J. Mason McGill. Judgment for plaintiff, and defendant appeals. Appeal dismissed.

J. S. Brice, of York, for appellant.

W. W. Lewis, of York, for respondent.

GARY, C. J. This statement appears in the record:

"This was an action brought by the respondent, W. G. Hayes, for the purpose of recovering the sum of \$1,600 from the appellant, from whom respondent alleged he had purchased a certain truck, and that the appellant had guaranteed that the truck was sound and in good condition, and practically new; and that respondent, relying on the express warranty of the plaintiff, bought said truck, and afterwards discovered that it was worn out, and only good for old junk; and as there had been a complete failure of this warranty the respondent asked that he might be allowed to return the truck to appellant and recover the purchase price of \$1,600."

The jury rendered a verdict in favor of the plaintiff for \$1,600 and the defendant appealed on five exceptions. They, however, cannot be considered, as the appellant has failed to comply with the requirements of Rule 5 of this court (90 S. E. vii), which is as follows:

"Each exception must contain a concise statement of one proposition of law or fact, which this court is asked to review. * * * Each exception must contain within itself, a complete assignment of error, and a mere refer-

ence therein to any other exception then or previously taken, or request to charge, will not be considered."

Appeal dismissed.

WATTS and COTHRAN, JJ., concur.

FRASER, J. I dissent. While the exceptions might have been clearer, yet it seems to me that it is clear enough for consideration that the appellant intends to complain that his honor charged the jury the law of implied warranty when the plaintiff had alleged an express warranty. The point is not that his honor the trial judge misstated the law as to implied warranty, but that his error was in charging the law of implied warranty in a case in which the plaintiff relied upon an express warranty. The respondent had not been misled, and the question should be decided.

It seems to me that his honor did charge the jury that, if the plaintiff failed to establish his express warranty upon which he relied, then the jury might still find for the plaintiff under the implied warranty, if he had not bought a sound article for a sound price. I do not so understand the recent cases.

For this reason I dissent.

(116 S. C. 377)

POOLE v. SOUTHERN RY. CO.
(No. 10679.)

(Supreme Court of South Carolina. Aug. 1, 1921.)

1. Commerce §10 — Liability of interstate railroad for punitive damages governed by state law, in absence of federal statute.

The question of whether a railroad engaged in interstate commerce can be held liable for punitive damages to automobile driver, injured at crossing, is governed by the state law, in the absence of a federal statute.

2. Railroads §349—Liable for punitive damages for personal injuries.

An interstate railroad may be held liable for punitive damages to automobile driver, injured at crossing.

Appeal from Common Pleas Circuit Court of Greenville County; S. W. G. Shipp, Judge.

Action by Joseph P. Poole against the Southern Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Cotthran, Dean & Cotthran, of Greenville, for appellant.

Martin & Blythe, of Greenville, for respondent.

(108 S.E.)

FRASER, J. The plaintiff was riding in his automobile on a public highway, near the city of Greenville. He crossed the main line of the defendant railway company in safety. When he came to a spur track, a box car loaded with goods, consigned to Fall River, Mass., came suddenly upon him and injured his car, and also inflicted injury upon the person of the plaintiff. The freight car was not attached to an engine and was being operated with no means of control. The action was for actual and punitive damages. The case was tried and a verdict rendered as follows: "We find for the plaintiff twelve hundred and fifty dollars." From the judgment entered on this verdict, this appeal is taken, and raises the question of the liability of the defendant for punitive damages.

The verdict does not show that punitive damages are included, but the question of punitive damages is fairly made and should be decided. The record shows:

"The defendant requested the following charge: 'The railway company in this case is shown to have been an interstate commerce carrier at the time, engaged in interstate commerce, and, that being the case, all instrumentalities of the carrier are exclusively within the control of the laws of the United States. I charge you that the laws of the United States which forbid the imposition of punitive damages upon a master for the willful tort of his servant, unauthorized or unratified by him, must be applied in this case; and even though the acts complained of were such as to justify the imposition of punitive damages under the laws of South Carolina, the jury in this case cannot impose such damages unless they believe from the evidence that the railway company authorized or ratified such acts of its employees.'

"The presiding judge refused to charge as requested, and charged as follows: 'Now I might as well make a ruling at this point. The defendant sets up here that the railroad was engaged in interstate commerce, and that for that reason it is not liable to punitive damages, unless the act was ratified by the railroad company. I have been very much interested in the discussion about that; but, after having my attention called to the fact that the case that I was familiar with to some extent myself I had not looked at it in that view, I take it that punitive damages cannot be recovered against interstate carriers, when he is engaged in interstate commerce, where Congress has acted upon the subject, that he is engaged in interstate commerce. That is where it refers to the conduct toward the person party to the contract or passenger, where a person is on a train; but it has no application here. Where a railroad company is passing through this state, although it may be engaged in interstate commerce and injures some third person that is not concerned with the contract involved, and therefore I take it that this is to be governed by our state law, or the common law as administered in this state, and if you find that the railroad was willful in this case, and that it willfully operated as the proximate cause of the

injury to the plaintiff, if the plaintiff was injured, then they would be liable for punitive damages."

[1, 2] We have been cited to no federal statute, and we know of none, that covers the case. The state law governs in the absence of a federal statute, and the state law unquestionably allows punitive damages.

The judgment is affirmed.

GARY, C. J., and WATTS, J., concur.

(116 S. C. 382)

TERRY PACKING CO. v. ATLANTIC COAST LINE R. CO. (No. 10691.)

(Supreme Court of South Carolina. Aug. 1, 1921.)

Railroads ⇨ 116—Contract liability for loss of cars a question of fact.

In an action by a packing company against a railroad for the value of refrigerator cars owned by the packing company and destroyed by fire on the railroad's tracks, plaintiff company's claim of liability against the railroad being grounded on a stipulation in the rules of the Master Car Builders' Association, whether or not plaintiff company's cars were received and were to be handled by defendant railroad under exactly the same terms and conditions as the cars of a regular railroad company, a member of the Car Builders' Association, was one of fact; the evidence offered by plaintiff company tending to support such theory.

Appeal from Common Pleas Circuit Court of Richland County; Thomas S. Sease, Judge.

Action by the Terry Packing Company against the Atlantic Coast Line Railroad Company. From a judgment for plaintiff, defendant appeals. Judgment reversed, and case remanded for new trial.

Frank G. Tompkins, of Columbia, and W. A. Townes, of Wilmington, N. C., for appellant.

Benet, Shand & McGowan, of Columbia, for respondent.

COTHRAN, J. Action by Terry Packing Company for \$1,385.60, the value of three refrigerator cars owned by it, destroyed by fire at Punta Gorda, Fla., while upon the tracks of the defendant. From a judgment in favor of the plaintiff for the full amount claimed, entered upon a verdict by direction of the circuit judge, the defendant appeals.

The facts of the case are substantially as follows:

Terry Packing Company is a corporation engaged at Columbia, S. C., in the purchase, distribution, and sale of fresh fish, shipped in carload lots from Punta Gorda, Fla., to Columbia and other points. The refrigerator cars used for this purpose belonged to Terry

Packing Company. In May, 1915, three of the cars were returned empty to Punta Gorda and placed upon the track of a dock owned by the defendant, and alongside of a fish-packing plant of certain vendors, who sold fish to the Terry Packing Company, awaiting loading and shipment. On June 27, 1915, a fire of incendiary origin destroyed the fish-packing plant and the three cars. The defendant was in no way to blame for the fire.

The plaintiff makes no charge of negligence against the defendant, nor does it seek, in the complaint, to hold the defendant liable as a common carrier. It relies upon a certain stipulation in the rules of the Master Car Builders' Association, to the effect that "damage done to any car by unfair usage, derailment, or accident" is assumed by the railroad company handling the car. It seeks to connect itself with those rules, so as to get the benefit of such assumption of responsibility by the defendant.

The rules of the Master Car Builders' Association are a set of rules adopted by practically all of the railroad companies in the United States, providing, in the interchange of cars, for repairs made upon cars of one line when broken on the line of another company, and for the loss of or damage to such cars by fire or otherwise. Among these rules is the rule above quoted. The plaintiff was not a member of that association; possibly, having no railroad of its own upon which the cars of other companies might operate, it could not become a member; it did not sign any contract, or secure a contract from the defendant, entitling the plaintiff to the benefits of the Master Car Builders' rules.

The plaintiff relies upon the following circumstances to establish the same obligation on the part of the defendant to it as the defendant owed to members of the Master Car Builders' Association, in the matter of responsibility for the destruction of a car by fire, regardless of its culpability.

The plaintiff became dissatisfied with the handling of its goods in the refrigerator cars belonging to the railroad companies and certain transportation lines, and determined to lease or buy cars of its own. Accordingly the plaintiff in April, 1913, opened negotiations with the car accountant of the defendant, who wrote the plaintiff on April 28, 1913, that he could probably secure cars from a certain party in Chicago. In that letter the car accountant stated that the cars would be "handled under our tariffs" allowing compensation to the plaintiff at the rate of three-fourths of a cent per mile, loaded and empty, while in service. He also stated that, when it became necessary to repair the cars, the work would be done and bills rendered by the mechanical department of his road. Nothing was said in that letter to indicate that the rules of the Master Car Builders' Association would be binding upon the defend-

ant or upon the plaintiff. Between April 27th and August 20th the plaintiff secured 10 refrigerator cars, and on the latter date so notified the car accountant. He replied on the 21st, stating that he had issued instructions permitting the cars to remain in service and added:

"I am inclosing herewith copy of our tariff, which governs the handling of refrigerator cars of private ownership, and by reference to page 19 you will note that we pay three-fourths cents per mile on loaded or empty movements, with the provision that any excess empty mileage, at the end of a fixed period of time, will be billed for at regular tariff rates. This applies to cars in service."

There is nothing in this letter to indicate that the rules of the Master Car Builders' Association would be binding upon either party. The president of the plaintiff company testified that when the cars were put in service the car accountant furnished the defendant (evidently meaning the plaintiff) with a copy of said rules; that repair bills were sent to the plaintiff every month, based upon the schedule set out in the Master Car Builders' rules, and were paid; that during the time the plaintiff owned the cars they were used by railroads all over the United States, for which he had received compensation from the various railroads using them; that after they were put in service the plaintiff had no further control over the cars, and they would be moved on various lines without plaintiff's consent or knowledge; that all cars tendered for traffic had to comply with the said rules; and that plaintiff was specifically notified by the car accountant that its cars must be in accordance with the Master Car Builders' rules, if he wished them operated over the line of the defendant or other roads.

The question whether or not the plaintiff's cars were received and were to be handled by the defendant under exactly the same terms and conditions as the cars of a regular railroad company, a member of the Master Car Builders' Association, is one of fact. The evidence offered by the plaintiff tends to support that theory, and therefore the motion of the defendant for a directed verdict was properly refused; but it does not necessarily establish that fact. The plaintiff nowhere testifies that there was an express agreement that all the terms of the Master Car Builders' rules should be applicable to his arrangement. He relies upon an inference from certain facts to establish that fact; that because he was furnished with the rules, that the repairs were made and paid for according to the rules, that his cars had to come up to the standard of the rules, it follows that there was no difference between him and any other transportation line owning cars used by the defendant. As a matter of law, we cannot say that this is true. The correspondence shows only a reference to the matter of re-

pairs, and the furnishing of the rules might be deemed compatible with their limitation to this feature; so with the settlement of the repairs and the required equipment.

If the Master Car Builders' rule as to the responsibility for the destruction of the car should appear, upon a determination of the facts in issue, applicable to the relation existing between the parties, a further question, as to which we express no opinion, would arise, whether or not that rule would apply to a car not in service at the time of its destruction, under the tariff regulations specifically invoked and referred to in the correspondence as governing the situation.

The judgment of this court is that the judgment of the circuit court be reversed, and the case remanded for a new trial.

GARY, C. J., and WATTS and FRASER, JJ., concur.

(116 S. C. 380)

GOUGH v. TEXAS CO. (No. 10684.)

(Supreme Court of South Carolina. Aug. 1, 1921.)

Corporations \S 308(11)—Whether agent was allowed 30 days after termination of agency, to make collections so as to be entitled to commissions, held for the jury.

In an action by a former agent of an oil company for commissions on collections made after termination of the agency, wherein it conclusively appeared that the written contract providing that commissions on uncollected accounts were forfeited was waived by an extension of time, the question whether the agent was given 15 or 30 days to make collections held for the jury.

Appeal from Common Pleas Circuit Court of Chester County; Edward McIver, Judge.

Action by S. A. Gough against the Texas Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Henry & McLure, of Chester, for appellant.

Gaston & Hamilton, of Chester, for respondent.

FRASER, J. Prior to July 1, 1920, the plaintiff had been the agent of the defendant company at Chester, S. C. On June 30, 1920, the defendant sent to Chester Mr. Dority, its assistant superintendent, to check up the plaintiff's business and to install Mr. McGuire, the new agent. The plaintiff was working under a written contract that provided for sales on commissions. The contract provided that on the termination of the agency all commissions on uncollected accounts should be forfeited. When Mr. Dority completed the settlement, he told Mr. Gough,

the plaintiff, that he would allow him commissions on all claims he collected prior to July 15th, and asked him to take the new agent around with him, and introduce him to the customers. The plaintiff agreed to continue his collections and carry the new agent, but said 15 days is not enough time in which to collect \$4,000, in July, and claimed 30 days instead. It is not denied that the plaintiff, at his own expense of travel, in his own machine, did make the collections. The defendant tendered to the plaintiff pay for collections made prior to July 15th, but refused to pay commissions on claims that he collected after that day, and before the end of July. Mr. Dority, the assistant superintendent, states that he did not protest against the extension to 30 days, instead of 15, as he said it would have done no good to protest. At the close of the testimony the defendant moved for a directed verdict, on the ground that there was no evidence of a waiver of the offered extension of 15 days. This motion was refused.

There are several exceptions, but they raise but one question. The motion was properly refused. There is no question but that the written contract was waived. The only question is, Was it waived for 15 or 30 days? There was abundant evidence of a 30-day waiver to carry the case to the jury. The judgment is affirmed.

GARY, C. J., and WATTS and COTHRAN, JJ., concur.

(116 S. C. 388)

WINTHROP v. ALLEN. (No. 10698.)

(Supreme Court of South Carolina. Aug. 1, 1921.)

1. Landlord and tenant \S 223(4)—Tenant's counterclaim in action for rent held to plead fraud, entitling him to punitive damages.

In a landlord's action for rent, tenant's counterclaim, alleging that landlord, in violation of his agreement not to disturb labor residing on land under landlord's control, but employed by tenant, "deliberately, and with the intention of doing injury to the defendant, willfully, and negligently moved about 20 negro laborers away, took a number from the fields of the defendant, and began working them in the fields of the plaintiff, thereby depriving defendant of the only possible means of harvesting his crop," held to entitle tenant to punitive damages on the ground of fraud.

2. Action \S 27(2)—Tenant's counterclaim held to state cause of action for tort, entitling him to punitive damages.

In a landlord's action for rent, defendant's counterclaim, alleging that landlord violated his agreement not to disturb labor residing on land under landlord's control, but employed by tenant, and "deliberately, and with the intention of doing injury to the defendant, willfully,

and negligently moved about 20 negro laborers away, took a number from the fields of the defendant, and began working them in the fields of the plaintiff, thereby depriving defendant of the only possible means of harvesting his crop," held to state a cause of action in tort entitling tenant to punitive damages; the allegations as to the contract being merely preliminary to the action based on the tort.

Appeal from Common Pleas Circuit Court of Hampton County; I. W. Bowman, Judge.

Action by Frederick Winthrop against Paul N. Allen, in which defendant filed a counterclaim. Judgment for plaintiff, and defendant appeals. Reversed.

Hugh O. Hanna and Geo. Warren, both of Hampton, for appellant.

J. W. Manuel, of Hampton, for respondent.

GARY, C. J. The following statement appears in the record:

"This case was brought by the plaintiff to recover rent alleged to be due by the defendant to him, for certain real estate for the years 1913 and 1914. The defendant answered by general denial, and as a counterclaim alleged that during the years 1912, 1913, and 1914 the plaintiff willfully and negligently committed certain acts, resulting in damage to the defendant, and asked for a judgment of \$25,000 by way of a counterclaim. At the close of the defendant's testimony, plaintiff made a motion for a directed verdict against the defendant, for the sum of \$555.05; and the plaintiff also made a motion for a directed verdict, as to the defendant's claim for punitive damages, on the ground, to wit: that punitive damages cannot be awarded for the breach of a contract, unless fraud be both alleged and proved, and that there was no allegation of fraud in the counterclaim filed in this case. After hearing argument by counsel, the court ruled as follows: 'I refuse the motion for the direction of a verdict, in favor of the plaintiff for so many dollars. The question of punitive damages is eliminated. I am going to cut that out.'"

The charge of the presiding judge sufficiently states the case and pleadings.

Turning to the charge we find the following:

"The plaintiff alleges that for two years he rented to Mr. Paul Allen, the defendant, certain lands, and that there is a balance due him for rent of \$555.05, which is still unpaid, and he asks for a judgment at your hands for that amount, \$555.05.

"Mr. Allen, the defendant, comes in with his answer, and for a first defense he denies each and every allegation in the complaint of the plaintiff. He alleges that during the years 1912, 1913, and 1914, the plaintiff, through his agents, servants, and employees, acting under the express direction and within the scope of their employment, willfully, wantonly, carelessly, negligently, and with a total disregard to the rights of this defendant, broke his express agreement and contract with this defendant, to the effect that the labor then residing on certain lands in Hampton county, S. C., under the

control of the plaintiff, and on the lands of the defendant, would not be disturbed by the plaintiff, but would be allowed to work the lands which Robert Winthrop had rented to the defendant, such contract and agreement being broken by the said plaintiff by having the said labor intimidated and coerced against working for the said defendant, and by having said laborers moved away and taken out of the crops of the defendant, then being raised by the said defendant, during the harvesting seasons of 1913 and 1914; that the plaintiff had expressly agreed to allow the defendant the privilege of employing said laborers, about 25 or 30 in number, during the year 1913, and had ratified this express agreement on several occasions.

"That the defendant during the year 1913 planted said lands, putting down large quantities of fertilizers on the said lands, amounting to about \$450, and planting seeds costing about \$100, at a cost to the defendant for labor and plows for the planting and cultivation, of about \$800 or more; that at harvest time and at the time that cotton was to be picked, the plaintiff, notwithstanding his agreement not to do so, deliberately, and with the intention of doing injury to the defendant, willfully, and negligently moved about 20 negro laborers away, took a number from the fields of the defendant, and began working them in the fields of the plaintiff, thereby depriving defendant of the only possible means of harvesting his crop."

The jury rendered a verdict in favor of the plaintiff for \$555.05, and the defendant appealed.

The vital question in the case is raised by the following exception:

"His honor erred, it is respectfully submitted, in holding that the law in this case does not allow punitive damages, and in refusing to submit the question of punitive damages to the jury; the error being that the counterclaim of defendant was based on an action ex delicto arising out of the contract, and in such an action the law does allow punitive damages, and the same should have been submitted to the jury."

[1] The first question we will consider is whether the allegations of the counterclaim were sufficient to entitle the defendant to punitive damages on the ground of fraud. The allegations of the counterclaim which we have italicized show that the plaintiff, not only committed a breach of the contract, by willfully invading the rights of the defendant, but likewise removed about 20 negro laborers from the fields of the defendant, for the purpose of financial benefit to himself. In 12 R. C. L. 229, we find the following, under the definition of fraud:

"Fraud assumes so many different hues and forms that courts are compelled to content themselves with comparatively few general rules for its discovery and defeat, and allow the facts and circumstances peculiar to each case to bear heavily on the conscience and judgment of the court or jury, in determining its presence or absence. While it has often been said that fraud cannot be precisely defined, the

books contain many definitions, such as the unlawful appropriation of another's property by design."

See, also, *Welborn v. Dixon*, 70 S. C. 108, 49 S. E. 232, 3 Ann. Cas. 407. These authorities render unnecessary the citation of others, in order to show error on the part of his honor the presiding judge.

[2] The next question that will be considered is whether the allegations of the counterclaim that the plaintiff willfully and wantonly invaded the rights of the defendant entitled him to punitive damages. The following definition of a tort is quoted with approval in *Welborn v. Dixon*, 70 S. C. 108, 49 S. E. 232, 3 Ann. Cas. 407:

"The word 'tort' means nearly the same thing as * * * civil wrong. It denotes an injury inflicted otherwise than by mere breach of contract; or, to be more nicely accurate, a tort is one's disturbance of another in rights which the law has created, either in the absence of contract or in consequence of a relation which a contract had established between the parties."

It is true, the answer alleges that the plaintiff willfully, wantonly, carelessly, negligently, and with a total disregard of the rights of the defendant, broke his express agreement and contract with the defendant in the manner therein stated; but it also alleges a cause of action for damages arising *ex delicto*; the allegations as to the contract being merely preliminary to the action based on tort. *Pickens v. Railway*, 54 S. C. 498, 32 S. E. 567; *Hellams v. Tel. Co.*, 70 S. C. 83, 49 S. E. 12; *Harrison v. Tel. Co.*, 71 S. C. 386, 51 S. E. 119; *Cabe v. Ligon*, 115 S. C. 430, 105 S. C. 739. We do not deem it necessary to cite authorities to sustain the generally recognized and well-settled principle that whenever the allegations of a complaint or counterclaim are sufficient to constitute an action *ex delicto*, and that it was committed willfully, wantonly, and with a total disregard of the injured party's rights, he would be entitled to punitive damages.

The respondent's attorneys argue that, while it is true punitive damages are recoverable for fraud in an action for damages arising *ex contractu*, the injured party is not entitled to punitive damages, in an act on where the tort is accompanied with willfulness or wantonness. They cite the following authorities to sustain this proposition: *Welborn v. Dixon*, 70 S. C. 108, 49 S. E. 232, 3 Ann. Cas. 407; *Prince v. Ins. Co.*, 77 S. C. 187, 57 S. E. 766; *Givens v. Electric Co.*, 91 S. C. 417, 74 S. E. 1067; *Donaldson v. Temple*, 96 S. C. 240, 80 S. E. 437; *Reaves v. Tel. Co.*, 110 S. C. 233, 96 S. E. 295. In the first-mentioned case this court, after stating that there were allegations in the complaint appropriate to an action for damages arising *ex contractu*, but also to an

action of tort, committed with a fraudulent and malicious intent, used this language:

"Under the allegations of the complaint it was a fraudulent act on the part of the defendant when he intentionally disposed of the land as the owner thereof, knowing that it was conveyed to him by way of mortgage, and that it belonged to the plaintiff (but, of course, subject to the mortgage). The question, then, is presented whether, in an action arising out of a breach of contract, attended with a fraudulent act, the defendant is liable for exemplary damages. There is no doubt as to the general principle that in an action for breach of contract the motives of the wrongdoer are not to be considered in estimating the amount of damages, and that he is only liable for such damages as are the natural and proximate result of the wrongful act. When, however, the breach of the contract is accompanied with a fraudulent act, the rule is well settled, certainly in this state, that the defendant may be made to respond in punitive as well as compensatory damages."

The ruling of the court that the plaintiff was entitled to punitive damages was based upon the principle that fraud is a tort. No reference whatever was made to torts committed with willfulness or wantonness, for the reason that no such question was involved, and was not argued.

In the case of *Prince v. Ins. Co.*, 77 S. C. 187, 57 S. E. 766, the plaintiff sought to recover damages for the alleged failure of the defendant to issue to him a policy of insurance on his life. It was that, although the plaintiff had performed his part of the contract in full, the defendant refused to issue the policy, but instead willfully and wantonly attempted to compel plaintiff to accept another policy of insurance, by threatening plaintiff with imprisonment. The court said:

"The final question for consideration is whether or not punitive damages are recoverable in this case. * * * This is * * * an action on contract, and unless fraud is alleged and proved, punitive damages cannot be recovered for the breach. The general rule is thus stated in *Sedgwick on Damages* (8th Ed.) § 603: 'It may be considered to be established that the motives of the defendant in breaking his contract are to be disregarded, and consequently, exemplary damages are not recoverable.' In this state, however, in the early case of *Rose v. Beattie*, 2 N. & McO. 538, the doctrine was suggested that where a breach of contract is accompanied with a fraudulent act, punitive damages are recoverable, but not for a breach unaccompanied by fraud. This principle has been recently laid down as the law in the case of *Welborn v. Dixon*, 70 S. C. 108, 49 S. E. 232. As no fraudulent act is here alleged, exemplary damages cannot be recovered."

In the said case the plaintiff alleged the failure and refusal of the defendant to comply with his part of the contract, and that in so doing he acted willfully and wantonly,

but the plaintiff did not allege such facts as were sufficient to show willfulness or wantonness on the part of the defendant; furthermore it was stated in the opinion that the action was on contract. Mr. Chief Justice Pope, who delivered the opinion quoted from Sedgwick on Damages for the purpose of showing the marked difference between mere motive and acts accompanying the breach or a contract.

Even if the language we have quoted is susceptible of the interpretation that punitive damages are recoverable when there is a breach of contract accompanied with a fraudulent act, but that such damages cannot be recovered, when the tortious act is committed willfully or wantonly, then it is a mere dictum which is not to be followed.

In the case of Givens v. Electric Co., 91 S. C. 417, 74 S. E. 1067, the court uses this language:

"Evidence was admitted, over defendant's objection, to prove remote and speculative damages, the court holding that the complaint alleged a willful and wanton violation of the contract, which, if proved, would entitle plaintiff to punitive damages. This was error. Punitive damages are not recoverable for breach of contract, except where the breach was accompanied by an intent to defraud the other party to the contract. Welborn v. Dixon, 70 S. C. 108, 49 S. E. 232. There is no allegation of fraud in this case. Therefore punitive damages are not recoverable, notwithstanding the allegation of a willful and wanton violation of the contract by the defendant."

In that case the action was for damages for breach of a contract. The only authority upon which Mr. Justice Hydrick relied to sustain the proposition announced by him is Welborn v. Dixon, 70 S. C. 108, 49 S. E. 232, 3 Ann. Cas. 407, which we have already shown does not sustain his view. While there were allegations to the effect that the defendant willfully and wantonly broke the contract, no facts were alleged which were sufficient to constitute a tort.

We need not discuss the case of Donaldson v. Temple, 96 S. C. 240, 80 S. E. 437, as the ruling therein was based entirely upon the authority of Givens v. Electric Co., 91 S. C. 417, 74 S. E. 1067.

In Reaves v. Tel. Co., 110 S. C. 233, 96 S. E. 295, the only reference made by the court to the question under consideration is as follows:

"Nor is there any doubt of the rule that punitive damages are not recoverable for the mere breach of a private contract, in the absence of circumstances giving rise to a cause of action for fraud. Welborn v. Dixon, 70 S. C. 108, 49 S. E. 232, 3 Ann. Cas. 407."

Reversed.

WATTS, FRASER, and COTHRAN, JJ., concur.

(116 S. C. 396)

FLANAGAN v. GLENCOE COTTON MILLS.
(No. 10702.)

(Supreme Court of South Carolina. Aug. 1, 1921.)

Appeal and error \Rightarrow 1177(7)—Where evidence not fully developed cause will be remanded for new trial.

In an action by the bookkeeper and director of a cotton mill to recover the balance of the bonus voted him with themselves by the directors, after his obligation to the corporation for the share purchased by him should be marked paid, evidence as to the corporate transactions, particularly the ratification of the directors' acts by a stockholders' meeting, held insufficient to permit a final judgment, so that the case should be remitted to the trial court for full showing as to the facts.

Appeal from Common Pleas Circuit Court of Richland County; John S. Wilson, Judge.

Action by O. A. Flanagan against the Glencoe Cotton Mills. From a judgment for plaintiff, defendant appeals. Reversed and remanded for new trial, with directions.

Nettles & Tobias, and Weston & Aycock, all of Columbia, for appellant.

Nelson, Gettys & Mullins, and D. W. Robinson, all of Columbia, for respondent.

FRASER, J. This evidence tends to show: That the plaintiff was the bookkeeper of the defendant mill. That the mill bought in the stock of one of its deceased stockholders at 50 cents on the dollar and resold it at par to some of the people who were in with the management of the mill. The defendant purchased 25 shares and gave his obligation to the mill for the purchase money. He was then made a director. The mill had not been making money, but it became prosperous and gave by way of bonus to its directors about \$40,000. This gift was ordered by the directors. Subsequently a stockholders' meeting was had and the action of the directors was approved. These directors owned a large majority of the stock. The plaintiff was secretary of the board, but he did not send out any notices of a stockholders' meeting. We are left only to presume that the stockholders were duly notified. Plaintiff demanded that his obligation to the corporation be marked paid, and asked for judgment for the balance. Some, if not all, of the directors, who were voted a bonus, are said to have returned it; but there is no sufficient proof of it, or of any circumstances that rendered the payment of a bonus necessary or proper, or an indorsement of it by the corporation.

It would be manifestly unfair, on this partial and incompetent statement of facts, to make a final judgment. As the record now stands, it appears that the directors voted a bonus to each other, and then resolved

themselves into a stockholders' meeting and approved the action. A bonus equal to 40 per cent. of the capital stock was given to the directors, with no explanation, except that they had the money. No authority sustains that. The plaintiff paid out a part of it as federal taxes; so there should be a full investigation, in order that complete justice may be done.

It is therefore ordered that the judgment appealed from be reversed, that the case be sent back to the court of common pleas for a full showing as to the facts of the case, and an accounting by all who took part in the \$40,000 bonus, and that all the directors be made parties hereto.

GARY, C. J., and WATTS, J., concur.

COTHRAN, J. (concurring). Action in court of common pleas, Richland county, instituted April 7, 1920, for a balance of \$5,838.42 appearing on the books of the defendant to be due to the plaintiff. The alleged indebtedness of the defendant to the plaintiff arose out of the following transactions: For several years prior to the year 1919, and up to and including the month of November of that year, the plaintiff was employed by the defendant as bookkeeper; he was also secretary of the corporation; he resigned in November, 1919; at the time his resignation took effect the books of account of the defendant, kept by the plaintiff, showed a balance to his credit of \$5,838.42, as the plaintiff alleges, on account of plaintiff's salary as bookkeeper and a bonus paid to him by the corporation during the year 1919 and credited to his salary account. We assume that the plaintiff intended to allege that the bonus was voted to be paid, and not actually paid, but credited as stated. The complaint is in quite skeleton form, and is accompanied by no statement of account, the items of which make up the account, his salary, credits, payments, or the alleged bonus.

The defendant answered, denying any indebtedness to the plaintiff, setting up a counterclaim upon a note for \$2,500, executed and delivered by the plaintiff to the defendant on April 23, 1915, with interest at 6 per cent. per annum, payable quarterly, upon which payments had been made as follows: October 2, 1916, \$250; October 9, 1918, \$200; and November 2, 1918, \$50—and demanding an accounting by the plaintiff by reason of the matter hereinafter set forth.

The facts connected with this controversy, which we understand are admitted without question, are as follows:

The plaintiff entered the employment of the defendant in 1914, and continued as its bookkeeper until some time in November, 1919; the salary began at \$100 per month, raised to \$125, later to \$150, and during the year 1918 it was \$300. Some time in 1915, the exact date is not clear, the corporation bought from the estate of George C. Moseley

\$10,000 of its own stock at 50 cents on the dollar. This sum was in turn sold by the corporation to the plaintiff (bookkeeper), T. H. Wannamaker, Jr. (a director), R. C. Clayton (a director), and Miss Martin (stenographer), at par; these parties taking \$2,500 each, and giving their notes severally therefor to the corporation. The plaintiff testified:

"And the dividends and special bonuses were credited on the stock [we assume he intended to say "the note"], and the last bonus in the early fall of 1919, of \$900, which was the balance I owed, I was instructed to charge off."

On the 16th of January, 1919, possibly about the peak of industrial prosperity, succeeding a period of unexampled flood tide in manufacturing profits, the directors of the corporation, including T. H. Wannamaker, president, T. H. Wannamaker, Jr., vice president, R. C. Clayton, and the plaintiff, who had been elected a director shortly after his acquisition of the 25 shares, held a meeting, at which, as the minutes show:

"It was decided to call a meeting of the stockholders for the purpose of determining what bonus shall be appropriated to the several officers of the mill."

The reason for this action, if it can be so denominated, was thus expressed in the minutes:

"In view of the large profits of 1918, and because of the fact that all of the officers had been working on moderate salaries previous to this time, it was felt that they were entitled to a liberal share of the profits under these abnormal conditions."

Accordingly a meeting of the stockholders was held on January 23, 1919, at which the only stockholders present were the two Wannamakers, Clayton, and the plaintiff; the elder Wannamaker voting the stock of Miss Martin by proxy. The plaintiff testified that as secretary he did not send out to the stockholders notice of this meeting; that Wannamaker usually did this, but he did not know whether he did so on this occasion or not. At any rate, no stockholder was present except those who were interested in the proposition to vote bonuses to the officers. It does not appear that any resolution was adopted, or even proposed; the minutes simply containing this memorandum:

"The directors were authorized to pay the following bonus to the several officers of the mill for the year 1918:

T. H. Wannamaker.....	\$15,000.00
T. H. Wannamaker, Jr.....	10,000.00
R. C. Clayton.....	7,500.00
C. A. Flanagan.....	7,500.00

"There being no further business the meeting adjourned."

It appeared that the plaintiff was admittedly entitled to certain credits upon the \$2,500 note given by him to the corporation for the 25 shares of stock; the dates and

amounts of said credits are set out in the answer and have been repeated in the foregoing statement. The amount which would have been due upon this note, after deducting the above admitted credits, has been liquidated by the allowance of certain bonuses to the plaintiff, which, however, appear to have been entered upon his account as credits upon the verbal direction of the president, without corporate action in reference thereto.

The amount of the bonus which the stockholders' meeting of January 23, 1919, authorized the directors to allow to the plaintiff, \$7,500, was not actually paid, but passed as a credit to the plaintiff's salary account. Of it the plaintiff charged himself with certain items for income tax, paint, coal, and "perhaps other items," amounting to \$1,661.58, which he drew out, leaving a claimed balance in favor of the plaintiff of \$5,838.42, all of which is bonus money. This is the foundation of his claim.

The defendant's motion, severally, for non-suit, directed verdict on the plaintiff's claim, and directed verdict on the defendant's counterclaim, were refused by the circuit judge. The case was submitted to the jury which rendered a verdict in favor of the plaintiff for the full amount sued for. The defendant appeals.

The entire balance claimed by the plaintiff is necessarily a part of the \$7,500 bonus allowed to him by the action of the directors and stockholders in the meeting of January 16, 1919, and January 23, 1919. It is apparent, therefore, that the plaintiff's alleged cause of action depends upon the validity of that action and upon the further question, assuming that such action was so far valid as to prevent the recovery of the money by the corporation in case it had actually been paid, whether, not having been actually paid, such action constitutes the basis of an action in favor of the plaintiff against the corporation.

Upon the first question suggested, the validity of the bonus allowance to the plaintiff: Two most salutary principles of corporate management are in obstruction: (1) The corporate assets belong to the stockholders; (2) the directors of a corporation are trustees for the stockholders. While the minutes of the directors' meeting of January 16, 1919, do not show a formal resolution of the board appropriating the bonuses, they do show a decision by the board that such action should be taken, and that for the purpose of a show of legality a stockholders' meeting be called, no date being fixed, to determine the amount of the allowances. At that meeting on January 23, 1919, to which it does not appear that any stockholder, other than the participants were invited, formal action appears to have been taken fixing the amount of allowances. The stockholders attending that meeting were the same who, as directors,

had come to a decision on the 16th. Their action upon its face as stockholders was nothing more or less than their action as directors.

Considered as the action of the board of directors, the allowances were for services already performed and to the men selected as trustees of the corporation, and upon both grounds were without consideration and void. The attempted action of the stockholders' meeting was that of a majority of the stockholders, consisting alone of those who were the beneficiaries of the allowances. Majority stockholders cannot for selfish purposes act in hostility to the interests of the corporation, with the effect of defrauding nonassenting stockholders.

Even if it should be conceded that the stockholders had the power to vote this bonus, the circumstances under which that action was taken were not such as to receive the sanction of this court. The directors met, and without taking any formal action upon the matter, in which every one of them was personally interested, "decided" to call a stockholders' meeting to determine what bonus should be appropriated to the several officers of the mill, as if they had already "decided" the main question, and desired the action of the stockholders only in fixing the size of the melon that was to be cut. They took pains to spread upon the minutes the reasons for allowing the bonus, "the large profits of 1918," "moderate salaries," and "profits under these abnormal conditions." The stockholders, whose money was being appropriated to this generous purpose, and who had passed through the lean and hungry years since 1910 without dividends, were not consulted; it was not deemed necessary, we apprehend, to give them notice, as those who were to participate in the bonus had control of the corporation. The profits, abnormal though they may have been, belonged to the stockholders, and it seems only fair that, when their property to the extent of \$40,000, 40 per cent. of the capital stock, was to be donated, they were entitled at least to be consulted.

A further consideration is conclusive of the issue in the case. The bonus was a gift, in violation of the trust imposed upon the directors, either in their capacity of directors or in the swift change to stockholders; it was never paid, and at best amounts to no more than a promise to pay. Being without consideration and void, it cannot form the basis of an executory contract. *Pitts v. Mangum*, 2 Bailey, 588; *Bennett v. Cook*, 28 S. C. 353, 6 S. E. 28.

The judgment of this court should be that the judgment of the circuit court be reversed; that the case be remanded to that court for a new trial; that upon said new trial the defendant be allowed judgment against the plaintiff for the amount due on the \$2,500 note, less the credits admitted in the com-

plaint; that the defendant be allowed, if so advised, to amend its answer, setting up an additional counterclaim for the \$1,661.58 admitted by the plaintiff to have been received out of the \$7,500 bonus.

(116 S. C. 406)

SEACOAST PACKING CO. v. LONG.
(No. 10704.)

(Supreme Court of South Carolina. Aug. 1, 1921.)

1. Evidence ¶441(9) — Written subscription contract cannot be varied by parol.

A written subscription to corporate stock cannot be varied by proof of a parol contract made by the parties soliciting the subscription.

2. Corporations ¶90(5)—In action on stock subscription, allegation as to parol agreement and fraudulent representations of solicitors held not to state a defense.

In an action on a stock subscription, allegations that parties soliciting the subscription made a certain parol contract and made fraudulent representations do not state a defense where nothing is alleged to show any connection between the corporation and those soliciting the subscription.

3. Corporations ¶90(1)—Stock subscription enforceable, though made before organization.

It is not a defense to an action on a stock subscription that the subscription was made before the corporation had come into existence as bona fide subscription to the capital stock is a condition precedent to the formation of the corporation.

Cothran, J., dissenting.

Appeal from Common Pleas Circuit Court of Beaufort County; J. W. De Vore, Judge.

Action by the Seacoast Packing Company against R. A. Long. From an order striking out certain defenses as sham, defendant appeals. Affirmed.

Randolph Merdaugh, of Hampton, for appellant.

W. J. Thomas, of Beaufort, for respondent.

FRASER, J. The complaint alleges that the defendant, along with others, subscribed in writing for five shares of the capital stock of the plaintiff corporation at a par value of \$100 per share and had failed to comply with the terms of the subscription.

The defendant, for a second defense, alleges a failure of the plaintiff to comply with a certain parol contract made by "the parties soliciting his subscription," and that the representations were fraudulently made. The third defense was that the subscription was made before the corporation had come into existence. On motion these defenses were stricken out as sham. From this order this appeal is taken.

[1, 2] I. Inasmuch as a written contract cannot be varied by parol, and nothing was alleged to show any connection between the corporation and "those who solicited the subscription, this defense could be stricken out 'without argument.'"

[3] II. Inasmuch as bona fide subscription to the capital stock is a condition precedent to the formation of a corporation, this defense also falls "without argument."

The exceptions are overruled, and the order appealed from is affirmed.

GARY, C. J., and WATTS, J., concur.

COTHRAN, J. (dissenting). Action to recover an unpaid subscription of \$500 to the capital stock of a proposed corporation. The defendant admitted making the subscription, but alleged as defenses to the action, that he made the subscription upon the representation of the parties soliciting subscriptions: (1) That the corporation would not be formed until the whole amount of the proposed capital stock, \$150,000, had been subscribed for by bona fide subscribers; (2) and upon the further representation by said parties that two of the subscribers had covenanted and agreed to underwrite \$50,000 of the subscriptions; and (3) upon the further assurance that the business to be conducted by the corporation was the operation of a packing plant; (4) that the whole amount of the proposed capital stock has not been subscribed for; that the representation as to the underwriting of \$50,000 thereof was false; that the corporation has contracted to go into other business in addition to the operation of a packing plant; (5) that he would not have made the subscription but for the foregoing representations, and that by reason of the false and fraudulent character thereof there has been a failure of consideration in his subscription, that the same is of no force and effect, and that he had been relieved of all liability thereon; (6) that the subscription was made to a company which was not in existence at the time it was given and was without consideration.

Upon motion of plaintiff's attorney the circuit judge passed an order striking out as frivolous, sham, and irrelevant the foregoing defenses, "except any allegations of fraud and misrepresentation therein contained."

There is, of course, no merit in the defense numbered (6) in the above enumeration. The corporation cannot be formed until the requisite subscriptions have been made, which are necessarily valid before the actual existence of the corporation takes place.

Should there be any merit in the other defenses, the other should be reversed as utterly incapable of execution. To strike out all of the allegations of fact constituting the fraudulent misrepresentation and leave only

the bald allegation of fraud and misrepresentation, would render that which was left without supporting allegations. Should there be no merit in these defenses, the whole of them, including the allegations of fraud and misrepresentations, should have been stricken.

The several defenses above outlined, with the exception of the sixth, which upon its face is untenable, will now be considered.

The first defense in the enumeration adopted herein is based upon the alleged false representation that the entire capital stock of \$150,000 would be subscribed before the corporation would be formed. This is a perfectly valid condition to a subscription, a prudent provision, which a subscriber who puts his money into a proposed venture has the unquestionable right to insist upon, taking the very sensible position that, while he may be willing to risk his money in an enterprise organized with sufficient capital to meet the demands of the business, he is not willing to be foster father to a cripple. This, however, is not the misrepresentation of a fact, but rather an assurance of the policy of the corporation, a condition which the subscriber has the right to impose, but which, to become effectual, must be in writing and a part of the original subscription. A subscription to stock is a contract, and when evidenced in writing, is subject to the same rule as to parol evidence that all other contracts are subject to.

"Under the general rule of evidence that a written agreement cannot be varied or added to by parol evidence, it is not competent for a subscriber to stock to allege that he is but a conditional subscriber. The condition must be inserted in the writing in order to be effectual." 1 Cook on Corp. (6th Ed.) § 81.

If, therefore, the defendant may not be able to establish this condition attached to his subscription, in the manner provided by law, he cannot claim the benefit of it. That is a matter, however, that may arise upon the trial of the case; it is no ground for striking out the defense as frivolous, sham, and irrelevant. If it be valid defense, when properly established it cannot be thus characterized. In the case of *Groce v. Jenkins*, 28 S. C. 172, 5 S. E. 352, the court holds that it is not necessary to allege in the complaint that an agreement as to lands, sought to be enforced, was in writing; that is a matter of proof not pleading under the statute of frauds. By analogy, it is not necessary to allege that the representation was in writing and a physical part of the contract of subscription; that is a matter of defense, one of evidence, and not pleading. The question of the authority of the promoters to bind the corporation by assurances or representations is discussed in reference to the second defense.

The second defense is based upon the alleged false representation that two of the subscribers, presumably men of means, had covenanted and agreed to underwrite \$50,000 of the subscriptions. This representation differs very materially from the provision or assurance referred to above in the discussion of the first defense. To state that Mr. Richardson and Mr. Christensen had so agreed is the statement of a fact, not a promise or an assurance; a most persuasive, inducing argument in securing the defendant's subscription, particularly in view of the previously discussed assurance in reference to the subscriptions to the entire capital stock. If, as we must assume from the allegations of the complaint, the defendant would not have subscribed but for this representation, and it was false, the defense was good, and should not have been stricken out.

It is suggested that the complaint does not show any connection between the corporation and those who made the representation. It must be remembered that the corporation had not at that time been created; there was no one in a position to speak for it except the promoters. If the corporation seeks to take advantage of the canvassing work of these promoters, it cannot accept the benefits without the burdens.

In 1 Cook on Corp. (6th Ed.) § 104, it is said:

"The well-established rule now is that a corporation cannot claim or retain the benefit of a subscription which has been obtained through the fraud of its agents. The misrepresentations are not regarded as having actually been made by the corporation, but the corporation is not allowed to retain the benefit of the contract growing out of them, being liable to the extent that it has profited by such misrepresentations. The question of the authority of the agent taking the subscription is immaterial herein. It matters not whether he had any authority, or exceeded his authority, or concealed its limitations. The corporation cannot claim the benefits of his fraud without assuming also the representations which procured those benefits. Parol evidence is admissible to show the fraud, since it does not vary or contradict the contract, but shows that no contract was legally entered into."

It was therefore error in the circuit judge to strike out the defense.

The third defense is based upon the alleged false representation that the business to be conducted by the corporation was the operation of a packing plant. This statement or promise or assurance is ruled by the observations made in connection with the first defense.

The judgment of this court should be that the order appealed from is reversed.

(151 Ga. 696)

CITIZENS' & SOUTHERN BANK et al. v. STATE et al. (No. 2305.)

(Supreme Court of Georgia. July 13, 1921.)

(Syllabus by the Court.)

1. Taxation \S 590—In suit to enforce liability of persons diverting trust funds, joinder of state and county not misjoinder.

The petition is not demurrable upon the ground of misjoinder of parties.

2. Action \S 50(10)—Pleading \S 21—Petition to enforce liability of parties diverting funds of bank not duplicitous or inconsistent.

The petition is not duplicitous or inconsistent.

3. Taxation \S 572, 584—Taxes not "debt" collectible by suit; suit held not one for collection of taxes.

Taxes are not a "debt" within the usual meaning of that word, and cannot be collected in a suit at law, in the absence of express statutory authority. Properly construed, the petition is not one having for its purpose the collection of taxes by a suit at law.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Debt.]

4. Taxation \S 584—Trusts \S 348, 359(2)—Trustees misapplying assets and persons assisting them accountable to persons injured; equitable petition will lie to recover misapplied trust funds; suit in equity maintainable against persons misapplying funds of bank without paying taxes.

Where funds in the nature of trust funds are misapplied by persons acting in the character of trustees, they, and all persons aiding and assisting in the misapplication of such assets with knowledge of such misapplication, are accountable to the person injured for such misappropriation, and an equitable petition will lie in behalf of such injured person to recover such misapplied trust funds.

5. Demurrer properly overruled.

The court did not err in overruling the demurrer to the petition.

Error from Superior Court, Chatham County; P. W. Meldrim, Judge.

Suit by the State of Georgia and another against the Citizens' & Southern Bank and others. Demurrers to the petition were overruled, and defendants bring error. Affirmed.

The petition of the state of Georgia and the county of Chatham alleged in substance as follows: On or about December 30, 1918, the directors of the Merchants' National Bank of Savannah entered into a tentative agreement with the Citizens' & Southern Bank, a corporation of this state, for the liquidation of the affairs of the first-named bank. A meeting of stockholders of the Merchants' National Bank was held on January 14, 1919, at which were present and represented, either in person or by proxy, shareholders owning two-thirds of the capital

stock. Joseph Hull and others were elected as directors. The directors elected V. B. Jenkins as cashier. A resolution was adopted authorizing and directing the liquidation of the affairs of the Merchants' National Bank through the Citizens' & Southern Bank; and V. B. Jenkins was elected liquidating agent. By virtue of this resolution all the assets of the bank became a trust fund in the hands of the directors of that bank, primarily for the purpose of the payment of its debts, and then for the purpose of distribution among its stockholders. The tentative agreement of December 30, 1918, for liquidation of the Merchants' National Bank was ratified by its stockholders and by its directors on January 14, 1919. Plaintiffs are advised and believe that under the terms of the agreement the price to be paid to the stockholders by the Citizens' & Southern Bank for their shares of stock was \$140 per share. In pursuance of this agreement the Citizens' & Southern Bank paid to the directors of the Merchants' National Bank the sum of \$700,000, or other large sum, which sum became a fund primarily for the purpose of paying the debts of the Merchants' National Bank, and the amount remaining after the payment of its debts was to be distributed among its shareholders. The assets of the Merchants' National Bank had not been distributed on January 1, 1919, and were intact. On that date the state and county taxes due on the stock of the Merchants' National Bank for the year 1919 became due and payable. On April 16, 1919, V. B. Jenkins, as cashier of the Merchants' National Bank, made returns for its state and county taxes for the year 1919 of 5,000 shares of stock of the stated value of \$434,000. The fund arising from the sale of the assets of the Merchants' National Bank so paid by the Citizens' & Southern Bank became a trust fund, first, for the purpose of paying the debts of the bank, next for the purpose of distribution among its stockholders, and the Citizens' & Southern Bank became a trustee of such fund for that purpose. The fund arising from the sale of the assets of the Merchants' National Bank also became a trust fund in the hands of V. B. Jenkins, liquidating agent, primarily for the purpose of paying the debts of the bank, and afterwards for distribution among its stockholders. All the assets of the Merchants' National Bank have been distributed by the Citizens' & Southern Bank, the directors of the Merchants' National Bank, and V. B. Jenkins, as liquidating agent, to the stockholders of the Merchants' National Bank, leaving unpaid the taxes due the state of Georgia and the county of Chatham. The Citizens' & Southern Bank and the directors and the liquidating agent, not regarding their duty in the premises as trustees, have failed to pay such taxes. The amount due the state

and county for taxes for the year 1919 by the Merchants' National Bank on its shares of stock is \$8,193.92, besides interest from December 20, 1919, and the cost for issuing the tax execution. The defendants have been stubbornly litigious and have caused plaintiffs unnecessary trouble and expense in the collection of the tax *fi. fas.*, and the plaintiffs are entitled to recover of the defendants reasonable attorney's fees and expenses of litigation. The plaintiffs file this petition in behalf of themselves and such other creditors of the Merchants' National Bank as may intervene; and they pray judgment against the Citizens' & Southern Bank and the directors of the Merchants' National Bank (naming them), and against V. B. Jenkins as liquidating agent, for the sum of \$8,193.92, besides interest, cost, expenses, and attorneys fees incurred in bringing this suit. There is also a prayer that the Citizens' & Southern Bank answer, not under oath, what sum of money it agreed to pay to the Merchants' National Bank for its assets, and that the directors be required to answer what amount of money the Citizens' & Southern Bank agreed to pay the Merchants' National Bank for the sale of its assets, and on what date the first payment was made and the amount thereof; also that V. B. Jenkins, liquidating agent, be required to answer what dividends were paid to the stockholders and the dates of payment, and what payments were made to him as liquidating agent by the Citizens' & Southern Bank for the assets of the Merchants' National Bank, and on what date the first payment of the same was made.

The defendants demurred to the petition, because: (1) There is a misjoinder as to plaintiffs, in that the declaration joins as plaintiffs the state of Georgia and the county of Chatham, which parties have not a joint interest and whose demands are separate. (2) There is a misjoinder of causes of action, in that the declaration attempts to join two separate demands and to enforce by one proceeding distinct and separate claims. (3) The declaration joins two distinct claims of two distinct plaintiffs as a joint claim, and asserts a liability for the aggregate. (4) The declaration is duplicitous and contradictory and is not consistent, in that it undertakes to proceed against the Citizens' & Southern Bank as a trustee for the fund involved, and against the directors as trustees, and against V. B. Jenkins, liquidating agent, as trustee, charging these three separate defendants as alleged trustees, and charging each separately. (5) No cause of action is set forth in the declaration against the defendants or any of them. (6) The state of Georgia, suing to recover an alleged tax claim, has no right to maintain the suit. (7) The county of Chatham, suing to recover an alleged tax claim, has no right to maintain the suit. The other grounds of the demurrer state in different ways a gen-

eral demurrer. The court overruled the demurrer, and the defendants excepted.

Adams & Adams, of Savannah, for plaintiffs in error.

Geo. W. Owens, of Savannah, for defendants in error.

HILL, J. (after stating the facts as above).

[1] 1. The first three grounds of the demurrer raise the contention that the petition is demurrable because of misjoinder of parties, in that the declaration attempts to join separate demands and to enforce by one proceeding distinct and separate claims. It is argued that the state of Georgia and the county of Chatham are distinct plaintiffs, and that a suit for a demand due to the county cannot be maintained by the state of Georgia, and vice versa; that different tax amounts are due and the claims are separate and distinct. We think that this contention is without merit. The petition shows that but one execution was issued for the tax, in a stated amount, and this included taxes due both to the state and to the county. Executions for nonpayment of taxes against persons who are not required to pay to the treasurer are issuable by the tax collector of their respective counties as soon as the last day for payment has passed. Civil Code 1910, § 1151. The Code also provides that the several tax collectors of this state shall keep a stub book of tax receipts, and enter on the receipt and the stub attached thereto the name of each taxpayer in their respective counties, the amount of taxes assessed against him, and itemize the same, stating the amount due the state, county, poll tax, or any other professional or special tax. Civil Code 1910, § 1228. It will thus be seen that the tax collector is the collector for both the state and county, only one tax *fi. fa.* is issued for both, and the defendants are the same, and their liability to the state is the same as their liability to the county, except as to the amount owing to each, which depends on the difference in rates of taxation. The county is a part of the political subdivision of the state. It would be useless, therefore, to issue two *fi. fas.* against the same defendants and levy them upon the same property, and the law will not require a useless thing to be done.

[2] 2. The petition is also demurred to on the ground that it is duplicitous and contradictory. We think that this ground of the demurrer is also without merit. The suit is brought against the directors of the Merchants' National Bank and its agent, who delivered the property, and the Citizens' & Southern Bank, which received it. All of the defendants were parties to the transaction of the purchase and sale and to the liquidation of the Merchants' National Bank. They all had a common purpose, and it cannot be held that an action brought against all three is inconsistent. First National Bank of Spar-

ta v. Wiley, 150 Ga. 759, 105 S. E. 308. And see Morrison v. Fidelity & Deposit Co., 150 Ga. 54, 102 S. E. 354.

[3, 4] 3. The other grounds of the demurrer are merely general demurrers stated in different ways. It is insisted by the plaintiffs in error that the state of Georgia and the county of Chatham sued to recover an alleged tax claim, and have no right to maintain the suit. It is argued that the petition means that the two plaintiffs are creditors of the Merchants' National Bank, that their claims are "debts," and that they have no right to a judgment as creditors asserting "debts." Properly construed, we do not think that the petition is open to this criticism. The petition has not for its purpose the collection of taxes as such, but it seeks to hold the defendants, who have acted, not technically as trustees, but in a trust relation with reference to certain funds, liable for the diversion of such funds, which should have been applied by them in good conscience to the payment of taxes due the state and county on property which had been sold and the funds misapplied by them. It is unquestionably true that according to the weight of authority taxes are not a "debt" within the usual meaning of that word; but there is authority holding that a tax is a debt. State of N. C. v. Georgia Co., 112 N. C. 34, 17 S. E. 10, 19 L. R. A. 485; 7 Ann. Cas. 22; Albany County v. Durant, 9 Paige (N. Y.) 182; People v. Weber, 164 Ill. 412, 45 N. E. 723; McInerney v. Reed, 23 Iowa, 410; United States v. Pacific R. Co., 4 Dillon, 68, Fed. Cas. No. 15,983; State v. Duncan, 3 Lea (Tenn.) 679. The petition in the present case, properly construed, cannot be regarded as a suit at law to collect taxes as a debt of an individual taxpayer. The plaintiffs here are not creditors in the ordinary sense, and their claims are not debts. State v. S. W. R., 70 Ga. 11 (8), 13, 33; Georgia R. Co. v. Wright, 124 Ga. 596, 621, 53 S. E. 251. Taxes in this state cannot be collected by a suit at law, in the absence of express statutory provision. Id. See DuBignon v. Brunswick, 106 Ga. 317, 325, 32 S. E. 102; State v. W. & A. R. Co., 136 Ga. 619 (2), 626, 627, 71 S. E. 1055. The present is not a suit at law to collect taxes as such, but is a proceeding, alleging that the directors of two corporations and the cashier of one of them agreed to the liquidation of one of the corporations, and the agent of one, under agreement, did bring about the liquidation, received and paid out all of the proceeds from the sale, and failed and refused to pay the taxes upon property which had been returned, which taxes were due by the bank which went into liquidation; and the present proceeding was instituted to recover of these defendants the amount which is due by the selling corporation for taxes on account of the misappropriation of the funds arising

from the sale of the assets of the bank which went into liquidation under the agreement as stated in the petition. There is nothing in the petition to show that any real estate was sold by the selling corporation. In Atlanta Real Estate Co. v. Atlanta National Bank, 75 Ga. 40, it was held that—

"The directors and managers of a corporation who control and have charge of its effects, are trustees for the stockholders, and both they and others who, with knowledge of their misappropriation, aid them in diverting its property, would be liable to the injured parties."

In the opinion in that case it was said:

"That such of the defendants as control the corporation or had charge of its effects are trustees for the stockholders is a proposition too well established to be denied, * * * and * * * both they and others who, with a knowledge of their misappropriation, aided them in diverting its property, would be liable to the injured parties, is an equally well settled principle."

In the instant case it appears that the Merchants' National Bank on April 16, 1919, returned its property for state and county taxes for that year to the amount of \$434,000. The taxes amounted to \$8,193.92, and this amount was not paid, but, in the language of the learned trial judge, they "ought in law and good conscience to have been paid." The consideration of the selling bank, \$700,000, having passed into the hands of the Citizens' & Southern Bank, cannot be levied on by the sheriff. This is a case where funds in the nature of trust funds were misapplied, and which calls for the aid of a court of equity. Without it the plaintiffs are remediless. Civil Code 1910, § 3784, declares:

"All persons aiding and assisting *trustees of any character* [italics ours], with a knowledge of their misconduct, in misapplying assets, are directly accountable to the persons injured."

The property of the liquidating bank having been disposed of by the two banks and their agent, no property of the Merchants' National Bank could be found upon which to levy the *fi. fa.*; the assets turned over to the plaintiff in error being in money. Nor could a writ of garnishment avail; for the answer would necessarily be, under the allegations of the petition, that there is no property, it having been paid out to the stockholders of the Merchants' National Bank; and it is manifest that mandamus would not lie. For every right there is a remedy; and while, as already stated, the suit cannot be maintained as one at law to collect taxes, yet, under the facts alleged in the petition, a court of equity will require the defendants, who are essentially trustees of the property misapplied, and who have misappropriated the funds of the selling bank, a part of which should have gone to the payment of these taxes, to

respond to the injured party in a sum equal to the amount misappropriated. See, in this connection, *Anderson v. Adams*, 117 Ga. 919, 43 S. E. 982; *Morrison v. Fidelity, etc., Co.*, supra. There is no question of the fact that the amount of taxes claimed by the state and county is due and unpaid. But learned counsel for plaintiffs in error argues that the remedy by execution is exclusive, and that this necessarily inhibits every other form of procedure by the state and county. A number of cases are cited in support of this contention, viz.: *Marye v. Diggs*, 98 Va. 749, 37 S. E. 515, 51 L. R. A. 902; *Gatling v. Commissioners*, 92 N. C. 536, 53 Am. Rep. 434; *Johnson v. Howard*, 41 Vt. 122, 98 Am. Dec. 568; *Bradford v. Storey*, 189 Mass. 104, 75 N. E. 256, 257; *City of Rochester v. Bloss*, 185 N. Y. 42, 77 N. E. 794, 6 L. R. A. (N. S.) 694, 7 Ann. Cas. 15; *Marion County v. Woodburn Mercantile Co.*, 60 Or. 367, 119 Pac. 487, 41 L. R. A. (N. S.) 730; *Louisville Water Co. v. Com.*, 89 Ky. 244, 12 S. W. 300, 6 L. R. A. 69; *Baldwin v. Hewitt*, 88 Ky. 673, 11 S. W. 803, 805; *First National Bank v. Fancher*, 48 N. Y. 524.

There are two lines of decision on this question, some of them holding in accordance with the above view. But, on the other hand, there are decisions holding that a remedy created by statute for the collection of taxes, unless the statute expressly makes it so, is not exclusive of all others. See note to case of *Grell Bros. Co. v. Montgomery*, Ann. Cas. 1915D, 738, 741, citing *U. S. v. Chamberlin*, 219 U. S. 250, 81 Sup. Ct. 155, 55 L. Ed. 204, reversing 156 Fed. 881, 84 C. C. A. 461, 13 Ann. Cas. 721. See, also, *State v. New York Life Ins. Co.*, 119 Ark. 314, 171 S. W. 871, 173 S. W. 1099. Compare *Preston v. Sturgis Mill Co.*, 183 Fed. 1, 105 C. C. A. 293, 32 L. R. A. (N. S.) 1026; *Succession of Mercier*, 42 La. Ann. 1135, 8 South. 732, 11 L. R. A. 817; *Post v. Taylor County*, 2 Flp. 518, Fed. Cas. No. 11,802; *Garrett v. Memphis (C. C.)* 5 Fed. 870. Our own statute does not expressly make the remedy by execution exclusive. In the *Chamberlain Case*, supra, Mr. Justice Hughes, delivering the opinion of the court, said that an action would lie on behalf of the United States under a statute which "creates an obligation to pay the tax, and does not provide an exclusive remedy." And see *Darnell v. State*, 174 Ind. 143, 90 N. E. 769. *Cooley on Tax*. (3 Ed.) 17, states both rules as follows:

"It sometimes becomes a question whether a tax can be regarded as a debt in the ordinary sense of that term, so that the ordinary remedies for the collection of debts can be applied to it. In general it will be found that statutes imposing taxes make special provision for their collection, and do not apparently contemplate that any others will be necessary; but these may, nevertheless, fail; and the question then arises whether the tax must fail also, or whether resort may be had by the state to such remedies as would be available to individuals to

enforce demands owing to themselves. But instances have occurred of tax laws which provided for laying the tax, but made no provision whatever for collection. In such case it may well be held that the Legislature contemplated the enforcement of the tax by the ordinary remedies; and therefore, if the tax was assessed against an individual, that assumpsit or debt would lie for the recovery thereof. The same reasoning would support a proceeding in equity to enforce a lien for the tax when assessed, not against an individual, but against property; and some courts have gone so far as to hold that the imposition and assessment of a tax create a legal obligation to pay, upon which the law will raise an assumpsit, although the statute has given a special remedy. But in general the conclusion has been reached that, when the statute undertakes to provide remedies, and those given do not embrace an action at law, a common-law action for the recovery of the tax as a debt will not lie."

The remedy by execution is obviously not an adequate one in a case like the present; nor is garnishment or mandamus an adequate remedy. Section 1151 of the Civil Code of 1910 is as follows:

"Executions for nonpayment of taxes, against persons who are not required to pay to the treasurer, are issued by the tax collectors of their respective counties as soon as the last day for payment has arrived, and must be directed to all and singular the sheriffs and constables of this state."

The Legislature surely did not intend, by the passage of the act authorizing the collection of taxes by execution, to foreclose the state and county in a case like the present, from collecting trust funds misapplied, where state and county taxes are admitted to be due and are withheld. Equity is the correction of that wherein the law by reason of its universality is deficient. The remedy by execution in the instant case is obviously deficient. There is no property of the Merchants' National Bank which can be reached by execution or garnishment, but there was trust property in the hands of the defendants which has been misapplied and which can and ought in good conscience to be recovered of them by a court of equity for the party injured. In 26 R. C. L., § 339, it is said:

"In states in which an action at law may be maintained for the collection of a tax, whether by virtue of statutory authority or otherwise, it is generally held that a court of equity will aid in the collection of a tax when the remedy at law proves inadequate"

—citing *State v. Georgia Co.*, supra, which was a civil action in the nature of a creditors' bill, brought by the state of North Carolina and county of Guilford for the appointment of a receiver for the defendant corporation, to collect its assets and pay its debts. "It stands on complaint and demurrer." In delivering the opinion of the court, Clark, J., said, in part:

"The imposition of a tax clearly implies the intention to collect. If the plaintiffs cannot bring a creditor's suit, they cannot prove their claims in a suit brought by another, and would thus be compelled to stand idle and see a private creditor, or even a stockholder, bring suit and absorb the entire assets of the delinquent corporation. Thus the sovereign would be placed beneath the subject, the creator below the corporation of its own creation. The principle that the absence of an adequate statutory remedy preserves the right of action is recognized by all the authorities. *Gatling v. Commissioners* [92 N. C. 536]; *Cooley on Taxation*, p. 13, note and cases therein cited.

"Moreover, throughout all the authorities a clear distinction seems to run between the cases where a private plaintiff brings an action to compel and levy the collection of taxes to pay a debt due him and where the sovereign seeks to collect its own taxes for the general purposes of government. The citizen has only such remedies as are given to him; the state has inherently all remedies not voluntarily and unequivocally relinquished. * * * If this was a creditors' bill by private individuals seeking to collect a debt of \$60,000 against a debtor who had fraudulently removed his assets out of the state, they would be entitled to the present remedy for the appointment of a receiver. * * * If private individuals under these circumstances can have a receiver appointed, the state and county have a remedy at least as broad. The day has gone by in North Carolina when men by uniting themselves in a corporation can obtain exemption from taxation which they could not claim as individuals. Const. art. 5, § 3. Neither can corporations now claim to be exempt, in the enforcement of the collection of taxes, from any process which would lie in favor of or against individuals for the collection of taxes or other debts. Indeed, the debt due the state for taxes is a preferred debt. It is expressly recognized as a debt, and preferred by the statute for the settlement of estates of deceased persons (Code, § 1416) and in bankruptcy proceedings. It also has the distinction that neither the homestead nor offsets can be claimed against it. In all this there is evidence that public policy provides not a lesser, but a broader, remedy for the collection of taxes than for other indebtedness. When there is property subject to levy, taxes are collectible usually in that mode. But when the property has been spirited away the state does not necessarily lose its debt, but has at least the same remedies for its collection as are given to its humblest citizens. It is hardly necessary to note that this is not a proceeding to assess the defendant for taxation. That has been done in the appropriate forum, the amount due has been adjudged, and the defendant has acquiesced by abandoning any appeal therefrom. The present proceeding is to enforce collection of the taxes so adjudged due, by proceedings which would be open to any one else against a debtor who had removed all his property from the jurisdiction of the court."

In view of our own statutes and laws on this and kindred subjects, the reasoning of Judge Clark is peculiarly appropriate to the present case. Our Code declares that—

"In the payment of the debts of a decedent, they shall rank in priority in the following order: * * * Unpaid taxes or other debts due to the state or United States." Civ. Code 1910, § 4000.

And while it is true that under our decisions taxes may not be a "debt" within the strict meaning of that word, yet, so far as we are aware, this court has not gone further than to hold that an action at law will not lie in this state to collect taxes as a debt; and it has not held, where an adequate remedy is not provided by statute, that equity will not assume jurisdiction in aid of the statute to collect trust funds which have been misappropriated and which should be collected and applied to taxes due the state and county.

[5] In the view we take of this case the petition sets out an equitable cause of action, and the court below did not err in overruling the demurrer.

Judgment affirmed.

All the Justices concur.

(27 Ga. App. 321)

CODY v. STATE. (No. 12576.)

(Court of Appeals of Georgia, Division No. 1.
July 26, 1921.)

(Syllabus by the Court.)

Criminal law \Rightarrow 1160—Judgment affirmed when verdict supported by evidence and approved by trial judge.

The motion for a new trial in this case contained no special grounds. There was some evidence to support the verdict, which is approved by the presiding judge, and the judgment is affirmed.

Error from Superior Court, Taliaferro County; E. T. Shurley, Judge.

Elizabeth Cody was convicted of an offense, and brings error. Affirmed.

J. A. Beazley, of Crawfordville, for plaintiff in error.

M. L. Felts, Sol. Gen., of Warrenton, for the State.

BLOODWORTH, J. Affirmed.

BROYLES, C. J., and LUKE, J., concur.

(27 Ga. App. 321)

JOHNSON v. STATE. (No. 12582.)

(Court of Appeals of Georgia, Division No. 1.
July 26, 1921.)

(Syllabus by the Court.)

Criminal law \Rightarrow 935(1) — Denial of new trial not error when evidence sufficient.

This case is here upon the single assignment of error that the evidence did not authorize

the verdict. The evidence for the state fully authorized the verdict. This verdict has the approval of the trial judge, and under repeated ruling of the Supreme Court, as well as of this court, it was not error to overrule the motion for a new trial.

Error from Superior Court, Webster County; Z. A. Littlejohn, Judge.

Joe Johnson was convicted of an offense, and brings error. Affirmed.

J. F. Souter and M. A. Walker, both of Preston, for plaintiff in error.

Jule Felton, Sol. Gen., of Montezuma, for the State.

LUKE, J. Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(27 Ga. App. 304)

CHAMBLISS v. CHANDLER. (No. 12521.)

(Court of Appeals of Georgia, Division No. 1. July 26, 1921.)

(Syllabus by the Court.)

Appeal and error \S 977(4) — Discretion in granting first new trial not controlled when verdict not demanded.

This being the first grant of a new trial, and the verdict not having been demanded by the law and the evidence, the discretion of the judge in granting another trial will not be controlled.

Error from City Court of Greenville; Leon Hood, Judge.

Action between W. G. Chambliss and H. B. Chandler. A new trial was granted on the latter's motion, and the former brings error. Affirmed.

N. F. Culpepper, of Greenville, for plaintiff in error.

R. A. McGraw, of Greenville, for defendant in error.

BROYLES, C. J. Judgment affirmed.

LUKE and BLOODWORTH, JJ., concur.

(27 Ga. App. 274)

SEABOARD AIR LINE RY. v. BROOKS. (No. 11707.)

(Court of Appeals of Georgia, Division No. 1. July 12, 1921.)

(Syllabus by the Court.)

Suit held barred by limitations.

"Where a suit to recover damages for the homicide of an employee of a railway company is brought under the federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665), by the administratrix of the deceased employee, the action is barred by the statute of limitations

where it was commenced more than two years after the date of the homicide sued for, but within two years from the date of the appointment of the administratrix."

Error from Superior Court, Cobb County; D. W. Blair, Judge.

Action by Eugenia Brooks, administratrix, against the Seaboard Air Line Railway. Judgment for plaintiff, and defendant brings error. Reversed in conformity to answers of the Supreme Court (107 S. E. 878) to certified questions.

Randolph & Parker and S. F. Parham, all of Atlanta, and J. Glenn Giles, of Marietta, for plaintiff in error.

J. Caleb Clarke, and Westmoreland & Smith, all of Atlanta, for defendant in error.

BLOODWORTH, J. On March, 31, 1917, Mrs. Eugenia Brooks as the administratrix of R. B. Brooks, filed suit against the Seaboard Air Line Railway, alleging in part that R. B. Brooks was her son; that while in the employ of defendant and engaged in interstate commerce he was killed by the negligence of the defendant, that he was unmarried and that at the time of his death, May 14, 1913, she was dependent upon him for support. The defendant filed a demurrer as follows:

"First. Said petition sets forth no cause of action against this defendant. Second. Because said petition shows that R. B. Brooks died on May 14, 1913, and that therefore the cause of action, if any ever existed against this defendant, is barred by the statute of limitations, and because, by the act of Congress commonly known as the federal Employers' Liability Act, upon which said suit is based, viz. that act of Congress of April 22, 1908, it is provided 'that no action shall be maintained under this act unless commenced within two years from the day the cause of action accrued,' and it appears from the allegations of the petition that more than two years have elapsed from the time the cause of action accrued, to wit, the date of the death of said R. B. Brooks, before the filing of plaintiff's suit, said suit being filed in the clerk's office of this honorable court on the 31st day of March, 1917."

The trial judge overruled the demurrer, and the defendant excepted. This court certified to the Supreme Court the following question:

"Where a suit to recover damages for the homicide of an employee of a railway company is brought, under the federal Employers' Liability Act (U. S. Comp. St. § 8662) by the administrator of the estate of the deceased employee, is the action barred by the statute of limitations where it was commenced more than two years after the date of the homicide sued for, but within two years from the date of the appointment of the administrator?"

The headnote above is the answer of the Supreme Court. The full opinion of that court will be found in 107 S. E. 878.

Under this ruling the judge of the superior court erred in overruling the demurrer, and the judgment must be reversed.

BROYLES, C. J., and LUKE J., concur.

(27 Ga. App. 301)

KERSEY et al. v. STATE. (No. 12516.)

(Court of Appeals of Georgia, Division No. 1.
July 26, 1921.)

(Syllabus by the Court.)

Criminal law §935(1)—Denial of new trial was error when evidence insufficient.

The evidence was insufficient to authorize the verdict, and the court erred in overruling the motion for a new trial.

Error from City Court of Swainsboro; Geo. Kirkland, Jr., Judge.

Estus Kersey and others were convicted of an offense, and bring error. Reversed.

C. W. Turner, of Metter, for plaintiffs in error.

I. W. Rountree, Sol., of Swainsboro, for the State.

LUKE, J. Judgment reversed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(27 Ga. App. 298)

CITY OF WARRENTON v. BRADSHAW.
(No. 12183.)

(Court of Appeals of Georgia, Division No. 1.
July 26, 1921.)

(Syllabus by the Court.)

Municipal corporations §176(5), 183(4)—Allegation that salary of marshal was fixed at certain amount must be proved, when denied; statute prohibiting change of salary during term repealed as to marshal.

The court erred in directing a verdict for the plaintiff for the full amount sued for.

Error from Superior Court, Warren County; R. N. Hardeman, Judge.

Action by T. B. Bradshaw against the City of Warrenton. Judgment for plaintiff, and defendant brings error. Reversed.

L. D. McGregor, of Warrenton, for plaintiff in error.

R. W. Ware and M. L. Felts, both of Warrenton, for defendant in error.

BLOODWORTH, J. T. B. Bradshaw sued the city of Warrenton for \$226.64, which he insisted was due him as his salary as marshal of the city from February 15 to April

23, 1920, at \$100 per month. The second and third paragraphs of his petition are as follows:

"Second. Petitioner alleges that on the — day of October, 1919, he was duly elected marshal of said city for a period of one year, by the qualified voters of said city of Warrenton, Ga.

"Third. Petitioner alleges that the salary for the marshal of the city of Warrenton, Ga., was fixed by the mayor and councilmen of said city at twelve hundred dollars (\$1,200.00) a year, or \$100.00 a month for twelve months."

In its plea the city denied these paragraphs. On the trial the judge directed a verdict for the plaintiff for the full amount sued for, and the city excepted.

Paragraph 3 of the petition, which is quoted above, was distinctly answered and expressly denied by the plea of the defendant. This denial required proof of the allegation that the salary of the marshal was fixed by the mayor and council (called in the charter "commissioners") at "\$1,200.00 a year, or \$100.00 per month for twelve months." The record does not show that any such proof was made. Extracts from the minutes of the city council were introduced, which showed that on October 30, 1919, the election of Bradshaw as marshal was formally declared by the commissioners; that on December 15, 1919, his salary as marshal was fixed at "\$100 for the period from December 15, 1919, to January 15, 1920"; that on February 14th a warrant was ordered "drawn for \$100 for T. B. Bradshaw for the period from January 15, 1920, to February 15, 1920," and on the same date it was "ordered that salary of T. B. Bradshaw as marshal of city of Warrenton, Ga., for period from February 15, 1920, to March 15, 1920, be fixed at \$5, and that specified duties of said Bradshaw for said period be the enforcement of all ordinances of the city of Warrenton, and his hours of duties be from 11 o'clock a. m. to 12 o'clock noon fast time, each day during that period," and that on March 15th his "salary as marshal for the period from March 15, 1920, to April 15, 1920, was fixed at \$5, and his hours of duties fixed from 11 a. m. to 12 m. fast time, each day, during the period stated."

In their brief counsel for the defendant in error insist that when their client was elected marshal in October, 1919, the salary of the marshal was \$100 per month, and that the mayor and council, having fixed the salary at \$100 a month at the beginning of the term, "had no right to reduce the salary of an officer as originally fixed by them"; and in support of this contention they quote from section 5 of the act of 1859 (Ga. L. 1859, p. 212), that the salaries of certain officers, including the marshal, "shall not be increased or diminished during their continuance in office," and say:

"There is nothing in any subsequent act amending the charter of Warrenton which reveals this provision of the act of 1859 denying to commissioners the right to increase or diminish the salary of this officer during his term of office."

In this the learned counsel are in error. The act to amend the charter of the city of Warrenton (Ga. L. 1915, p. 960) expressly amended section 5 of the act of 1859 by striking therefrom all reference to marshals, and the amendment of 1915 made the limitation as to increasing or diminishing salaries apply only to the salaries of tax collectors, tax receivers, and treasurer. The act of 1915 (Ga. L. 1915, pp. 962, 963) provides for the annual election of the marshal for the city by popular vote, and further provides:

That "said marshal so elected shall be paid such salary as may be fixed by the commissioners of the city of Warrenton," and that "it shall be the duty of the commissioners of said city of Warrenton to prescribe the duties of the marshal of said city."

As the record does not show that the said commissioners fixed an annual salary of \$1,200 a year, or \$100 per month for 12 months, but, on the contrary, shows that the salary fixed by the commissioners for the period of time covered by the suit was \$5 per month, the court erred in directing a verdict for the plaintiff for the full amount sued for.

Judgment reversed.

BROYLES, C. J., and LUKE, J., concur.

(117 S. C. 24)

WATSON et al. v. COX et al. (No. 10677.)

(Supreme Court of South Carolina. July 15, 1921.)

1. Deeds ⇨54—Delivery necessary.

Unless a grantor delivered the deeds that he had drawn up either to the grantees or in escrow, and unless he parted with them intending to part with control of them, the deeds were never fully executed, and the grantor did not divest himself of the fee in the land, but if he did deliver the deeds in this manner the fee passed immediately to the grantees named.

2. Deeds ⇨58(3)—Delivery to scrivener held to convey title.

When grantor delivered to the scrivener deeds in which his children were grantees, held, that there was a valid delivery.

3. Dower ⇨20—Not defeated by voluntary deed made in contemplation of marriage.

A voluntary deed made in contemplation of marriage, and to defeat the future right of dower, does not prevent the inchoate right of dower of a subsequent wife from attaching to the land of which the husband was possessed at the time of his marriage; she being, through

no fault of hers, ignorant of such transfer of title.

4. Dower ⇨31, 38—Attaches upon consummation of marriage.

Upon the consummation of marriage the law causes the inchoate right of dower to attach, whether there be a contract in writing or not, and it is beyond the power of the husband to destroy this right after marriage.

5. Dower ⇨20—Deeds held executed to defeat dower.

Evidence held to show that deeds involved were made in contemplation of marriage and for the purpose of defeating dower.

6. Trial ⇨398—Findings and conclusions of trial court held not inconsistent.

Findings of trial court that there was no testimony to show that deeds in question were made with the intention of defrauding defendant wife or that they were made in contemplation of marriage held not inconsistent with a conclusion of the court that the deeds under the circumstances were a fraud upon the marital rights of such wife, and hence that they did not bar her inchoate right of dower, and appellate court could sustain such conclusion, although the wife did not appeal from the alleged inconsistent findings of fact.

7. Deeds ⇨108—Clause as to postponement of possession held not to destroy force of instrument.

A clause, "Providing, nevertheless, that G. * * * and M. are not to have possession nor is the deed to take effect until the youngest, M., shall become twenty-one years of age," contained in a deed otherwise providing that they were to have and hold all and singular the premises forever, held not to destroy the force of the instrument, it being apparent that grantor was anxious to safeguard the interest of the grantees during their adolescence, the fee vesting immediately, and possession and use being reserved to the grantor and his estate until M. should attain her majority.

Fraser, J., dissenting.

Appeal from Common Pleas Circuit Court of Greenville County; James E. Peurifoy, Judge.

Action by Dora Cox Watson and others against Samuel M. Cox and others. From a decree, various parties, plaintiffs and defendants, appeal. Decree modified and affirmed.

Cothran, Dean & Cothran, of Greenville, for plaintiffs.

Wm. G. Sirrine and Stephen Nettles, both of Greenville, for defendants.

FRANK B. GARY, A. A. J. This is an action in which the relief sought is the removal of a cloud on the alleged title of the plaintiffs to the land described; an adjudication that the plaintiffs own the fee in the lands; an injunction against S. C. Cox mortgaging or disposing of the said land; and a

declaration that Mrs. Annie Cox has no claim of dower therein.

The case comes before this court upon numerous exceptions to the decree of his honor the presiding judge. Some of the exceptions are filed by the plaintiff and some by the defendants.

There are three main questions raised by the pleadings. These embrace several minor questions:

First. Did S. M. Cox make a delivery of the deeds in question and thereby divest himself of the fee in the lands referred to?

Second. Was the wife whom he married after he signed the deeds thereby prevented from acquiring an inchoate right of dower in said lands?

Third. Does the deed in favor of the grantor's grandchildren, Gilmer, Marlon and Mary Thompson, convey an estate to them?

Should the first question be answered in the negative, there would be no reason to consider the other questions. We will consider them in the order named.

In 1911 the defendant Sam M. Cox, after having reared a large family, lost his wife. His children were the plaintiffs, except Royal Cox, Bessie May Shannon, and Gillman Thompson, who are his grandchildren. The defendants Marlon Thompson and Mary Thompson are also his grandchildren. The parents of these grandchildren, who were children of S. M. Cox, are dead. Mrs. Annie Cox is the second wife of Sam M. Cox. She was married to him after the deeds were signed by S. M. Cox, but while he was in possession of the land and apparently the owner of it.

The complaint alleges that the deeds were executed on the 14th of March, 1914, in pursuance of a family settlement with the children and grandchildren of S. M. Cox. The answer put in issue this claim, asserting that the deeds were never delivered, though signed by S. M. Cox and turned over to L. E. Childress, his alleged agent.

[1] There is no difference of opinion as to the principles of law that should affect the first question, to wit, that unless the grantor delivered the deeds that had been drawn up by him either to the grantees or in escrow, unless he had parted with them intending to part with control over them, the deeds were never fully executed, and the grantor did not divest himself of the fee in the lands; if he did deliver the deeds in this manner, the fee passed immediately to the grantees named.

Our inquiry will therefore be directed to the question of what conclusion of fact must be reached in the light of the circumstances surrounding the transaction.

The testimony shows that Sam M. Cox was well advanced in years; in fact, had passed the allotted period. He had been a widower for three years. His life was com-

paratively lonely, although his children, who had married, looked after him. He had accumulated about 350 acres of land, presumably with the assistance of his wife and children. As is usually the case with men of his age and in his situation, "his fancies lightly turned to thoughts of love," or rather to thoughts of matrimony. His own statement is that he always intended to marry again, but had not selected his spouse to be. His children were naturally solicitous about his intended marriage. They were necessarily concerned, as all right-thinking children would be, lest their father become, at his age, the victim of some designing woman. This is not intended as a reflection on the woman he did marry. For ought that the court knows she may be a good woman who makes the old man a dutiful wife. The children under the circumstances would naturally be the beneficiaries of his property after his death. He does not seem to have had any other idea than that his children should inherit his property. They would most naturally be concerned about anything tending to dissipate the estate.

Whether what thereafter took place was due to this natural and commendable solicitude of his children for their father and the property in which they had a moral, if not legal, interest, or whether it was due to their cold-blooded and selfish insistence, the fact remains that he voluntarily procured a survey to be made of his lands, a division to be made according to where he thought the lines should run, and had the children pay for the surveys. He was apparently under no compulsion then. After he had procured plats to be made of the several tracts, he sought a lawyer and procured deeds to be made of the several tracts in favor of his children and grandchildren respectively. He does not seem to have been under any fear or compulsion at that time. None of the grantees were then present threatening or coercing him, even though they had previously manifested concern about his talk of marriage. After signing these deeds in the presence of witnesses he turned them over to the scrivener to be kept by him. There is a conflict here as to what the grantor's directions were. The scrivener who is disinterested says that he directed him to keep them until his death, and at the grantor's death deliver them to the respective grantees. Upon cross-examination he is uncertain whether he said, "Keep them until my death," etc., or, "Keep them for me and give them to my children," etc. He is uncertain as to the verbiage. The scrivener held the papers for several years. The old man married. Then it was that the confusion arose. He said he had not conveyed his property and took steps to undo what had been done and to undo what had been acquiesced in for several years.

If we might enter the realm of speculation,

we would readily conclude that when this good woman found herself mated to an old man, presumed to be possessed of considerable property, but in reality without more than a life estate, she let her displeasure or disappointment at the situation be known to him in no uncertain terms. It should not be surprising that when so accosted, after long acquiescence in what had been done, he suddenly sought to undo it.

We need not speculate, however, when we conclude that Sam M. Cox did the things enumerated voluntarily, and not under compulsion. Besides, the evidence shows that he told Mat Cox, his brother, that he had divided his property and deeded it to his children and left the deeds with Mr. Childress to be kept as long as he lived, and after his death to be delivered to the children. He said he did not want the children to see the deeds because some of them might be dissatisfied about what he had left them or given them. He said nothing at the time about wanting to recall the deeds.

To J. Frank Epps, a lawyer of high character, he said he had made deeds to his land to his children and delivered them to Mr. Childress to be delivered to the children upon his death; that before his second marriage he had cut his property up, some to one child and some to another; that he thought he had the whole thing settled; but that circumstances had come up, his second marriage, the dissatisfaction of his wife, the anxiety of his children, etc., that caused trouble.

The anxiety of the children as elsewhere explained was due to the fact that the deeds were held by Childress and were not recorded. The dissatisfaction of his wife was, it seems, due to the fact that she had just learned that he had disposed of practically all of his property, except a life estate.

Mr. Epps further testified that—

"The impression left on my mind was that Sam Cox thought that he was in a mess and didn't know what to do. His children were after him and so was his wife."

There was friction between the children and the stepmother. It was under these circumstances that he sought to palliate a dissatisfied wife, by repudiating acts long acquiesced in, and, until his marriage, never questioned.

When Sam Cox had this land surveyed, divided, and platted, and procured the various deeds to be drawn up, and signed in the presence of witnesses, and then turned them over to Childress, he surely intended to do something effective. He either intended to fully execute deeds, or his conduct was idle. It makes but little difference whether he directed Childress to keep the deeds and deliver them after his death, or to keep them for him and deliver them to his children, he must have intended that through this me-

dium they should be transmitted to the various grantees.

We prefer and do conclude that he intended to do something effective rather than that his conduct was idle and amounted to nothing. We cannot accept his statement made in his present predicament that he intended to mislead his children and make them think he had done something for them when he had not. He says now:

"I don't doubt but that the children thought that they [the deeds] were good. I just meant to hold them off so that they would let me alone and let me die in peace."

[2] Such avowed duplicity does not commend itself to us, but tends rather to discredit other statements made by him. In view of his oft-repeated statements in different form and to different people that he had deeded his property to his children, and in the light of all the circumstances, we are of the opinion that, when the grantor delivered the deeds referred to to Childress he intended that it should be made certain that his children and grandchildren would get his land, that the dower right of any future wife would not complicate matters, and that he would reserve all he needed—a life estate. It was a complete execution of the deeds, and had the effect of divesting S. M. Cox of the fee in the land in question, but of reserving to him a life estate therein. At the same time there was in contemplation the barring of the dower right of any future wife. The decree of the circuit judge is therefore in this particular affirmed.

[3, 4] Was the wife whom S. M. Cox subsequently married thereby prevented from acquiring an inchoate right of dower in said lands? There is little or no question as to the law. The difficulty is to determine whether or not the circumstances will warrant the application of these well-known principles, to wit, that a voluntary deed made in contemplation of marriage and to defeat the future right of dower does not prevent the inchoate right of dower of a subsequent wife from attaching to the land of which the husband was possessed at the time of the marriage, she being through no fault of hers ignorant of such transfer of title. Upon the consummation of marriage the law causes the inchoate right to attach whether there be a contract in writing or not; and it is beyond the power of the husband to destroy this right after marriage.

There is nothing in the case of McAulay v. McAulay, 96 S. C. 86, 79 S. E. 785, in conflict with this statement of the law. There the question under consideration was whether or not a deed made in derogation of a premarriage agreement not in writing would be set aside as in fraud of the wife's right to participate in the distribution of the husband's estate. It was conceded that the deed would

be void; in so far as it purported to affect the wife's dower right to a distributive share in the land conveyed fraudulently a written contract would be essential; that a verbal contract could not be proved, because it would be within the statute of frauds. In the case before us the law makes the contract that casts upon the wife the inchoate right immediately upon the marriage. This right when it attaches cannot be defeated by the husband. In this respect the right differs from right to participate in a distribution which can be preserved as against deeds by a written contract, but not otherwise.

We are not now confronted with the question of whether or not Mrs. Cox has a valid claim against the land as heir at law or distributee. Indeed such question would be premature now, nor could such claim be successfully made as against the deeds; there being no evidence of a written agreement. That was the question before the court in *McAulay v. McAulay*, supra. This case holds that a voluntary deed made in contemplation of marriage would defeat a future wife's rights in the land conveyed, as heir at law or distributee, unless such rights were preserved by a written contract. That a verbal contract or agreement would be within the statute of frauds.

One of the reasons assigned for this holding is that one may do whatsoever he pleases with his property, and that even after marriage the husband might by a conveyance destroy the wife's right to a distributive share in the land conveyed. Such reasoning does not apply to the wife's right of dower. The law gives her the right of dower at her marriage, and places that right beyond the control of the husband.

For this reason and for the additional reason that the wife's dower right was not in question, but was conceded, we think that the case of *McAulay v. McAulay*, supra, is not in conflict with nor does it supersede the law as laid down in *Brooks v. McMeekin*, 37 S. C. 285, 15 S. E. 1019, which seems applicable to the case before us, in so far as Mrs. Cox's inchoate right of dower is concerned. That law is impressively expressed in the following statement:

"We are enabled, therefore, to declare it to be the law, as derived from our own decisions, that in this commonwealth, marriage is a valuable consideration paid by the wife for those rights and estates that by our law are accorded to the wife as a wife."

This was said with reference to dower.

We quote further:

"Here was a man of confessedly weak health. Is it to be a matter of censure that the woman he asked to be his wife and the mother of his children considered that he was the owner of a large plantation well stocked? This wife said she knew that her husband was the owner of this landed property, and that any change in

the ownership was studiously withheld from her. So much so that she was not aware until a year or so after her husband's death that there was any claim that he was not the owner of these lands. Was she not deceived? Did not both Henry and Stephen Gibson secretly confederate to destroy an estate that they both knew the law would give her at her marriage? Was this not a fraud? Marriage to a woman is a valuable consideration for the purchase of the privileges of wifehood, with all the rights affixed to that relation *by the law of the land* [italics added]; and any secret combination to defeat the vesting of those rights, between the husband, the vendor, and his vendee, is an actual fraud."

Taking this to be the law, let us see what the circumstances will warrant us in holding as to the facts. Let us see if the deeds were made with a view to marriage and to defeat a future right of dower. It will be remembered that Mr. Sam Cox was a widower well advanced in years having a large family of children and some grandchildren. In the natural course of events the old man would not live long. Apparently he was on good terms with his family. His children and grandchildren would naturally inherit his property. The old man was talking of marrying again. The children opposed it. They were concerned lest he marry and thus destroy their expected patrimony, patrimony that they had a moral right to expect. We think the testimony warrants us in saying that to avert such consequence they urged him to make such disposition of his property as would save their expected patrimony to them. He says he made the deeds in consequence of their insistence. Their insistence was on account of their fear that a future wife would acquire interest in the property. It did not amount to coercion. Mr. Childress testifies that—

"On several occasions he talked with me about his children being after him to deed them his property because they were afraid he would marry again."

Mr. Sam Cox testifies:

That the deeds were given to Childress in March, 1914. "At that time I intended to marry again, but had not decided whom I would marry. When I became engaged to my present wife I was living on the land involved in this suit. I don't think I told my wife about these deeds until some time after the marriage."

He says further in answer to the question:

"Q. What did he [George] say to you Mr. Cox? A. He just simply said: 'Pa there has been so much trouble and disturbance, you just simply make a deed and marry whom you please.' Q. What did you do then? A. I went and asked Childress to write me off some deeds."

He says further:

"I didn't want it done, but they kept arguing with me about marrying."

It seems that the conclusion is irresistible that the deeds were made with a view, not only of dividing his land during his lifetime, and reserving all he needed—a life estate—but of preventing the attaching of the right of dower of some future wife, whoever she may be. It makes no difference on whose initiative or suggestion this was done, if this was the purpose of the deeds, a future wife's right of dower would not be barred if the circumstances justified her belief that he still owned the land. We have concluded that this was one of the purposes of the voluntary deeds.

[5] In view, therefore, of the law and of what we find to be facts, we conclude that the deeds made at the time and in the manner detailed did not bar the inchoate right of dower of Mrs. Annie Cox, who was ignorant of the existence of the deeds and who married Mr. Cox having reason to believe that he was the owner of the land. The decree of the circuit judge is affirmed in this particular.

[8] Objection is made that Mrs. Cox has not appealed from certain alleged findings of fact by the circuit judge, which facts would absolutely prevent the conclusion reached by the circuit judge if unreversed by this court. Mrs. Cox does ask, however, that the conclusion be affirmed on certain additional grounds, to wit, that the circuit judge should have found as facts the reverse of what he is alleged to have found.

It is always well to adhere to the rules promulgated for hearing appeals, and we would not encourage any laxity in this regard; nor would we sanction any serious departure from those rules, especially if the departure affected injuriously the opposing side.

The case before us presents a peculiar situation. The circuit judge's conclusion is favorable to Mrs. Cox. She therefore does not wish to reverse it. In arriving at his conclusion the circuit judge incidentally says that, "there is no testimony to show that the deeds were made with the intention of defrauding the defendant, or that they were made in contemplation of marriage," circumstances that are essential to preserve a future wife's marital rights in the property if it is conveyed. He goes on, however, and finds that the deeds under the circumstances were a fraud upon the marital rights of Mrs. Cox.

It seems to us that the circuit judge must be understood to have meant that the making of the deeds was not intended to affect the marital rights of this particular individual as contradistinguished from an intention to affect any person whom S. M. Cox should marry. Taking this view of his honor's language, there is nothing inconsistent in his conclusion. In any event it would be taking too narrow a view of the court's duties if we should decline to con-

sider her contention because it might not be in exact accordance with the rule, when she is making an honest effort to have the court pass upon it. Had it been necessary, we would have considered her "additional ground," under the circumstances *ex gratia*.

[7] This brings us to the last question: Does the deed in favor of the grantee's grandchildren Gillman, Marion, and Mary Thompson convey any estate to them? This deed was executed under the same circumstances and at the same time as were the other deeds referred to. It is regular in every respect except that the following words appear in the habendum clause:

"To have and to hold all and singular the premises before mentioned unto the said Gillman Thompson, Marion Thompson, and their heirs and assigns forever. Providing, nevertheless, that Gillman T., Marion T., and Mary T. are not to have possession nor is the deed to take effect until the youngest, Mary, shall become twenty-one years of age."

The circuit judge holds that the last sentence is such an inconsistent provision as will destroy utterly the force of the instrument. We cannot take this view of it. These three grandchildren were as much the objects of the grantor's intended bounty as any of the children or other grandchildren. The circumstances under which he sought to deliver to these children their part of his estate are the same as those under which he gave to the others their part. The only difference was that he was anxious to safeguard the interest of the three grandchildren during their adolescence, and he attempted by this provision to do so. Surely the court will not prevent his well-meant, but misdirected, efforts along this line to destroy their inheritance unless the rules of construction imperatively demand it. The boast of equity jurisprudence would indeed be empty and unmeaning if it should permit such results.

In the case of *Merck v. Merck*, 83 S. C. 329, 65 S. E. 347, 137 Am. St. Rep. 815, a deed was in the usual form of a conveyance of land with warranty clause, except that it contains after the description of the property the following words:

"This deed is not to go into effect until after my death."

The words under consideration by us are:

They "are not to have possession nor is this deed to take effect until the youngest, Mary Thompson, shall become twenty-one years of age."

Citing *Williams v. Sullivan*, 10 Rich. Eq. 217, the court held that the title to the property passed on execution of the paper, the right to the use and possession only being postponed until the death of Mrs. Sullivan (the grantor). The court said:

"It does not strain the meaning of the words, 'This deed is not to go into effect until after my death,' to construe them in connection with the whole paper, as expressing the intention of the grantor to say, 'I do mean to make a good deed of conveyance to Laurence C. Merck, but I hold back from him for myself the beneficial rights of possession and enjoyment of the land while I live.'"

By the same token it would not strain the meaning of the words before us for construction to construe them in connection with the whole paper, as expressing the intention of the grantor to say:

"I do mean to make a good deed to the Thompson children, but I hold back from them for the benefit of myself and my estate the beneficial rights of possession and enjoyment of the land until the youngest shall have attained her majority."

The language used in the case relied on by the circuit judge (*Singleton v. Bremer's, Adm'r*, 4 McCord, 12, 17 Am. Dec. 699) and the surrounding circumstances are very different from the language and circumstances of the present case. The language there was:

"I do hereby in case of my death give to Tabitha Singleton (a free brown woman) my house and lot. * * *

The court said:

"The natural import of the terms used in the first part of this paper would unquestionably give it the effect and operation of a will."

A sale of property by the testator was said to be an ademption of the legacy. The court held that no fee vested. The case is not an authority in point, except that it recognizes the undisputed principle of the common law that a fee cannot be created to take effect in future. In the case under consideration the fee vested immediately, but the possession and use were reserved to S. M. Cox and his estate until the youngest grantee should attain her majority. The decree of the circuit judge is therefore in this particular modified.

The circuit judge did not pass upon the rights of George Cox, but the question is fairly raised by the pleadings and by the exceptions. We cannot, therefore, brush aside the question as unimportant, but should decide it.

In view of the admissions made by George Cox as they appear from the testimony, he is in no position to assert any title under the deed in question. His claim is therefore denied.

The decree of the circuit court is modified in the particulars named.

EUGENE B. GARY, C. J., WATTS, J., and WILSON, A. A. J., concur.

FRASER, J. (dissenting). The plaintiffs are the children and the defendants Marion Thompson and Mary Thompson are the grandchildren of the defendant Samuel M. Cox. Samuel M. Cox owned a large tract of land. His wife died, and some, at least, of his children became restive for fear that he would marry again and dispose of his property in some way that would defeat their prospective inheritance. The children urged him to divide up his land so that their interests might be secure. He told them that if they would employ a surveyor he would divide the land. They did employ a surveyor, and Mr. Cox showed the surveyor where to run the lines. Some time after the plats were made he took the plats to a neighbor and friend, Childress, who was a lawyer, but not in active practice, and asked him to prepare the deeds, nine in all. Mr. Cox signed the deeds in the presence of two witnesses and left them in the possession of Mr. Childress. How Mr. Childress was to hold them is the question in this case. This action was brought to declare the delivery and absolute delivery, and that the title was in the children and grandchildren, subject to a life estate in Mr. Cox. Mr. Cox denied that the delivery was absolute and claimed that Mr. Childress was merely to hold the deeds subject to his order, and to be delivered to the grantees at his death, in case he did not withdraw them in his lifetime. The circuit judge found that the delivery was absolute. In argument the attorneys for the children and grandchildren say there is one question of fact:

"Was the circuit judge in error in concluding as a matter of fact that the deeds were placed in the hands of Childress by S. M. Cox with unconditional instructions to deliver them to the grantees upon his death, and without any reservation in S. M. Cox of the right to revoke or recall them during his lifetime?"

There are only two witnesses who testify as to what was said at the time of delivery, to wit, Childress and S. M. Cox.

Childress testified that Cox said:

"Keep them until my death and deliver them to the children."

He also testified:

"Q. Mr. Childress, when Mr. Cox gave you those deeds and told you to keep them, didn't he say, 'Keep them for me until my death and then give them to my children?' A. He might have had it that way. I would not be certain; I would not be certain. Q. You would not swear that he did not say that. A. No; would not."

Mr. Childress is very uncertain as to the language that accompanied that delivery to him. When Mr. Childress was asked if Mr. Cox did not say that the reason the deeds were left with him was that Mr. Cox had no place to keep the deeds and he was afraid

to keep them in his house, for fear that his children might get possession of them when they came to clean up his house, Mr. Childress answered:

"I do not know whether he said that or not. Q. Well, if Mr. Cox testifies positively that he did say it, you would not deny it, would you? A. No; I would not deny it, for I don't remember."

Mr. Cox testifies that he left the deeds with Mr. Childress to hold for him (Cox); that he did not regard the deeds as anything more than postal cards to be withdrawn at his will; that at the time of the signing of the deeds, and up to the time that this immediate controversy arose, he never doubted his right to change his mind and recall the deeds from his attorney and friend; and that he had left the deeds with Mr. Childress as his attorney and friend, so that he might be free in his disposition of the property. In order for the children to succeed, they must show the delivery was unconditional. They attempt to show that cardinal fact by one witness and that witness frankly states that he is uncertain as to what was said. Who was most likely to remember? Mr. Cox. There are only two witnesses as to the circumstances connected with the delivery—one confessedly uncertain; the other clear and positive. The weight of the testimony is clearly with Mr. Cox. Then as to the light from circumstances: When Mr. Childress was nearer to the facts in question than he was when he testified, he says that he moved from the neighborhood, but before going he offered to give up the custody of the papers, but Mr. Cox told him to keep them because he had no place to hide them from his children. Mr. Childress has delivered the papers to Mr. Mat Cox, a brother of S. M. Cox, and one deed to George Cox, a son of S. M. Cox, but always on the order of S. M. Cox, and we see in the record no evidence that the grantees were consulted as to their wishes in the matter. There is no evidence of an agreement between Mr. Cox and his children that the deeds should be executed. Indeed, some of the grantees said the subject of deeds had not been spoken of between them and their father, and George Cox, one of the grantees, signed a written statement in which he expressly disavows any claim under the deed to him. It is reasonably clear that, when Mr. Cox signed the deeds and left them with Mr. Childress, it was his intention that after his death his children and grandchildren should take the land as set forth in the deeds, but until he had done an irrevocable act he could change his mind and change the disposition of the property. Mr. Cox further testifies that he had two propositions in contemplation. One was to make a will, and the other was to make the deeds subject

to his recall while he lived, and, if not recalled while he lived, then to be delivered at his death; that he considered the undelivered deeds the safer way, as it would avoid a possible contest of his will.

From a layman's point of view, the explanation is reasonable, but it is said that Mr. Cox treated the deeds as absolutely delivered when his brother suggested the delivery of the deeds to the grantees and a reconveyance from them of a life estate. This was a compromise arrangement, and cannot have the effect of converting a previous conditional delivery into an absolute delivery.

It is said that Mr. Childress refused to allow Mr. Cox to have a reservation of a life estate written into the deeds. The record shows that the objection was based upon the absence of the subscribing witnesses, and not on the ground that Mr. Cox could not alter the deeds.

The question in this case is: What was the intention of Cox at the time he delivered the deeds to Childress? The surrounding circumstances throw little light on the question in favor of an absolute delivery. The circumstances point the other way. Mr. Cox makes a clear, positive, reasonable statement. Mr. Childress is confessedly uncertain.

I see nothing in the record upon which to base a finding that the children helped their father to accumulate this property. I cannot consent to take a man's property from him, when, as here, the direct positive testimony is in his favor, and the witness against him confessedly does not know.

(117 S. C. 22)

MEYER v. MATTHEWS. (No. 10683.)

(Supreme Court of South Carolina. Aug. 1, 1921.)

Wills §634(8)—Remainder held vested, so that, on death of testator's child leaving issue, property passed to issue.

Where testator devised land and personalty to his wife for life, directing that at her death the property should be sold and the moneys equally divided among his named children, but that if any child should die not leaving lawful issue portions allotted to him should revert back to the other children, a child named took a vested remainder upon condition that if such child failed to survive the widow or leave issue the same should revert, etc., hence, where one of testator's daughters died before the widow, leaving issue, her share did not revert to the other children, though the issue died before the period of distribution, but it passed to heirs of the issue.

Appeal from Common Pleas Circuit Court of Barnwell County; Jas. E. Peurifoy, Judge.

Suit by Elizabeth Meyer against Rosa G. Matthews, for the construction of a will.

From a judgment denying the latter the right to share in the estate, she appeals. Modified.

Holman & Boulware, of Barnwell, for appellant.

Charles Carroll Simms and J. O. Patterson, Jr., both of Barnwell, for respondent.

GARY, C. J. This appeal involves the construction of a will, the material provisions being as follows: Testator first directed that certain personal property—

"be sold and that the proceeds be equally divided among my wife Jane and my six children, viz.: Ella, Ira, Lawton's child Bertha, Caleb, Mary Jane, and Elizabeth. * * * I also further give to my said wife, during her life, all of my real estate and the balance of my personal property. After the death of my wife, I want my real estate and the remainder of my personal property sold, and the money equally divided among my children as above named, with the same provision in regard to my daughter Ira as above stated. It is my desire that if any of my children should die not having lawful issue, that the portions allotted to them should revert back to my other children, with the same proviso in regard to my daughter Ira as above stated."

After the death of the testator, and before the death of his widow, the life tenant, his daughter Mary Jane died, leaving her husband and an infant child, which died before the death of the life tenant, its father being its only heir at law. Thereafter, and prior to the death of the life tenant, the father, H. B. Matthews, conveyed his interest in said estate to his second wife, Rosa Matthews, the appellant.

His honor the circuit judge (who adopted the report of the master) ruled that only those who answered the description of children or grandchildren of the testator at the time of the life tenant's death could take under the will, and therefore that Rosa G. Matthews was not entitled to the share, which Mary Jane would have taken if she had survived the life tenant. This was error. In the first place, it is only necessary to cite the cases of *McFadden v. McFadden*, 107 S. O. 101, 91 S. E. 988, and *Avinger v. Avinger*, 107 S. E. 26, to show that Mary Jane took a vested remainder. She, however, took it upon the condition that if she died before the termination of the life estate not having lawful issue the portion allotted to her should revert to the testator's other children. As she died leaving lawful issue, her interest in the estate was not divested, the condition upon which her portion was to revert to the testator's other children having failed.

"When there is a clear vested interest, * * * the express contingency upon which it was to be divested not having happened, the construction of the clause giving the vested

interest is not to be affected by anything connected with the contingency that would otherwise have divested the estate." *McGregor v. Toomer*, 2 Strob. Eq. 51; *Walker v. Alverson*, 87 S. C. 55, 68 S. E. 966, 30 L. R. A. (N. S.) 115.

Modified.

WATTS, FRASER, and COTHRAN, JJ., concur.

(117 S. C. 18)

CRYMES v. GAUL CONST. CO. et al.
(No. 10694.)

(Supreme Court of South Carolina. Aug. 1, 1921.)

1. Contracts §309(2)—Destruction of building being remodeled and failure to restore it held not to relieve contractor or surety.

Where contractors employed to remodel a building were to get the building as it stood, and own all of the building except what was used in the new work, and receive a specified amount for their undertaking, and were to be answerable for and restore and make good all damages, etc., occasioned or rendered necessary by fire, etc., the contractors and their surety were not discharged by the destruction of the building by fire before completion of the work, and by the owner's failure to restore it to the condition it was in when the contractors began to remodel it.

2. Contracts §309(2)—Failure of owner to pay insurance money to contractor held not to defeat liability for contractor's default.

Where a contract for the remodeling of a building did not provide that if the building burned down the insurance money was to be used in rebuilding it, the failure of the owner to pay the insurance money to the contractors for use in restoring the building after its destruction by fire, or to pay the amount of the contractor's loss, did not discharge the contractors or their surety.

3. Principal and surety §86—Completion by owner upon contractor's default after destruction of building not condition of surety's liability.

Under a contract for the remodeling of a building, where the building was destroyed by fire and the contractors abandoned the contract, the owner was not required to complete the building in order to render the surety liable, as the surety could relieve itself from liability by completing the contract itself.

Appeal from Common Pleas Circuit Court of Greenville County; J. W. De Vore, Judge.

Action by Thomas J. Crymes against the Gaul Construction Company and another. From an order overruling a demurrer to the complaint, defendants appeal. Affirmed.

Stephen Nettles, of Greenville, for appellants.

B. A. Morgan and Cothran, Dean & Cothran, all of Greenville, for respondent.

WATTS, J. This is an appeal from order of Judge De Vore overruling a demurrer interposed by defendants to complaint of plaintiff. The action was for damages by plaintiff against contractors and surety on their bond for failure to restore the residence which was destroyed by fire after the contractors had completed about 60 per cent. of their work. By agreement the original contract specifications and bond were treated as part of the complaint, for the purpose of passing upon the demurrer, the demurrer interposed was upon the ground that the complaint failed to state a cause of action. The exceptions are:

"(1) Because under the terms of the contract the contractors did not assume responsibility for the integrity of the old building, and consequently its destruction by fire operated to discharge them from further performance under the contract and to discharge the bonding company from further liability as surety on the contractor's bond.

"(2) Because the plaintiff did not restore or offer to restore the building to the condition it was in when the contractors began to remodel it, and under the contract this was a condition precedent to any obligation on their part to go on with the work and to any liability on the part of the surety for their failure to do so.

"(3) Because plaintiff's failure to procure insurance on the building to protect the interests of the contractors was such a breach of the contract as to excuse the contractors from further performance and to discharge the liability of the bonding company as surety.

"(4) Because the plaintiff did not pay or offer to pay the contractors the whole or any part of the insurance money, to be used by them in restoring the building, this being under the contract a condition precedent to any obligation on their part to rebuild and to any liability on the part of the surety for their failure to do so.

"(5) Because the plaintiff did not pay or offer to pay to the contractors the amount of their loss by the destruction of the building, to be used by them in restoring the building, this being under the contract a condition precedent to any obligation on their part to rebuild and to any liability on the part of the surety for their failure to do so.

"(6) Because the plaintiff has not completed the building, and until he has done so the liability of the surety on the contractor's bond cannot be determined."

[1] The demurrer admits the allegations of the complaint to be true, and the contract was before Judge De Vore. The complaint alleges in paragraph 10 that—

"The contractors shall be answerable for, restore, and make good all injurious damages, re-erectations and repairs occasioned or rendered necessary by defective material, bad workmanship, fire, and trespass or otherwise, previous to the completion and delivery of the same."

The complaint, contract, and specifications show that the contractors assumed responsibility for the whole job. The allegations of the complaint admitted to be true by the demurrer set forth fully the things embraced in the undertaking laid before the contractors. They were to get the building as it stood, so much money for their undertaking and job, and the work was to be completed the following August. The contractors were to own all of the old building, except what was stipulated to be retained by the owner, to wit, "Old material torn out and not used in new work. * * *"

Exceptions 1 and 2 are overruled.

Exception 3 is overruled. Plaintiff took out insurance to protect his interest and that of the contractors, Gaul Construction Company. The contractors sued Crymes for the whole of insurance and failed, not because they had no interest, but on other grounds. Policy was taken out when work began. At that time there was no part of the house new. They sued for destruction of old building, and lost out.

[2] Exceptions 4 and 5 are overruled. Nowhere does the contract provide that if the house burns down the insurance money is to be collected and used in building the house.

The contractors contracted to complete the job and the bonding company made the contract a part of their obligation. The court adjudged the contract abandoned; the building is not erected, the undertaking not performed. The contractor having defaulted, his surety must respond for any breach of duty on the part of the contractor. The bonding company is not that of an ordinary surety but the bonding company is in the business of underwriting for hire.

[3] Exception 6 is overruled. The surety can relieve itself from liability by completing the contract which it underwrote; as it is Crymes has no house, is out large sums of money advanced unaccounted for, which in his complaint he alleges is his damage, and admitted by demurrer to be true. All exceptions are overruled, and judgment affirmed.

GARY, C. J., and FRASER, J., concur.
COTHRAN, J., disqualified.

(117 S. C. 14)

TURNER v. GUEST et al. (No. 10696.)

(Supreme Court of South Carolina. Aug. 1, 1921.)

1. Wills §601(4)—Devise of remainder held to give fee simple.

A clause in a will devising real estate after the death of the life tenant to testator's four sons for their use and possession during their natural lifetime, but not to be subject to their debts or to be sold by them and to descend to their heirs, gives to the sons a fee simple.

2. Wills §506(3)—Widow of deceased son held entitled to share under will regardless of nature of estate.

Where the will gave a remainder to testator's four sons for their lives and then to descend to their heirs, the widow of a son, who died after testator, leaving a son who had subsequently died, is entitled, on the death of the life tenant, to the share which her husband would have taken under the will, as the heir of her husband and of their son, regardless of whether her husband had a fee or only a life estate, since in either event it was vested.

3. Partition §§85, 87—Evidence that debts and improvements were paid from income sustains finding against claim for accounting therefor.

Evidence that the income from the property and the work of the life tenants in possession thereof, including plaintiff's husband, had paid the debts against the property, sustains a finding that defendants had not sustained the issue for an accounting as to debts and improvements.

Appeal from Common Pleas Circuit Court of Greenville County; J. W. De Vore, Judge.

Suit for partition by Mattie Guest Turner against H. T. Guest and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Bonham & Price, and H. C. McKnight, all of Greenville, for appellants.

Martin & Henry, of Greenville, for respondent.

FRASER, J. The appellants in their argument on appeal thus state the facts and issues:

"John Guest, a resident of the upper section of Greenville county, died in March, 1884, leaving certain lands and a will and codicil, the construction of which is a material part in this case. John Guest had been married twice, his first wife being Nancy Guest and his second wife, Jane Guest. By his first wife, the deceased had two sons, the defendants H. T. Guest and John E. Guest. By his second wife, he had two sons, the defendants Squire E. Guest and William Guest, the predeceased husband of the plaintiff, Mattie Guest Turner. William Guest died May 22, 1894, leaving his wife and posthumous child. This posthumous child died in about four weeks after its birth. Plaintiff had moved away from the home of her

husband's people, and later married again. Jane Guest, the widow of John Guest, died on May 12, 1917, and this suit is brought to partition land under the will. The master held that the sons of John Guest had a fee-simple title to the land upon the death of the life tenant, Jane Guest, in May, 1917. The master entirely ignored the question of the improvements placed on the land by Squire E. Guest and the money advanced by the three eldest sons in paying off the debts of the estate."

Argument.

"The exceptions raise three questions:

(1) Did the four sons of John Guest have a fee-simple interest in the land under the terms of the will upon the death of Jane Guest?

"(2) Was the defendant Squire E. Guest entitled to an accounting with the plaintiff for the new buildings erected by him upon the land in which the plaintiff claims an interest?

"(3) Are the defendants entitled to reimbursement for the money which they paid out to satisfy the mortgages and debts against the land?"

The portion of the will of John Guest upon which appellants' case rests are:

"Item 4. It is my will that after the death of my wife, Jane Guest, that that part of my land that was inherited by my first wife, Nancy Guest, to be equally divided between H. T. Guest and John E. Guest, and the remaining part to be equally divided between Squire E. Guest [and] William Guest, the use and proceeds and possession of which is to be theirs during their natural lifetime, but not subject to any debt of their contracting or by them sold, but descend [to] their lawful heirs."

To this last will and testament the following codicil was made:

"I this day make this change or alteration in item 4th of the within will made by me on the 8th day of May, 1883. That a straight line shall be run beginning at the old spring on the river and running a northwesterly course to the corner where the land inherited by my first wife, Nance, and the land I bought joins on Langfords land and the southwest side of said [land], to be divided between H. T. Guest and John E. Guest, and other side divided according to directions in Item 4th of the within will." "And that item 4th shall read lifetime or widowhood instead of lifetime."

[1, 2] The master and circuit judge held that the sons of John Guest took fee-simple interests. The authorities, too numerous to cite, hold that words such as are used here carry a fee simple. Even if these words should be construed in their popular and not in their legal sense, it can avail the appellants nothing. (The devise to Jane for life, with remainder to William for life, with remainder to the heirs of William, would certainly give William a vested interest in whatever estate he took. After the life estate to William, his share went to his lawful heirs, i. e., to his wife and child, and on the death

of the child its share went to its mother, the plaintiff herein. The interest of William went, under the will, to the plaintiff in either case.)

[3] The appellant claims that the master and trial judge ignored the issue as to improvements, and money advanced to pay the debts. In this the appellant is mistaken. The master held, "None of the other issues raised by the parties is sustained by testimony." In this holding by the master there was no error. The income from the property and the work of the sons, William included, paid the debts and made the improvements. At least there was no evidence from which a contrary finding could have been made.

The judgment appealed from is affirmed.

GARY, C. J., and WATTS, J., concur.

COTHRAN, J. I concur in the result. So far as the interest of the plaintiff is concerned it makes no difference whether the sons take fee-simple titles or life estates with remainders to their children. I reserve my opinion upon the effect of the provision forbidding a sale of the property, which under *McWhite v. Roseman*, 114 S. C. 177, 103 S. E. 586, is indicative of an intention on the part of the testator that the sons should not take fee-simple estates.

(117 S. C. 11)

CLARK v. COLUMBIA RY., GAS & ELECTRIC CO. (No. 10690.)

(Supreme Court of South Carolina. Aug. 1, 1921.)

1. Evidence §219(1)—Testimony that company did not notify decedent's administrator of injury inadmissible.

In an action against a street railroad for death of a passenger in an automobile which collided with a car, testimony that defendant did not notify plaintiff administrator of the injury was properly rejected, there being no foundation for it, as there was no showing that any agent of defendant railroad knew whom to notify, and no attempt to show it.

2. Evidence §215(3)—Letters of company admitting place of accident dangerous property excluded.

In an action against a street railroad for death of a passenger in an automobile which collided with a car, two letters written by defendant company to the mayor of the city admitting that the place of the accident was dangerous were properly excluded, the danger admitted having no connection with the actual cause of the accident.

3. Appeal and error §1053(3)—Error in admission of ordinances in action against street railway for death harmless in view of instruction.

In an action against a street railroad for death of a passenger in an automobile which collided with a car, if the introduction of ordi-

nances of the city regulating the speed of automobiles was erroneous, such error could not have affected the result where the trial court charged that deceased was not responsible for the running of the automobile, as he had no control of it or the driver, his host.

4. Negligence §141(11)—Instruction on guest's responsibility for running of automobile not prejudicial.

In an action against a street railroad for death of a passenger in an automobile which collided with a car, there was no error prejudicial to plaintiff administrator on the part of the trial court in charging the jury that deceased was not responsible for the running of the automobile, deceased not being able to control the management of the car, and not being liable therefor.

Appeal from Common Pleas Circuit Court of Richland County; Ernest Moore, Judge.

Action by W. D. Clark, as administrator of the estate of W. W. Clark, deceased, against the Columbia Railway, Gas & Electric Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Tompkins, Barnett & McDonald, of Columbia, for appellant.

R. Beverly Herbert, of Columbia, for respondent.

FRASER, J. This is an action for death by the wrongful act. The testimony tends to show that deceased was invited to enter the automobile of another to go to Camp Jackson; that they were going down Gervais street in the city of Columbia, following a street car of the defendant going to the camp; that in going along the street there was another automobile standing on the street so as to obstruct the way; that the automobile driver swerved the car in which the deceased was riding towards the center of the street; that the automobile skidded further toward the center of the street and was struck by another street car of the defendant going in the opposite direction, and the deceased received mortal wounds from which he died during the day. The defendant denied negligence, and pleaded contributory negligence, etc.

[1] The first exception complains of error in refusing to allow the plaintiff to show that the defendant did not notify the plaintiff of the injury. The testimony was properly rejected. There was no foundation for it. The case fails to show that any agent of the defendant knew whom to notify, or any attempt to show it.

[2] The second and third exceptions complain of error in excluding two letters written by the company to the mayor of Columbia, admitting that the place of the accident was a dangerous place. The letters were properly excluded. Even if the letters within months afterwards could have been ad-

mitted, the danger admitted had no connection with the cause of the accident.

[3] The fourth and seventh exceptions complain of error in allowing the introduction of ordinances of the city of Columbia, regulating the speed of automobiles. Even if error, it could not have affected the result, as his honor charged the jury that the deceased was not responsible for the running of the automobile, as he had no control of it or the driver, whose guest he was.

[4] The fifth and sixth exceptions complain of error in charging the jury the law in regard to the responsibility of those riding in an automobile, who had the right to control the running of the car. His honor charged the jury that the deceased was not responsible for the running of the car. The charge condensed means: Where one is riding in a car as a guest, and cannot control the management of the car, he is not responsible for negligence; but if he can control it, he is responsible. In this case, however, the deceased could not control the management of the car, and he is not liable. There was certainly no prejudicial error there.

The judgment appealed from is affirmed.

GARY, C. J., and WATTS and COTHRAN, JJ., concur.

(117 S. C. 8)

BRITT v. McCORMICK COUNTY COMMISSION et al. (No. 10688.)

(Supreme Court of South Carolina. Aug. 1, 1921.)

1. Injunction \S 252(8) — Attorney's fees in procuring dissolution held "damages," within bond.

The bond, executed by plaintiff on procuring temporary restraining order, entitling defendants to "damages" sustained, held to warrant court, on dissolution of such order, in allowing defendants attorney's fees for services in procuring the dissolution.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Damage—Damages.]

2. Injunction \S 252(8)—Award of attorney's fees to defendants on dissolution of restraining order limited to fees for only such counsel as was proper or necessary.

Defendants, on dissolution of temporary restraining order, were not entitled as damages, under plaintiff's bond, to fees of all three attorneys employed to procure dissolution, since any one of the three could have attended to the matter, and since plaintiff under such bond was liable for fees to only such counsel as was proper or necessary.

3. Injunction \S 252(8)—\$208.90 allowance as attorney's fees on dissolution of temporary restraining order held excessive.

Allowance of \$208.90 as attorney's fees to defendants on dissolution of temporary re-

straining order, under bond allowing plaintiff damages, held excessive, and will be reduced to \$100.

Appeal from Common Pleas Circuit Court of McCormick County; R. W. Memminger, Judge.

Action by J. E. Britt against the McCormick County Commission and others. From an order allowing fees to attorneys of the defendants for procuring the dissolution of a temporary restraining order, plaintiff appeals. Modified.

Tillman, Mays & Harris, of Greenwood, for appellant.

Joseph Murray, of McCormick, for respondents.

WATTS, J. This is an appeal from an order of his honor, Judge Memminger, allowing fees to attorneys of respondents for procuring the dissolution of a temporary restraining order issued by his honor, Judge De Vore. Upon the hearing before Judge De Vore he dissolved the same, and dismissed that case as being without merit.

[1] Exceptions 1, 2, and 3 allege error, and deny that any attorney's fees can be recovered in this action. These exceptions are overruled. The appellant obtained the injunction, and put the respondents to the necessity of employing attorneys to obtain relief. It was decided by Judge De Vore that an unjust restriction had been placed upon the respondents by the action of the appellant; that the payment of attorney's fees was necessary on the part of the respondents, in order to obtain their rights; that to that extent they were damaged by the action of appellant in procuring the restraining order; and that under the bond of appellant he had agreed to pay such damages as respondents sustained. The employment of counsel and paying fees of counsel by respondents were damages natural to the obtaining of the order of injunction, and appellant should be required to pay a reasonable fee therefor.

[2, 3] Exceptions 4, 5, 6, and 7 will be considered together. They complain that his honor should have held that the regular attorney should have attended to the litigation, for his fixed yearly compensation, and that the respondents could not employ three different attorneys; that the allowance was excessive and unnecessary; that one of the attorneys who was paid a fee, had nothing to do with the vacation of injunction, but acted on an entirely different matter; and that it was error to allow for hire of automobile. Mr. Murray, according to the evidence, was not employed to attend to all matters of litigation. The respondents had the right to employ counsel to aid them in their duties and attend to the matters of litigation. They could select their

own counsel and pay them a reasonable compensation, but they could not employ more lawyers than were necessary. We are bound to hold that they employed more counsel than was proper or necessary. Either of the three could have attended to the matter for them, and no doubt have gotten good results. A fee of \$100 would have been ample compensation in a case of this character. No fees or costs should have been allowed, except for services for obtaining the order of dissolution of injunction.

The exceptions only question the allowance of attorney's fees and hire of automobile. Judge Memminger gave respondents judgment against the appellant for \$208.90 and costs of the master, including \$15 for stenographer and master in taxing his costs will not be allowed costs for taking down the testimony, as stenographer is paid for that. The judgment is modified by deducting \$108.90 therefrom, as only \$100 is allowed respondents for all counsel fees paid by them in this litigation.

Judge Memminger's decree, as modified, gives judgment for the sum of \$100 and the costs of master to be taxed as indicated, and \$15 for the stenographer taking the testimony before the master.

Modified.

GARY, C. J., and FRASER and COTH-RAN, JJ., concur.

(117 S. C. 4)

DONALD v. ATLANTIC COAST LINE RY. CO. (No. 10685.)

(Supreme Court of South Carolina. Aug. 1, 1921.)

1. Master and servant ⇨286(1)—Negligence question for jury.

In action for death of an employé, where the evidence to sustain the specifications of negligence was susceptible of more than one inference, the question of negligence was for the jury.

2. Master and servant ⇨333—Judgment for injuries to servant held properly entered on verdict exonerating fellow servant joined as defendant.

In action against a railroad and one of its employés for death of another employé, an entry of a judgment for the defendant employé on verdict exonerating him does not require court to grant judgment for the railroad found negligent where the evidence conclusively shows that agents and servants of the railroad other than the one joined as defendant are guilty of negligence contributing as a proximate cause to the accident.

Appeal from Common Pleas Circuit Court of Charleston County; T. S. Sease, Judge.

Action by Margaret T. Donald, as administratrix, against the Atlantic Coast Line

Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Rutledge, Hyde & Mann, of Charleston, for appellant.

Logan & Grace, of Charleston, for respondent.

WATTS, J. This is an appeal from a judgment entered on a verdict for \$5,000 in favor of plaintiff against defendant, as damages, by reason of the death of Michael J. Murphy, an employé of the defendant railroad company, due to injuries alleged to have been caused by the negligent and wanton acts of the defendant. The cause was tried by Judge Sease and a jury at the October term of court, 1920, for Charleston county; at the trial his honor eliminated from the jury the question of punitive damages.

The exceptions, three in number, raise the questions:

"First. Because the presiding judge erred in refusing to grant the motion for a nonsuit, made upon the ground that the plaintiff had failed to prove by any sufficient testimony that the defendant railroad company was guilty of any act of negligence charged against it.

"Second. Because the presiding judge erred in refusing to direct a verdict in favor of the defendant railroad company, made upon the ground that the only inference from the testimony is that before the engine was moved due warning was given to Mr. Murphy, if he was then under the engine, that the engine was about to be moved.

"Third. Because the presiding judge erred in refusing to direct that judgment be entered in favor of the defendant railroad company, as well as the defendant Sheehan, upon the ground that the negligence claimed to be the basis of the recovery against the company was the negligence of the defendant Sheehan; and the jury having acquitted Sheehan of negligence, no verdict could properly stand, or judgment be entered thereon, against the defendant railroad company."

As to the exceptions alleging error in not granting a nonsuit or direction of a verdict, the plaintiff alleges as specifications of negligence:

"(a) By causing and allowing said engine No. 549 to move over the said Murphy while he was about the duties of his employment, so as to crush and mangle him.

"(b) In failing and omitting to see that the said Murphy whose whole attention was directed upon the work which he was required to do and who was totally unaware of the terrible danger in which he was placed, got himself into a position of safety before moving said engine No. 549.

"(c) In failing and omitting to give the said Murphy any notice or warning that said engine was about to be moved, so that he would know what was going on.

"(d) In not causing and requiring and seeing that the said Murphy was in a place of safety before moving said engine, which said defend-

ants knew that the said Murphy was busily engaged in repairing, and his whole mind and attention was directed to his work.

"(e) In causing and allowing the said Thomas J. Sheehan, who was a machinist, and unauthorized to do so, to move said engine and thus cause the death of the said Michael J. Murphy.

"(f) In failing and omitting to provide the said Murphy with a reasonably safe place to work by reason of the facts above set forth."

[1] A reading of the evidence will determine in the affirmative that there was evidence to sustain some of the specifications of negligence, and that the evidence was susceptible of more than one inference, under a long line of decisions of this court this fact automatically carries the case to the jury, and it would have been reversible error on the part of his honor either to have granted a nonsuit or have directed a verdict as asked for.

The exceptions raising these questions are overruled.

[2] Exception raising the third question is overruled on the ground the evidence shows that Sheehan was not the only agency by which the deceased was injured and died. The evidence conclusively shows that other agents and servants were in some manner careless and negligent, which in some manner contributed as a proximate cause of deceased's injury and death.

The testimony shows that Sheehan was not the sole agency that brought about deceased's death.

Judgment affirmed.

GARY, C. J., and FRASER and COTH-RAN, JJ., concur.

(117 S. C. 1)

MASSEY v. HINES, Director General and Agent of Railroads.

(Supreme Court of South Carolina. Aug. 1, 1921. On Petition for Rehearing Aug. 15, 1921.)

1. Railroads \Leftrightarrow 5½, New, vol. 6A Key-No. Series—Federal Director General not liable in punitive damages for willful tort of agents.

The federal Director General of Railroads in control of a railroad is not liable in punitive damages for the willful tort of his agents and servants.

On Petition for Rehearing.

2. Appeal and error \Leftrightarrow 115(1)—Appeal being from portion of verdict allowing punitive damages, judgment should have been modification of trial court's judgment to such extent.

Where defendant federal Director General of Railroads appealed only from such portion of verdict against him as allowed punitive

damages for the willful tort of his agents and servants, the judgment of the Supreme Court should have been a modification to such extent of the judgment of the trial court, both for actual and punitive damages, and not an order for new trial nisi.

Appeal from Common Pleas Circuit Court of York County; W. H. Townsend, Judge.

Action by Jessie H. Massey against Walker D. Hines, Director General and Agent of Railroads. From judgment for plaintiff, defendant appeals. Judgment, in so far as for actual damages, affirmed, in so far as for punitive damages, reversed.

Glenn & Glenn, of Chester, and Thomas F. McDow, of York, for appellant.

Samuel E. McFadden, of Chester, and John B. Hart, of York, for respondent.

COTH-RAN, J. The sole question in this case is whether or not the Director General of Railroads while in federal control of a railroad is liable in punitive damages for the willful tort of his agents and servants.

[1] The question is answered in the negative by the decisions of this court in *Rowell v. Hines*, 114 S. C. 339, 103 S. E. 545; *Ginn v. Hines*, 114 S. C. 236, 103 S. E. 548, and by the decision of the Supreme Court of the United States in *Missouri, etc., Railroad Co. v. Ault*, decided June 1, 1921, 256 U. S. —, 41 Sup. Ct. 593, 65 L. Ed. —, where it is declared:

"The purpose for which the government permitted itself to be sued was compensation, not punishment."

The judgment of this court is that so much of the judgment of the circuit court as is for \$8,000 actual damages, be affirmed, and that so much of the judgment as is for \$12,000 punitive damages be reversed.

GARY, C. J., and WATTS and FRASER, JJ., concur.

On Petition for Rehearing.

PER CURIAM. [2] The appellant herein has filed a petition for a rehearing of this appeal upon the ground that the appeal was only from such portion of the verdict as allowed punitive damages, and that the judgment of this court should have been a modification of the judgment to that extent, and not an order for a new trial nisi. The position of the appellant is sustained. *Salley v. Railroad Co.*, 79 S. C. 388, 60 S. E. 988; *Elmson v. Railroad Co.*, 84 S. C. 431, 77 S. E. 723, 78 S. E. 231; *DeLeach v. Railroad Co.*, 106 S. C. 155, 90 S. E. 701; *Calhoun v. Railroad Co.*, 106 S. E. 781. The agreed case shows:

"The appellant now appeals to the Supreme Court from so much of the verdict and judgment

as awarded punitive damages to the respondent, and asks that the verdict and judgment in so far as punitive damages are concerned be set aside and vacated. The appellant by this appeal makes no question as to the verdict for \$8,000 actual damages, and only appeals from the verdict and judgment for punitive damages. The appellant does not ask for a new trial, but does ask that the verdict and judgment for \$12,000 punitive damages be reversed, set aside, and vacated by this court."

The argument for the respondent states:

"Defendant appeals to this court only as against punitive damages awarded plaintiff, and upon the legal ground that under the law the defendant, Director General, as Agent of Railroads, cannot be sued for willfulness, and therefore no recovery, verdict, or judgment can be had against him for punitive damages. And this is the whole question presented by this appeal."

It is ordered that the judgment at the foot of the opinion which has been filed be stricken out, and the following substituted in lieu thereof:

The judgment of this court is that so much of the judgment of the circuit court as is for \$8,000 actual damages be affirmed, and that so much of the judgment as is for \$12,000 punitive damages be reversed.

(116 S. C. 469)

RYAN v. NEW ENGLAND MUT. LIFE INS. CO. (No. 10672.)

(Supreme Court of South Carolina. June 30, 1921.)

Insurance ¶668(15)—Whether insurer, in accepting usual premium and failing to reply to insured's letter stating his understanding of policy terms, waived payment of extra war premium held for jury.

Under a life insurance policy limiting the insurer's liability, unless the insured, if he engaged in military service in time of war, paid an extra premium within 31 days, where insured, more than 31 days after entering an officer's training school, wrote to the company's agent, informing him of such fact and asking whether, if he died in the service, his beneficiary could collect, to which the agent replied that she could, but that, when he received his commission, he must pay the extra premium, whereupon insured wrote, enclosing a check for the regular premium, and stating he understood from the agent's letter that until he went abroad there was no extra premium, and the agent accepted the premium and made no reply, such letter was admissible, the evidence showing it had been received, and the contents, if correctly stated by plaintiff, tending to show waiver, which was for the jury.

Cothran, J., dissenting.

Appeal from Common Pleas Circuit Court of Sumter County; M. L. Smith, Special Judge.

Action by Loretta M. Ryan against the New England Mutual Life Insurance Company. Verdict for plaintiff, and defendant appeals. Affirmed.

Lee & Molise, of Sumter, and Buist & Buist, of Charleston, for appellant.

John H. Clifton, of Sumter, for respondent.

GARY, C. J. This is an action on a policy of life insurance, issued by the defendant, to Jno. B. Ryan, Jr., on the 26th of July, 1917, in the sum of \$2,500, wherein his wife, the plaintiff, was named as the beneficiary.

The application of Jno. B. Ryan, Jr., for the insurance, contained these words:

"I further agree that said policy shall be void, if within five years from its date, I engage in military or naval service in time of war, without the written consent of the company previously obtained."

The supplemental application contains this provision:

"If within five years from the date of this policy the insured shall engage in any military or naval service in time of war, the liability of the company in event of the death of the insured while so engaged, or within six months thereafter, will be limited to the return of the premiums paid hereon, exclusive of any extra premium paid for military or naval service, less any indebtedness to the company hereon; unless before engaging in such service or within thirty-one days thereafter, or at the time of paying the first premium due hereon, if the insured shall be then so engaged, the insured shall pay to the company at its home office in Boston, Mass., such extra premium as may be required by the company, and in like manner shall pay annually thereafter on each anniversary of this policy or within thirty-one days thereafter, while the insured shall continue to be so engaged, such extra premium as may be required by the company."

The policy thus provides:

"This clause is by mutual agreement attached to said policy prior to its delivery, and is hereby expressly incorporated therein."

The plaintiff introduced in evidence the following letter:

"Greenville, S. C., Box 807, June 23, 1918.

"Mr. Robert J. Guinn, Atlanta, Ga.—Dear Sir: On May 15, 1918, I entered the service of the United States by becoming a member of the Fourth Officers' Training School at Camp Sevier. Will you advise me by return mail what effect this will have on my policy No. 337355, which was issued in July 1917.

"If I am killed or die in the service, whether while in this country or abroad, can my beneficiary collect this policy?

"Awaiting your reply before paying the premium due on July 26, 1918, I remain,

"Yours very truly, J. B. Ryan, Jr."

"Box 807, Greenville, S. C.

(108 S.E.)

Also the following:

"Atlanta, Ga., June 25, 1918.

"Mr. John B. Ryan, Jr., Box 807, Greenville, S. C.—Dear Sir: Re: Policy No. 337355. We have your favor of the 23d and note that on May 15th you became a member of the Officers' Training School, and making inquiry concerning your policy. In reply beg to advise that in the event of your policy becoming a claim while you are in service, at home or abroad, the same is payable to your wife. But you will please be advised that when you receive your commission you will have to pay the extra war premium, which is \$87.50 per thousand per year.

"Trusting this is the information desired, we are

"Yours truly,

R. J. Guinn,
General Agent. H."

Also the following letter:

"June 30, 1918, Greenville, S. C., Box 807.

"Mr. R. J. Guinn, Atlanta, Ga. Care of New England Mutual Life Insurance Co. Dear Sir: Replying to yours of June 25th, I am inclosing herewith check for \$81.50 for premium on my policy No. 337355. Also am inclosing order for my share of surplus profit to become \$23.00 paid-up insurance.

"I understand from yours of the 25th, that until I go abroad there is no extra war premium due on my policy.

"Yours very truly,

J. B. Ryan, Jr.

"Please send receipt to Box 807, Greenville, S. C."

John B. Ryan, Jr., was commissioned a second lieutenant of infantry on the 25th of August, 1918, and died on the 4th of October, 1918.

The following statement appears in the record:

Letter from Jno B. Ryan, Jr., to R. J. Guinn, dated June 30, 1918, offered in evidence. The defendant's attorney objects to the introduction of the letter, there being no proof that it was ever mailed or received by Mr. Guinn, and that a waiver of a condition in a policy of insurance could not be established by an alleged letter claimed to have been written and mailed without proof that the same was received by the company or some officer or agent of the company.

The plaintiff testifies on cross-examination by defendant's attorney, and also on direct examination by plaintiff's attorney, that she wrote the letter in question, mailed it at the main post office in Greenville, S. C., duly stamped and addressed to Mr. Robert J. Guinn, at Atlanta, Ga. "I knew the address of Mr. Guinn, and had received letters from him." Over defendant's attorney's objection letter introduced in evidence and marked Exhibit D. "In this letter that my husband dictated to me, in which it says, 'Check inclosed for \$81.50,' the check was put in that letter, in the letter of June 30, 1918. We left Camp Sevier about July. I don't remember the exact date, and went to Camp Gorden at Atlanta, and was called back to Camp Wadsworth. While in camp I kept copies of the letters. I had a book with car-

bon copies, and I wrote them and made the carbon copies. I had no typewriter."

R. J. Guinn thus testified in behalf of the defendant:

"The premium due in July, 1918, was paid to me by check. I had no original letter inclosing the check. There was no such letter that I remember. Usually no letter accompanied the check. I am positive that no letter came with this remittance. If any letter did come, I am positive no notice was sent with the premium that Mr. Ryan was in the service. I am positive that no letter came other than this: 'Enclosed find check for premium.' Most of them just send check with no letter. * * * I attend to all the correspondence out of the ordinary; all letters from the policy holders that required an answer were answered by me personally, or I would give direction as to how to answer the same. * * * I have made search of all letters in our files and all copies of letters, and have not found the original letter from John B. Ryan, Jr., alleged to have been written on June 30, 1918."

Upon the close of the defendant's testimony, the defendant moved to strike the letter from the record, on the ground that it had been admitted in evidence by reason of the presumption that the letter having been mailed according to the plaintiff's testimony, it was presumed to have been received, but that, the defendant's testimony having conclusively shown that the letter had not been received, the presumption had been rebutted. His honor refused to strike the letter from the record.

At the close of all the testimony, the defendant's attorneys made a motion for the direction of a verdict, which was refused. The jury rendered a verdict in favor of the plaintiff for the amount claimed, and the defendant appealed upon exceptions, which will be reported.

The appellant's attorneys did not argue the exceptions separately, nor do we deem it necessary to consider them in detail.

There is no question, that the letter which Jno. B. Ryan, Jr., mailed to the defendant, inclosing the check for \$81.50, in payment of the second premium, due on his policy of insurance, was delivered to the defendant. But the issue was whether the contents of the letter were correctly stated in the plaintiff's testimony. If so, they tended to show waiver on the part of the defendant, and the case was properly submitted to the jury.

Affirmed.

WATTS and FRASER, JJ., concur.

COTHRAN, J. (dissenting). The facts of this case are very clearly stated in the opinion of the Chief Justice.

In reference to the motion by the defendant to strike from the record the alleged letter from Ryan to Guinn, general agent of

the defendant, dated June 30, 1918, the motion was properly refused. Mrs. Ryan testified that she personally mailed the original letter, of which that offered in evidence purported to be a copy, in the post office at Greenville, postage paid, containing check for \$81.50. The presumption would arise that it was delivered in due course, and, coupled with the fact that the check was received and cashed, the burden of disproving receipt was upon the defendant. This raised an issue of fact which was properly submitted to the jury.

It was also a question of fact for their determination whether or not the purported copy truly represented the contents of the original letter. For the purpose of this appeal from the order refusing to direct a verdict for the defendant, I will assume that the letter of June 30th was received by the defendant, and that the copy in evidence is a correct one.

The question for determination is whether or not the conduct of the general agent in reference to this letter constituted such evidence of waiver or estoppel as required the submission of that issue to the jury.

To restate the facts bearing immediately upon this issue: The policy was issued July 26, 1917, and the initial premium of \$81.50 was paid at that time. On May 15, 1918, the insured entered an officers' training school, I assume not having enlisted at that time, but in fact entering the military service. On June 23, 1918, he wrote the general agent, notifying him of that fact and submitting to him this question, the answer to which he desired before paying the second premium:

"If I am killed or die in the service whether while in this country or abroad, can my beneficiary collect this policy?"

—to which letter the general agent replied, June 25, 1918:

"In the event of your policy becoming a claim while you are in service, at home or abroad, the same is payable to your wife. But you will please be advised that when you receive your commission you will have to pay the extra war premium, which is \$37.50 per thousand per year."

Then comes the questioned letter, dated June 30, 1918, from the insured to the general agent, acknowledging his letter of the 25th and inclosing check for \$81.50, and closing with this statement:

"I understand from yours of 25th that until I go abroad there is no extra war premium due on my policy."

This letter, if received, does not appear to have been answered. The defendant cashed the check, applying it to the second ordinary premium due July 26, 1918. The insured was commissioned as second lieutenant in August, was transferred to Camp Gordon,

and thence to Camp Wadsworth, where he died in the service on October 4th. No payment of the war premium was made by him, and no notice given to the defendant of his having been commissioned; the only notice given being June 23, 1918, of his having entered the Officers' Training School at Camp Sevier on May 15, 1918.

The condition quoted in the leading opinion from the application, providing for an annulment of the policy, is broader than the conditions set forth in the rider to the policy, which contains the war clause. The latter must control the former, and the former goes out of the case, particularly as it was shown that the letter of June 25th amounts to a waiver of the written permission required by the former.

The leading opinion declares that the contents of the letter of June 30, 1918, tended to show a waiver by the defendant of the requirement in question. It is an inadvertence, of course, to say that the contents of the letter could possibly have this effect; that letter simply contained a statement by the insured of his understanding of the conditions of the policy; what he thought could not bind the company. What was intended, I assume, is that the acceptance of the premium, accompanied as the remittance was with a statement of the insured's apprehension of the contract, unanswered and uncorrected, was evidence of such waiver. That is practically the sole issue in this appeal.

It will be noted that the insured was informed of the condition in the policy, and on June 23d, after he had entered the training school, but before he was enlisted or commissioned, anticipating that he would be commissioned, he made inquiry of the company as to the effect his entering the training school would have on his policy, and, further as to the effect of his dying in the service, in this country or abroad, information which he stated he needed "before paying the premium due on July 26, 1918." The general agent of the company promptly, two days later, on June 25th, replied in as plain language as could possibly be employed:

"When you receive your commission you will have to pay the extra war premium, which is \$37.50 per thousand per year."

Following this letter, and specifically in reply to it, the insured, on June 30th, still prior to the date of his commission August 26th, and notwithstanding the plain terms of the policy and the plainer terms of the general agent's letter of June 25th, expresses his construction of the policy and the letter to be that no extra war premium was due upon his policy until he went abroad. This misconstruction does not appear to have been corrected by the general agent, and the contention of the plaintiff is that this conduct

on his part was sufficient evidence of waiver to carry the case to the jury.

I adhere to the opinion expressed by me in the case of *Watson v. W. O. W.*, 108 S. E. 145, recently filed, that the facts here do not present a case of forfeiture, and that therefore waiver has no application. My views stated therein need not be repeated here. Particular attention however is called to the quotation from the *Arkansas Case of Miller v. Ass'n*, 138 Ark. 442, 212 S. W. 310, 7 A. L. R. 378. See, also, *Reid v. Assur. Co.*, 204 Mo. App. 643, 218 S. W. 957.

The real question is whether or not the failure of the general agent to correct the misapprehension of the wife of the insured expressed in the letter of June 30, purporting to have been signed by the insured, was such evidence of estoppel (not waiver) as justified or required the submission of that issue to the jury. In other words, it involved the application of the principle of estoppel by silence.

In the first place, it is by no means certain that, if the general agent had replied to that letter, stating to the insured that he was mistaken, that the policy in his possession plainly showed that the war assessment had to be paid within 31 days after his enlistment, that his letter of but 5 days before also plainly called his attention to this requirement, the insured would have paid the war assessment. It is entirely problematical; there is absolutely no evidence that he would. It is just as reasonable to suppose that he would, in order to have the war assessment, have kept the policy alive as to all contingencies except that not assumed by the company, suspended for the time being, to resume its normal state, as a bough when the restraining force is released.

But assume that he would have paid the assessment if his error had been corrected: The well-established principles of estoppel by silence demonstrate conclusively to my mind that they cannot avail the plaintiff under the admitted facts here. "To make the silence of a party operate as an estoppel, the circumstances must have been such as to render it his duty to speak." 16 Cyc. 759. What made it the duty of the general agent to correct so inexcusable an error? There was the policy; there was the letter of June 30th; nothing could have been plainer. "They would not hear Moses and the prophets"; a third impressment offered no hope that he would be convinced. "It is essential that he should have had knowledge of the facts, and that the adverse party should have been ignorant of the truth." *Id.* "It must appear that it was his duty to speak, and that his silence or passive conduct ac-

tually misled the other to his prejudice." *Id.* 761. There is nothing to show that if the error had been corrected the insured would have complied, and that he was therefore "actually misled." *McCormac v. Evans*, 107 S. C. 43, 92 S. E. 19.

"One is not estopped by silence when both parties know or have equal means of knowing the truth." 21 C. J. 1152, citing *Wingert v. Snouffer & Ford*, 134 Iowa, 97, 108 N. W. 1035, 111 N. W. 432; *Spahr v. Cape*, 143 Mo. App. 114, 122 S. W. 879; *Garvey v. Harbison-Walker Refractories Co.*, 213 Pa. 177, 62 Atl. 778. The insured had not only the policy, but the letter of June 25th, and his first letter of the 23d, shows that his attention had been called to the subject. "The party relying thereon must not have had the means of knowing the true state of facts." 10 R. C. L. 684. The party claiming an estoppel has no right to shut his eyes to a condition that he not only has full opportunity of learning, but which is actually and pointedly called to his notice. Estoppel by silence is classed as a species of implied misrepresentation, a species of fraud. How can this implication stand in the light of the express provisions of the policy and the letter of June 25th? "Estoppel by silence can only arise when the silence would amount to a fraud, actual or constructive." 21 C. J. 1152. Is there the faintest suggestion of such a thing in the conduct of the general agent? As is held in *Scaife v. Thomson*, 15 S. C. 368:

"There is not the slightest evidence warranting the belief that their silence or nonaction was induced by an intention to deceive."

From these conclusions, it is my opinion it follows that the circuit judge was in error in not directing a verdict for the plaintiff for the amount of the premiums paid, as requested by the defendant.

I think that he was in error also in excluding the testimony of Miss Hanft, the stenographer, to the effect that if the letter of June 30th had been received she would have corrected the apparent misapprehension of the insured. Ordinarily testimony of what a witness would have done under certain assumed circumstances is too speculative and uncertain to have any great probative force, although such testimony in the matter of the delivery of a telegram has frequently been received. *Wallingford v. Tel. Co.*, 53 S. C. 410, 31 S. E. 275. But is a case of this nature, where the plaintiff relies upon estoppel by silence, so much a matter of intention, good faith, the absence of fraud, or a purpose to deceive, the testimony should have been received as throwing light upon the essential feature.

(116 S. C. 466)

GORDON et al. v. BELL et al. (No. 10693.)

(Supreme Court of South Carolina. Aug. 1, 1921.)

1. Statutes \S 225—Construed together when relating to same subject-matter.

Statutes relating to the same subject-matter must be read together and effect given to each unless they are totally inconsistent.

2. Schools and school districts \S 154—Statute relative to transfer of children between districts not repealed.

Relative to the right to transfer children from one district to another within the county, Act Feb. 21, 1919 (31 St. at Large, p. 63), amendatory of Civ. Code 1912, § 1756, did not repeal Act Feb. 23, 1912 (27 St. at Large, p. 619), amendatory of Civ. Code 1902, § 1214, now section 1756 of Code of Laws; the acts both being amendatory and not inconsistent.

Appeal from Common Pleas Circuit Court of Abbeville County; Frank B. Gary, Judge.

Suit by W. S. Gordon and another against J. R. Bell and others, trustees, etc. Decree for defendants, and complainants appeal. Affirmed.

J. M. Nickles, of Abbeville, for appellants.
William P. Greene, of Abbeville, for respondents.

WATTS, J. This is an action for injunction, and is an appeal from an order of his honor Judge Gary. The only question raised by the appeal is whether children can be legally transferred from one school district within the same county without the consent of the trustees of the district to which the transfer is sought to be made. The solution of this question depends on whether the act of 1912 (Act Feb. 23, 1912 [27 St. at Large, p. 619]), with reference to the transfer of children from one school district to another was repealed by the passage of the act of 1919 (Act Feb. 21, 1919 [31 St. at Large, p. 63]) on the same subject. The question since the act of 1919 is purely academic, except for the costs of this case, and that is practically the only substance now in the case.

[1, 2] His honor Judge Gary held that the amendatory act of 1912 was a valid enactment and should be given force, unless it was subsequently repealed by the act of 1919, and that the act of 1919 did not repeal the act of 1912; that there was no expression in the act of 1919 indicating an intention to repeal the act of 1912, and there was no inconsistency or repugnancy between the two acts. The two acts must be read together and effect given to each unless they are totally inconsistent. The statutes in question relate to the same subject-matter. No intention is expressed in the latter act to repeal the

former act. They must be construed together and effect given to each.

The passage of the act of 1919 was an amendment to section 1756, which had been heretofore amended by the act of 1912, and was in effect simply another amendment, and was in no manner inconsistent with or in conflict with the same. The acts relate to different things. The amendments are the law of the subject. One is not dependent on the other. Both stand, and the objects and provisions sought in one amendment are not affected by the other amendment.

All exceptions are overruled, and judgment affirmed.

GARY, O. J., and FRASER, J., concur.
COTHRAN, J., disqualified.

(116 S. C. 463)

KING v. HOLLIDAY et al. (No. 10889.)

(Supreme Court of South Carolina. Aug. 1, 1921.)

1. Highways \S 184(4)—Instruction as to automobile driver's duty on seeing object on highway held a proper statement of law.

In an action against an automobile owner and his driver for injuries sustained by a boy of four when struck by the car while on the highway, instruction that a person driving on the public highway, seeing an object thereon, especially if he is driving a dangerous machine, must use caution and care and prudence to avoid injury, either to himself or to the object on the highway, if it be capable of being injured, was a proper statement of the law.

2. Negligence \S 85(3)—Child under seven incapable of being negligent on highway.

A child under seven years of age is incapable of committing a trespass or of being negligent, and in an action by his guardian ad litem for injuries sustained by him when struck by an automobile on the highway it was immaterial what use he was making of the highway when struck.

3. Highways \S 172(1) — Municipal corporations \S 705(1)—Duty of drivers of automobiles as to use of due care to avoid injuries stated.

It is the duty of drivers of automobiles on the public streets and highways to observe due care and caution, as a person of ordinary care and caution is required to, to avoid injury to themselves and their property and injury to the persons and property of others.

Appeal from Common Pleas Circuit Court of Greenville County; J. W. De Vore, Judge.

Action by E. G. King, as guardian ad litem, against Casper Holliday and another. From judgment for plaintiff, defendants appeal. Affirmed.

Martin & Blythe, of Greenville, for appellants.

Bonham & Price, of Greenville, for respondent.

WATTS, J. [1] This is an appeal from a judgment entered on a verdict for \$2,000; \$1,500 actual and \$500 punitive damages. The case was for personal injuries sustained by James Hoyt King, a minor four years of age at the time of the injury July 12, 1917. The injury was caused by an automobile owned by Casper Holliday and driven by W. C. Walker. The case was first tried before Judge Peurifoy and a jury, and resulted in a verdict in favor of plaintiff for \$500. Judge Peurifoy granted a new trial, and the cause was then tried before Judge De Vore and a jury at the September term of court, 1920, for Greenville county. After verdict rendered defendants made a motion for a new trial, which was overruled. The defendants then appealed, and by 11 exceptions impute error and ask for reversal. At the hearing the ninth exception was withdrawn. Exceptions 1 and 2 question the language of the charge of his honor in charging as follows:

"I charge you as matter of law that if a person is traveling upon the public highway and sees an object in the highway, especially if he is driving a dangerous machine, it does not make any difference what the object is, he must use caution and care and prudence, as a person of ordinary reason and prudence would use, so as to avoid injury either to himself or to the person who is driving the car or to the object upon the highway, if it be capable of being injured."

We see no error in this, it was a plain statement by his honor as to the duty of a person driving a car on the public highway to use ordinary reason and prudence to avoid injury to himself and others, and is good, sound law, well charged. He charged the law applicable to the issues and evidence, did not intimate any opinion, but left the facts entirely to the jury for their determination.

[2] Complaint is also made that the court imposed a liability upon the defendants for negligence in not keeping a proper lookout, and in not stopping the car if they could have seen the child, although the jury may have found that the child was not using the road as a traveler and not making a reasonable use of same, in which case the defendants would be liable only for willfulness. These exceptions are overruled. The injured, a child under seven years of age, is incapable of committing a trespass, or being negligent, and it makes no difference what use he was making of the highway.

[3] It is the duty of drivers of automobiles on the public streets and highways to ob-

serve due care and caution, as a person of ordinary care and caution is required, so as to avoid injury to themselves and their property and injury to the persons and property of others. Exceptions 5 and 6, 7, and 8 are overruled. His honor did not allude to any person; he told the jury in clear, plain language the care that an ordinary, prudent person must exercise under certain circumstances while traveling on the public highways. He gave a fair and clear declaration of the law of the case, and we were impressed at the argument before us that appellants did not seriously rely on exceptions 7 and 8.

Exception 10 is overruled. The court did all it could under the circumstances developed. Appellants cannot complain; they got all they were entitled to as the result of the medical examination. His honor's ruling was clearly right. Exception 11 is overruled under authorities. *Ex parte Hilton*, 64 S. C. 206, 41 S. E. 978, 92 Am. St. Rep. 800; *State v. Ballew*, 83 S. C. 86, 63 S. E. 688, 64 S. E. 1019, 18 Ann. Cas. 569; and *State v. Browning*, filed June, 1921, 108 S. E. 105. All exceptions are overruled.

Judgment affirmed.

GARY, C. J., and FRASER and COTHRAN, JJ., concur.

(116 S. C. 459)

MULLINAX v. HAMBRIGHT et al.

(No. 10706.)

(Supreme Court of South Carolina. Aug. 1, 1921.)

Highways \Leftarrow 96(1)—Complaint alleging negligence by highway commission held sufficient.

A complaint alleging that deceased was killed on account of the willful and careless conduct of defendants, their agents and servants, and that the defendants constitute a highway commission, is good against demurrer, since defendants are liable for their wrongful or careless misconduct as such commissioners, even though they may not be liable for the acts of their employés.

Cothran, J., dissenting.

Appeal from Common Pleas Circuit Court, Cherokee County; W. H. Townsend, Judge.

Action by John Mullinax, administrator, against J. B. Hambright and others for death by wrongful act. From a judgment sustaining demurrer to the complaint, plaintiff appeals. Reversed.

See, also, 115 S. C. 76, 104 S. E. 309.

N. W. Hardin, of Blacksburg, for appellant.

Dobson & Vassy, and Butler & Hall, all of Gaffney, for respondents.

FRASER, J. This is an action for death by wrongful act. The complaint alleges that the deceased was killed on account of the willful, reckless, and careless conduct of the defendants, their agents and servants, and that the defendants compose and constitute the Cherokee highway commission.

The defendants demurred to the complaint, on the ground that the complaint did not state facts sufficient to constitute a cause of action, in that the defendants are not liable for the negligence of subordinates engaged in the work. The demurrer was sustained.

The statute gives a right of action where death is caused by the wrongful act of another. It may be that on the trial it will appear that the death was caused, not by the negligence of the defendants, but by others for whose conduct the defendants are not responsible. But the complaint alleges that the death was caused by the wrongful act of the defendants, and in so alleging stated a good cause of action.

The judgment appealed from is reversed.

GARY, C. J., and WATTS, J., concur.

COTHRAN, J. (dissenting). The circuit judge in my opinion was entirely justified in sustaining the demurrer, and the order appealed from should be affirmed, for the very clear and convincing reasons assigned by him.

It is conceded that a public servant or agent is responsible for his personal tort while engaged in the public service, or for the torts of his subordinates employed by or under him, when he has specifically directed, or personally co-operated in the negligent act which caused the injury; and this regardless of the immunity of the governmental agency which he represents. The converse of this proposition is thus expressed by the authorities:

"It is a well-settled rule that a public officer is not responsible for the acts or omissions of subordinates properly employed by or under him, if such subordinates are not in his private service, but are themselves servants of the government, unless he has directed such acts to be done, or has personally co-operated in the negligence." 23 A. & E. 382.

In *Robertson v. Sichel*, 127 U. S. 507, 8 Sup. Ct. 1286, 32 L. Ed. 203, the court declares:

"A public officer or agent is not responsible for the misfeasances or positive wrongs, or for the nonfeasances, or negligences, or omissions of duty, of the subagents or servants or other persons properly employed by or under him, in the discharge of his official duties."

In 29 Cyc. 1445, it is said:

"Public officers are not, as a general rule, liable for the acts of subordinates, even where such subordinates are employees rather than

officers, except where the negligence of such subordinates is attributable to the superior."

In 22 R. O. L. 487:

"Public officers and agents of the government are not liable for the acts or defaults, negligence, or omissions of subordinate officials in the public service, whether appointed by them or not, unless they direct the act complained of to be done, or personally co-operate in the negligence from which the injury results. Where the subordinates have been appointed by them it is sufficient if they have employed trustworthy persons of suitable skill and ability, and have not been negligent in selecting such subordinates."

The liability of the highway commissioners, public officers and servants, is therefore exceptional; and if the plaintiff should desire to fix liability upon them it is essential that he bring himself within the exceptions, which he has utterly failed to do.

The allegation in the complaint that the tort was committed by the "defendants, their agents, and servants," is not a charge of direct negligence on the part of the defendants, but is plainly an effort to hold them liable for the tort of "their agents and servants"; this is necessarily the effect taken in connection with the act creating the commission, as will appear.

The office of a county highway commissioner, created by an act establishing such a commission, for the purpose of financing and directing in a general way the work of highway improvement, usually under a bond issue, is a patriotic and gratuitous service, undertaken at a personal sacrifice. Few men would be found willing to accept it with a burden such as the plaintiff proposes to place upon it; the personal responsibility of the officer for any act of negligence committed by a subordinate.

Judicial cognizance is taken of the act creating the Cherokee county commission; the duties of the commission are entirely supervisory; the actual work is directed to be done "by and through its engineers and other officers employed by it." It would be anomalous to hold, as this court held upon the former appeal (115 S. C. 76, 104 S. E. 309) that the commission cannot be held liable for the alleged tort, and now to hold that the individual members of that commission may be, in the absence of an allegation that they directed or co-operated in the act which resulted in the injury, and in the face of the statute which requires that the work be done by others.

In the case of *Vermillion v. College*, 111 S. C. 156, 97 S. E. 619, the court held that a charitable corporation, from motives of public policy, could or would not be held liable for its corporate negligence; a greater reason, it appears to me, exists for extending immunity to these faithful servants, men usually selected for their high business ability

and patriotic disposition engaged in a gratuitous and thankless service.

The plaintiff is not left without remedy; those who caused the injury are legally responsible. If they are not financially responsible, it is but the common misfortune of having a penniless debtor; it is no justification for making him pay who can, regardless of his culpability.

(117 S. C. 137)

SULLIVAN v. CALHOUN et al. (No. 10692.)

(Supreme Court of South Carolina. Aug. 1, 1921.)

1. Landlord and tenant §331(5)—Complaint of cropper to justify punitive damages for conversion need not allege fraud directly.

In an action by a share cropper against the owners of the land for their conversion of the crop and refusal to make an account to him for his part thereof, it was not necessary to justify an award of punitive damages that the complaint allege fraud in direct terms, it being sufficient if facts were stated from which fraud was necessarily to be implied.

2. Landlord and tenant §331(5)—Complaint of cropper held to allege fraud justifying award of punitive damages.

Complaint of share cropper against owners of land, alleging that they willfully violated the contract and took exclusive possession of plaintiff cropper's one-half interest in the crop, held sufficiently to allege fraud on the part of defendant owners to justify award of punitive damages to plaintiff share cropper.

Appeal from Common Pleas Circuit Court of Greenville County; T. J. Maulden, Judge.

Action by Ferdinand Sullivan against Peter Calhoun and another. From judgment for plaintiff, defendants appeal. Appeal dismissed.

J. J. McSwain and Oscar Hodges, both of Greenville, for appellants.

Cothran, Dean & Cothran, of Greenville, for respondent.

GARY, C. J. The question raised by the exceptions is whether the plaintiff, under the allegations of the complaint, was entitled to punitive damages.

The complaint is as follows:

"(1) That in February, 1918, the plaintiff entered into a contract with the defendants, for the occupation and cultivation of about five acres of land on the Augusta road, near the city of Greenville, which belongs to the defendant Sarah Calhoun, for the year 1919, the defendants furnishing the stock and the plaintiff the labor upon an equal division of the crop when made; that plaintiff pitched the crop and laid it by, and on or about the 18th of July, without just cause or excuse, the defendants ran the

plaintiff off said premises, gathered the crop, and refused to make an account to the plaintiff of his part thereof.

"(2) That the net proceeds of the crop amounted to about \$600, one-half of which the plaintiff was entitled to.

"(3) That the conduct of the defendants was in willful violation of the plaintiff's right in the premises, and that he has been damaged by their said conduct in the sum of \$500.00."

There was testimony tending to sustain the allegations of the complaint. The jury rendered a verdict in favor of the plaintiff for \$375 actual damages, and for \$100 punitive damages, whereupon the defendants appealed.

[1] The appellants contend that the complaint does not allege fraud. It is not necessary to allege fraud in direct terms; it being sufficient if the facts are stated from which it is necessarily implied.

[2] Not only does the complaint allege that the defendants willfully violated the contract, but also that they took exclusive possession of the plaintiff's one-half interest in the crop. This allegation is sufficient to constitute fraud.

In 12 R. C. L. 229, the rule is thus stated:

"Fraud assumes so many hues and forms, that courts are compelled to content themselves with comparatively few general rules for its discovery and defeat, and allow the facts and circumstances peculiar to each case to bear heavily upon the conscience and judgment of the court or jury in determining its presence or absence. While it has often been said that fraud cannot be precisely defined, the books contain many definitions, such as unfair dealing; the unlawful appropriation of another's property by design."

The foregoing is in harmony with the decisions rendered by this court. In *Welborn v. Dixon*, 70 S. C. 108, 49 S. E. 232, 8 Ann. Cas. 407 (in which the doctrine was announced that punitive damages are recoverable when there has been a fraudulent breach of the contract), the court used this language:

"In the case of *Lee v. Lee*, 11 Rich. Eq. 574, the court quotes with approval the following language from *Russell v. Southard*, 12 How. 139: 'To insist on what was really a mortgage as a sale is, in equity, a fraud, which cannot be successfully practised under the shelter of any written papers, however precise and complete they may appear to be.' Under the allegations of the complaint it was a fraudulent act on the part of the defendant, when he intentionally disposed of the land as the owner thereof, knowing that it was conveyed to him by way of mortgage, and that it belonged to the plaintiff (but, of course, subject to the mortgage)."

Appeal dismissed.

WATTS and FRASER, JJ., concur.
COTHRAN, J., disqualified.

(117 S. C. 122)

LEOPARD v. BEAVER DUCK MILLS.
(No. 10697.)

(Supreme Court of South Carolina. Aug. 1, 1921.)

1. Master and servant §101, 102(1)—Duty to provide reasonably safe place.

It is the duty of the master to provide the servant a reasonably safe place to work.

2. Master and servant §287(7)—Negligence of employee in charge for master held question for jury.

Where a card grinder when employed was directed to another card grinder for assignment to work, and by him told to put a screen in a machine, and while doing so was injured when the other card grinder put the machinery in motion, a verdict was erroneously directed for defendant, as the testimony tended to show that the place of work was rendered dangerous by one in charge for the master, without notice to plaintiff.

Cothran, J., dissenting.

Appeal from Common Pleas Circuit Court of Greenville County; George E. Prince, Judge.

Action by T. L. Leopard against Beaver Duck Mills. From a judgment on a directed verdict for defendant, plaintiff appeals. Reversed.

Martin & Henry, of Greenville, for appellant.

Haynsworth & Haynsworth, of Greenville, for respondent.

FRASER, J. The plaintiff's testimony tends to show: The plaintiff was employed as a card grinder in the defendant mill. While he was employed as an expert card grinder, he was new in the mill, and was directed to another card grinder, Atkins, for assignment to work. Atkins gave the plaintiff a screen, and told him to set it into the machine. The setting in of the screen ordinarily took about an hour. The screen was very near a very heavy cylinder, covered with teeth to catch the cotton. If the cylinder was still, the work was safe, but if the machinery should be set in motion, it became exceedingly dangerous. When the plaintiff had been working about 15 or 20 minutes, the other card grinder started the cylinder in motion. It caught the plaintiff's hand, and produced the injury complained of. The trial judge directed a verdict for the defendant. From the judgment entered on a directed verdict this appeal is taken.

[1, 2] There are several exceptions, but one question only need be considered. It is the duty of the master to provide the servant a reasonable safe place to work. There is testimony tending to show that the place at which the plaintiff was put to work was safe

enough when he started to work, but rendered very dangerous by one in charge for the master, and this change was made without notice to the plaintiff and caused the injury. *Hunter v. Alderman*, 89 S. C. 506, 71 S. E. 1084:

"The following rule, stated in *Brabham v. Tel. Co.*, 71 S. C. 53, 50 S. E. 716, has been followed in many cases: 'In determining who are fellow servants, the test or rule in this state is not whether the servants are of different grade, rank, or authority, one of them having power to control and direct the services of another, but the test is in the character of the act being performed by the offending servant, whether it was the performance of some duty which the master owed to the injured servant, the performance of which duty the master intrusted to the offending servant.'"

It is true that Atkins said he asked the plaintiff to listen for defects, and the plaintiff, instead of doing so, put his hand in the dangerous place. The jury should have been allowed to settle that matter. The exception that raises this question is sustained.

The other questions refer to errors peculiar to the first trial, and need not be considered.

The judgment is reversed.

GARY, C. J., and WATTS, J., concur.

COTHRAN, J. (dissenting). I think the facts and the law of this case thoroughly justify the action of Judge Prince in directing a verdict in favor of the defendant upon the grounds stated by him.

The facts are these: The defendant owns and operates a cotton mill at Greenville. Its principal officers were Moody, superintendent, Meredith, boss carder, and two section hands, E. H. Atkins and his brother, Bowen Atkins. The duty of E. H. Atkins as a section hand was to direct the hands in his section in the operation of the cards. Along with this duty was that of card grinder, a manual service. On the occasion of the injury it became necessary to overhaul certain of the card machines, the process being to take them apart, grind the cards, and set the machines up again. Atkins had authority to call to his assistance any of the hands in his section. On Saturday before the accident on Monday, the plaintiff applied to Meredith, the boss carder for work, representing himself as an experienced card grinder. He was employed, and on Monday reported for work. Meredith took him to Atkins, and instructed him to work under the direction of Atkins. A certain card had been dismantled and ground and was to be set back up again. Atkins and Leopard then proceeded to do this work, and worked upon it for about two hours. They set the "licker-in" in its socket, and then Atkins told Leopard to set the screen at the other end

of the machine. To do this Leopard had to put his hand very close to the cylinder upon which the card teeth were fixed. While he was so engaged, Atkins, without notice to Leopard, turned the cylinder, and the plaintiff's hand was caught between the cylinder and the screen, causing the injury for which he asked damages.

It is clear from the foregoing statement, taken most favorably to the plaintiff: (1) That Atkins was a superior servant to Leopard, with the right to direct his movements; (2) that Atkins and Leopard were engaged in the common undertaking of dismantling, grinding, and setting up the card machines; (3) that Atkins directed Leopard to set the screen; (4) that while Leopard was so engaged Atkins turned the cylinder which caught and injured Leopard's hand; (5) that the injury resulted from the negligence of Atkins in not giving Leopard notice of his intention to turn the cylinder.

After the close of all the testimony, in fact after the motion had been refused and the jury had wrestled with the case for some hours, the circuit judge directed a verdict in favor of the defendant, upon the ground that Atkins and Leopard were fellow servants, and the defendant could not be held responsible for the negligence of Atkins.

The pivotal question in the case, therefore, is whether or not under these circumstances Atkins and Leopard were fellow servants; an affirmative solution of the question absolving the defendant from the legal consequences of the negligent act of Atkins, and justifying the direction of a verdict for the defendant by the circuit judge.

Among the many theories in reference to the relation of fellow servants, this court has adopted with emphasis and reiteration this: The question whether a delinquent servant was or was not a vice principal, as regards the injured person, is ultimately determinable by the character of the act which by his negligence caused the injury, regardless of the fact that the delinquent servant was of a higher rank, grade, or authority, and had the power to control and direct the services of the other; that the superior servant rule, so far as that relation may compel the conclusion of vice principalship, does not obtain. This is the rule in the federal courts, Supreme and subordinate, Alabama, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Oregon, Pennsylvania, Rhode Island, South Dakota, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin. 4 Labatt (2d Ed.) p. 4413.

The principle is thus expressed in Brabham v. Postal Co., 71 S. C. 53, 50 S. E. 716:

"In determining who are fellow servants, the test or rule in this state is not whether the servants are of different grade, rank or authority, one of them having power to control and direct the services of another, but the test is the character of the act being performed by the offending servant, whether it was the performance of some duty the master owed to the injured servant, the performance of which duty the master had intrusted to the offending servant."

Similarly in B. & O. R. Co. v. Baugh, 149 U. S. 368, 13 Sup. Ct. 914, 37 L. Ed. 772:

"The question turns rather on the character of the act than on the relations of the employees to each other. If the act is one done in the discharge of some positive duty of the master to the servant, then negligence in the act is the negligence of the master; but if it be not one in the discharge of such positive duty, then there should be some personal wrong on the part of the employer before he is held liable therefor."

And in Justice v. Pennsylvania Co., 130 Ind. 321, 30 N. E. 303:

"On the other hand, if, at the time of the alleged negligence, the servant was not engaged in the performance of a duty which the master owed to his servants, but was in the discharge of a duty which the servant acting owed to the master, he will be held to be a fellow servant with others engaged in the same common business, and the master will not be liable for any injury inflicted upon such fellow servant by reason of his negligence."

To the same effect are *Sofeld v. Guggenheim Smelting Co.*, 64 N. J. Law, 605, 46 Atl. 711, 50 L. R. A. 417; *McElligott v. Randolph*, 61 Conn. 157, 22 Atl. 1094, 29 Am. St. Rep. 181; *Curley v. Hoff*, 62 N. J. Law, 758, 42 Atl. 731; *Fluke v. Railroad Co.*, 58 N. Y. 549, 13 Am. Rep. 545; *Fuller v. Jewett*, 80 N. Y. 46, 36 Am. Rep. 575; *Schroeder v. Railroad Co.*, 103 Mich. 218, 61 N. W. 663, 29 L. R. A. 321, 50 Am. St. Rep. 354; *Gillmore v. American Tube & Stamping Co.*, 79 Conn. 498, 66 Atl. 4; *Railroad Co. v. Barker*, 169 Ind. 670, 83 N. E. 369, 17 L. R. A. (N. S.) 542; *Robertson v. Chicago & E. R. Co.*, 146 Ind. 486, 45 N. E. 655; *Pasco v. Minneapolis Steel & M. Co.*, 105 Minn. 132, 117 N. W. 479, 18 L. R. A. (N. S.) 153; *Knutter v. N. Y. & N. J. Tel. Co.*, 67 N. J. Law, 646, 52 Atl. 565, 58 L. R. A. 808; *Railroad Co. v. Peterson*, 162 U. S. 346, 16 Sup. Ct. 843, 40 L. Ed. 994.

The rule laid down in *Brabham v. Postal Co.* has been reaffirmed in the following cases: *Martin v. Royster Guano Co.*, 72 S. C. 237, 51 S. E. 680; *Pagan v. So. Ry. Co.*, 78 S. C. 413, 59 S. E. 32, 13 Ann. Cas. 1105; *James v. Mfg. Co.*, 80 S. C. 232, 61 S. E. 391; *Goodman v. Tel. Co.*, 87 S. C. 449, 69 S. E. 1089; *Hunter v. Alderman*, 89 S. C. 502, 71 S. E. 1082; *Gibbes v. Phosph. Co.*, 93 S. C. 193, 76 S. E. 464; *Tucker v. Mills*, 76 S. C. 539, 57 S. E. 626, 121 Am. St. R-

957; *Stanton v. Corporation*, 97 S. C. 403, 81 S. E. 660; *Lyon v. Railroad Co.*, 77 S. C. 328, 58 S. E. 12.

In *Wilson v. Railroad Co.*, 51 S. C. 79, 28 S. E. 91, the present Chief Justice thus, for the court, declares the rule:

"When persons are employed in a common undertaking, all sustain toward each other the relation of fellow servants when exercising only the ordinary duties of their employment, even when they cannot see each other, or are working apart and not in conjunction. But if an employee sustains an injury through the negligence of a coemployee, while such coemployee is performing the duties of the master, the master cannot defeat his recovery on the ground that they are fellow servants."

In *Gunter v. Graniteville Mfg. Co.*, 18 S. C. 262, 44 Am. Rep. 573, the court declares:

"The true test is whether the person in question is employed to do any of the duties of the master; if so, then he cannot be regarded as a fellow servant or collaborer with the operatives, but is the representative of the master, and any negligence on his part in the performance of the duty of the master thus delegated to him must be regarded as the negligence of the master."

"The question is as to the nature of the duty, not as to the rank or grade of the person employed to perform it. Is it a duty which the master owes to his servants?" *Calvo v. Railroad Co.*, 23 S. C. 529, 55 Am. Rep. 28.

"Whether the employee whose negligence caused the injury was or was not a vice principal is determined by the nature of the functions which he was, as a matter of fact, discharging at the time when the injury was received, and not by the appellation by which he was designated." 4 Labatt (2d Ed.) § 1434.

"In other words the function of giving directions as to the proper manner of performing the work is not one of those absolute personal functions for the careful discharge of which a master is responsible, whatever agents he may employ." 4 Labatt (2d Ed.) § 1442.

"Servants employed at the same kind of work, except that one has authority to give directions to the other as to the manner of doing the work, are fellow servants." 4 Labatt (2d Ed.) § 1445, note, page 4175, citing *Postal Co. v. Hulsey*, 115 Ala. 193, 22 South. 854.

"The practical effect of this theory is that the defense of common employment is excluded or allowed to prevail, according as the delinquency in question was or was not a breach of what the law regards as a direct, personal, and absolute obligation, from which nothing but performance can relieve the master." 4 Labatt (2d Ed.) § 1479.

"If the act causing the injury is committed while the employee, however high his grade may be in other matters, is merely carrying out the details of the work, he is in respect to that act only a fellow servant, for whose negligence the master is not liable to other servants." 18 R. C. L. 747.

"If the delinquency of the foreman or boss consists in one of the nondelegable duties of the employer, the latter will be deemed liable, whereas if the fault is merely in respect of an act of service, as it is termed, no liability attached by reason thereof." 18 R. C. L. 753.

"It is the duty to be performed, and not the name of the officer, that determines this question." Mr. Justice Fraser, in *Halsall v. Railroad Co.*, 96 S. C. 308, 80 S. E. 467.

"It is the nature of the duty, and not the right to control, that governs this case" Mr. Justice Fraser, in *Williams v. Railroad Co.*, 105 S. C. 468, 90 S. E. 27.

"The fact that the pit boss was for some purposes a vice principal did not necessarily make him a vice principal in everything that he did. If he acted as an operative only, the liability of his master for his acts was not other or different from that which would result with reference to the acts of any other operative." *Cavanaugh v. Centerville Co.*, 181 Iowa, 700, 109 N. W. 363, 7 L. R. A. (N. S.) 907.

"One servant, however, may be, in relation to a coservant, a vice principal in one relation and a fellow servant in another, depending on the particular duties he is discharging at the time." *Norfolk & W. R. Co. v. Phillips*, 100 Va. 362, 41 S. E. 726.

In *Marks v. Railroad Co.*, 146 N. Y. 181, 40 N. E. 782, it is held in substance that the moment that an employee, not vice principal for general purposes, but who has authority to hire an emergency assistant, has completed such a hiring, and after having resumed his place as servant, enters upon the performance of his work as such, he ceases to represent the master, and becomes a fellow servant of the assistant for all purposes.

The responsibility of a master for the performance by a servant of the master's nondelegable duties is based upon the principle of "Qui facit per alium, facit per se," whether those duties be owing to a servant or a stranger; his responsibility to a stranger for the servant's delict in delegable duties is based upon the principle of respondeat superior, which in turn finds its support, not in substantive law, but in public policy. Public policy does not demand or justify that the master should be so responsible to an injured servant for a breach of the delegable duties by a fellow servant. He may sue the offending servant, but to make the master liable, unless that servant is taking the place of the master, is contrary to reason and justice, and has therefore no support in public policy.

Fortunately, for the sake of this great desideratum in the law, the principle has been definitely and certainly fixed in this state; the only difficulty remaining being the application of it to the facts of this particular case. If Atkins in the tortious act was performing, or attempting to perform, one of the absolute, nondelegable duties which the defendant as master owed to the plaintiff as servant, he was a vice principal, the representative of the master, and his negligence was the negligence of the defendant, for the consequences of which it must respond; if, on the other hand, the defendant as master had fully complied with

the several obligations due by it to the plaintiff as servant, and the tortious act of Atkins was a personal act of negligence on his part, a breach of his obligations to the common master, a delinquency in his service, a default in the details of the work, a misuse of the safe places or instrumentalities supplied by the defendant, while engaged with the injured servant in the common undertaking immediately in hand, Atkins and Leopard were, *pro hac vice*, fellow servants, and the defendant would not be responsible for the consequences of Atkins' carelessness.

The question may be determined upon the principle of exclusion, by defining in the first place the absolute, nondelegable duties of the master, and then by demonstrating that the act of Atkins was not committed in the furtherance of any of them. The terms "nondelegable" and "nonassignable," applied to the absolute duties of the master, do not happily convey the idea intended, for in a sense every duty of the master is assignable or delegable, and in the case of a corporation necessarily so; the simple term "absolute" more accurately defines a duty that is continuous upon the master, one which he cannot relieve himself of by delegating or assigning its performance to a servant.

The absolute duties of a master in the sense indicated are: To provide a reasonably safe place for the servant to work, and exercise reasonable care in maintaining it in that condition; to provide reasonably sound, safe, and suitable instrumentalities for the servant to work with, and to exercise reasonable care in maintaining them in that condition; to exercise reasonable care in the selection of competent servants and a sufficient number for the work in hand; to exercise reasonable care in the supervision of the servants and in the inspection of the place and instrumentalities provided; to promulgate rules reasonably adequate for the proper conduct of the work in hand; to warn the servant of concealed and unknown dangers; to warn inexperienced servants of the dangers of the work; and others which may have escaped attention.

The facts show, not only that not a single one of these duties, or any other that may be recalled, was neglected by the defendant as master, but, what is the nerve of the controversy, not a single one of them was delegated to Atkins, and, conclusively, that the act which he committed was not in the furtherance of any one of them.

The only contention that could possibly arise is that the act of Atkins made the plaintiff's place of work unsafe, and that that, therefore, constituted a breach of the master's duty in this regard. If that position were tenable, the immunity of a master from liability on account of the negligence of a fellow servant of the injured servant is a myth; for every act of a fellow servant caus-

ing injury to another renders the place of work for the time being unsafe. This contention is answered by the following authorities:

"The duty devolving upon the master to provide the servants a safe place to work, in the first instance, is one which cannot be delegated so as to relieve the master from liability on the ground that the negligence was the act of a fellow servant. So the master cannot escape liability by relying on the fellow-servant rule when the place of work afterwards becomes unsafe, and he knew, or ought to have known, of its unsafe condition and failed to remedy it within a reasonable time when a servant is injured by reason thereof. This rule does not extend, however, to negligent acts of a servant making a place unsafe, nor when the negligence relates to the details of arrangement and execution in keeping a safe place." 26 Cyc. 1322.

This court in *Jenkins v. Railroad Co.*, 39 S. C. 507, 18 S. E. 182, 39 Am. St. Rep. 750, quotes the following with approval, as the "statement of a learned judge" (*Howard v. Denver & R. G. Ry. Co.* [C. C.] 26 Fed. 837):

"So far as the place and machinery, both were safe. There is no pretense that the track was not in good order, or that the engines and other implements for the movement or control of the train were not sufficient. It will not do to say that because Ryan's engine was in the way and collided with decedent's train the track was not clear, and therefore the master had failed in his duty of providing a 'safe place' for the employees to work in and upon. The negligent use by one employee of perfectly safe machinery will seldom be adjudged a breach of the master's duty of providing a safe place for the employees. Such a construction would make any negligent misplacement of a switch, any collision of trains, even any negligent dropping of tools about a factory, a breach of the duty of providing a 'safe place.' The true idea is that the place and the instruments must in themselves be safe, for this is what the master's duty fairly compels, and not that the master must see that negligent handling by an employee of the machinery shall not create danger," etc.

The place was safe, the appliances were safe; the negligence consisted in the act of Atkins turning the cylinder without giving notice of his purpose to Leopard.

"The failure of an employee, in performing the work which he is directed to do, to give a fellow employee warning when doing an act which may endanger him, is not a fault attributable to the employer." 18 R. C. L. 714, citing *Desautels v. Cloutier*, 189 Mass. 349, 75 N. E. 703, 1 L. R. A. (N. S.) 669, 109 Am. St. Rep. 641.

Illustrations of the application of the principle demonstrate the correctness of the circuit judge's ruling.

In *Wilson v. Chemical Co.*, 78 S. C. 381, 58 S. C. 1019, the deceased was one of a gang of laborers under a foreman named Sanders, en-

gaged in shoveling rock loaded from the space in front of a door, through which rock loaded in cars was being unloaded into a building. Robinson was foreman of a gang pushing cars up to the door. The injury occurred from the failure to give notice of the approach of the car. The court held:

"Sam Robinson was foreman of the gang pushing the car. He and Sanders were nothing more than gang foremen, both working under the orders of Happolt, who was the boss in charge of all the laborers, referred to in the testimony. These foremen had no power to hire laborers, provide machinery, or the place of labor, or to do any duty imposed by law on the master. They were therefore fellow servants of the deceased, and the master is not responsible for their negligence."

In *Goodman v. Telegraph Co.*, 87 S. C. 449, 69 S. E. 1089, the injured servant was one of a telegraph line force engaged in stringing wires and working under a foreman named Melon, who had the authority of not only directing the squad, but of employing and discharging hands. The plaintiff was required to climb the pole and fasten the wire to the bracket; the line was then to be pulled tight by the men on the ground, but not until the plaintiff had notified them that it had been tied. Without notice from or warning to the plaintiff the wire was tightened prematurely, and he was jerked to the ground. The record is not entirely clear whether the foreman pulled the wire or gave the order therefor; but as the case went off upon the ground that the plaintiff and foreman were fellow servants, it is assumed that his negligent act was the cause of the injury. The court after quoting from 26 Cyc. 1364, declares:

"At the time of the injury the duties of Melon were in no way connected with the employment and discharging of servants, but he was merely discharging the duties of a fellow servant, as foreman of the gang."

In *Gibbes v. Phosphate Co.*, 93 S. C. 193, 76 S. E. 464, the plaintiff was injured by the fall of a pile of fertilizer sacks, which he alleged were negligently stacked up, not "tied," as they should have been, and that he was negligently ordered to work in this unsafe place by the foreman. It appeared that the offending servant was not only a foreman, but a common laborer along with the plaintiff. The court held that the foreman was not a vice principal, and that the case was ruled by the *Brabham and Martin Cases*, which established the relation of fellow servants between the plaintiff and the foreman. The distinction is clearly illustrated by the case of *Leopard v. Laurens Cotton Mills*, 81 S. C. 15, 61 S. E. 1029. There the plaintiff, a youth of tender years, was put to work in a cotton mill under a specific agreement with his father that he would not be put to work in a dangerous place. In-

dependently of that agreement, it was the duty of the master to warn the inexperienced youth of the dangers of the work assigned him; and, when the master delegated that duty to a subordinate, it was the delegation of a duty which the master owed the servant, nondelegable, and the subordinate was the immediate representative of the master, for whose negligence the master was responsible.

In *Koon v. Railroad Co.*, 69 S. C. 101, 48 S. E. 86, the distinction is also clearly illustrated. There the negligence alleged was a defective appliance which was selected by one otherwise a fellow servant of the injured servant. The court held that it was a non-delegable duty on the part of the master to exercise care in the selection of reasonably safe appliances, and that the servant who was charged with this duty was *pro hac vice* the representative of the master.

The case of *Hunter v. Alderman*, 89 S. C. 502, 71 S. E. 1082, is readily distinguishable from the case at bar. There the plaintiff was assured by the manager of the saw-mill that the mill would not run that day. He was down in the saw pit, engaged in sharpening and adjusting the saw. The foreman of a gang of laborers, who had authority to employ and discharge and to direct the fireman when to blow the whistle, ordered him to do so. The valve was opened, and the machinery operating the saw set in motion, causing the injury. The foreman was not engaged with the plaintiff in his work. The court held that:

"If it be true that the master assumed this special obligation to keep the place of labor safe by not starting the machinery, and it was started by the direction of a person who was intrusted by the master with the authority to require an act to be done which would start the machinery, such act would be the act of the master, and such person the representative of the master in that particular act."

In the case of *Alaska Mining Co. v. Whelan*, 168 U. S. 86, 18 Sup. Ct. 40, 42 L. Ed. 390, the injured servant was one of a squad engaged in breaking rock and preparing them to go in a chute, under the direction and control of a foreman. He was directed to break rock over one of the chutes, and while so engaged the foreman drew the gate at the mouth of the chute, causing the rock at the head of the chute to be suddenly drawn in, carrying the plaintiff with it, a distance of 30 feet, covering him with rock and debris, thereby greatly injuring him. The court directed a verdict for the defendant, holding:

"Finley [the foreman] was not a vice principal or representative of the corporation. He was not the general manager of its business, or the superintendent of any department of that business. But he was merely the foreman or boss of the particular gang of men to

which the plaintiff belonged. Whether he had or had not authority to engage and discharge the men under him is immaterial. Even if he had such authority, he was none the less a fellow servant with them, employed in the same department or business, and under a common head. There was no evidence that he was an unsuitable person for his place, or that the machinery was imperfect or defective for its purpose. The negligence, if any, was his own negligence in using the machinery or in giving orders to the men."

To the same effect is *Central R. Co. v. Keegan*, 160 U. S. 259, 16 Sup. Ct. 269, 40 L. Ed. 418.

(117 S. C. 106)

GRICE v. HANN et al. (No. 10701.)

(Supreme Court of South Carolina. Aug. 1, 1921.)

Master and servant — 287(7)—Negligence of employee in charge of dredge held for jury.

In an action for the death of an employee working on a dredge, where there was testimony that some of the machinery was old and defective, and that the place where the deceased was directed to work by one who was in charge of the dredge as the representative of the owner was unsafe, it was error to grant a nonsuit.

Cothran, J., dissenting.

Appeal from Common Pleas Circuit Court of Richland County; Edward McIver, Judge.

Action by Maggie Grice, administratrix, etc., against Harry F. Hann and others. From an order granting a nonsuit in favor of the defendant named, plaintiff appeals. Reversed and remanded for new trial.

The complaint was as follows:

The plaintiff alleges:

(1) That on the 28th day of September, A. D. 1918, James A. Grice, late of the county of Richland, state aforesaid, departed this life, intestate, and that by an order of the probate court in and for the county and state aforesaid, on or about the 14th day of April, 1919, the said Maggie Grice was duly appointed administratrix of the estate of James A. Grice, deceased, and as such is authorized and directed to bring this action for the benefit of herself and her children, who are Edwin Grice, Katie Grice, Inez Grice, Thomas Grice, James Grice, Jeanette Grice, and Maggie Grice, and that plaintiff, Maggie Grice, the wife, and the children, as aforesaid are the only heirs at law of the said James A. Grice; that this action is brought for their benefit; that the said wife, Maggie Grice, and the said children were dependent upon the said James A. Grice for a livelihood.

(2) That the defendant Harry F. Hann was and now is a contractor, doing business and maintaining an office therefor at Camp Jackson, in the county of Richland, state of South Carolina, and at the times hereinafter mention-

ed, was engaged in operating a certain dredge by the name of Mary Mahone, used in dredging a certain creek, known as Gill creek, on or near the Child's place in the county and state aforesaid; that the defendant Grant Collins was in the employ of the defendant Harry F. Hann, and as such was engaged as a watcher, or lookout, upon said dredge, whose duty it was to give signals to warn plaintiff's intestate and other employees of any danger in the operation of said derrick in said dredging.

(3) That on or about the 28th day of September, 1918, the plaintiff's intestate James A. Grice, was in the employ of the defendant Harry F. Hann, and as such was engaged as a mechanic; that while not engaged as a mechanic plaintiff's intestate was engaged as a laborer; that while engaged in the duties as a laborer for the defendant Harry F. Hann, on said dredge known as the Mary Mahone, on or about the 28th day of September, 1918, the plaintiff's intestate was instructed by the defendant to go into the said creek for the purpose of placing a chain around a slippery log that had for some time slipped off the dredge bucket, each time it was brought out of the water, and in order that said log might be removed from said creek; and to reach said log plaintiff's intestate had to leave the dredge-boat and go upon the bank of said stream, and while going along the narrow ledge on the edge of the water and between the creek and the bank which rose up abruptly for about six or eight feet from the level of the water to the level of the ground above, and before plaintiff's intestate had arrived at said log, the defendant, without notice or warning to plaintiff's intestate, caused and permitted the said derrick to move said log to the bank of the creek where plaintiff was, striking plaintiff's intestate with said log, and thereby injuring and killing him; that the aforesaid injury to and death of plaintiff's intestate was directly due to and approximately caused by the joint and concurrent negligence, wantonness, and, willfulness of the defendants under the foregoing circumstances, conditions, and relations of the parties in the following respects:

(A) In failing to use and furnish plaintiff's intestate safe and suitable machinery and appliances: (1) In that the said machinery used for removal of logs from said creek, did not have clamps or picks with which to hold the log so as to prevent it from falling on and killing plaintiff's intestate. (2) In not using chains to hold said log on the dredge bucket so as to prevent it from slipping and falling upon and killing plaintiff's intestate. (3) In failing to use grabhooks or similar appliances for the removal of slippery logs from the water and putting same out upon the bank.

(B) In failing to furnish plaintiff's intestate a safe place to work: (1) In that, after he was ordered by the defendant to the place where he received said injuries, the said derrick bucket and log was rapidly thrown over and upon plaintiff's intestate without warning and without giving him opportunity to escape. (2) In failing to use proper grabhooks, or similar appliances, and to chain and secure said slippery log to said derrick bucket before moving or throwing the same over to the place where said defend-

ants had directed plaintiff's intestate to go, without warning to him, and without giving him opportunity to escape. (3) In that there was not a plain and open view between the leverman or foreman in charge of the dredging operation and plaintiff's intestate, by reason of which said leverman could not see plaintiff's intestate, whom he had sent to chain said log, and as a result of which plaintiff's intestate was struck and killed by the log as it was thrown over on the bank.

(C) In failing to make reasonable inspection of said place, machinery, and appliances, as a reasonable inspection would have revealed the defects in said place, machinery, and appliances.

(D) In failing to notify plaintiff's intestate of the dangers, as aforesaid, of which he was unconscious.

(4) That by reason of the joint and concurrent negligence, willfulness, and wantonness of the defendant, as aforesaid, the plaintiff, as administratrix of the estate of James A. Grice, deceased, has been damaged in the sum of \$50,000, for which amount she asks judgment and costs.

The reasons assigned by the presiding judge in granting the nonsuit were as follows:

The Court: Gentlemen, this is a motion for a nonsuit. I have given this matter considerable and careful consideration, and have reviewed it in my mind and had the stenographer to look up certain of the evidence. I cannot see that there is anything to go to this jury. The parties litigant are held to the allegations of the pleadings. That makes the issue between the parties.

Now the allegations of the pleadings are that the injury was caused by the negligence of the defendant Grant Collins, combining and concurring with the negligence of the master himself, who was Mr. Hann. And Grant Collins admits in his answer his negligence, his liability, and joins in the prayer of the complaint for relief. Of course I cannot grant a nonsuit against him.

The testimony all goes to show that Mr. Chitwood, the man in charge, the representative of the master, Hann, was not there, and that, if there was any negligence on the part of the master that resulted in this accident, it was negligence of Ward. Mr. Chitwood, who was in charge of the whole work, and Ward himself, in answer to my questions, said that Grice was in charge of the work generally in the absence of Mr. Chitwood, but that he was not to interfere with Mr. Ward in the management of the machinery part of the work. And Mr. Chitwood, the man in charge, who assigned these various duties, said, in answer to my question, that, under the employment of Grice he was not subject to order of Ward, and he did not have to obey his instructions, or his directions, or his orders, but that he was merely expected, while he was not engaged in work he was actually employed to do, to render such assistance as he might. I cannot see that he could be anything more than a fellow servant with Ward. He was in charge generally, under the testimony, of the whole work when Chitwood was not there. Of course if the injury was the result of negligence on part of a fellow servant, un-

der the law he would not be entitled to recover, and do not see how Ward could be more than a fellow servant, if he was not even under Grice.

Then, too, all the testimony on the part of the operators of this machine was that Mr. Grice was an experienced man, perhaps the most experienced of the whole crowd there; that he undertook to do these things because he understood it better; that he had engaged in this kind of work; that he knew what it was; and I cannot see why, under the law, there is not an assumption of risk naturally incident to the doing of the work he was employed to do.

Under those circumstances, I cannot see how the plaintiff has made out his case. It seems to me that he has one theory in the complaint and another theory in the testimony. The theory in the complaint was that Grant Collins was negligent, but certainly that is not the theory of the testimony.

I am obliged to grant a nonsuit to Harry Hann. Of course, if the plaintiff wishes to proceed against Collins under his admission in his answer, I think that they would be entitled to do so.

The exceptions for appeal were as follows:

That the presiding judge erred in ruling that there was no testimony to go to the jury and granting the defendant Hann's motion for a nonsuit, and in holding:

(1) That under the testimony in the absence of Chitwood, who was in charge of the whole work, Grice (plaintiff's intestate) was in charge of the work generally, but was not to interfere with Ward in the management of the machinery part of the work, and was a fellow servant of Ward, if not his superior. While he should have held from the undisputed testimony: (1) That Grice, the plaintiff's intestate, was employed as machinist, but when not engaged as machinist it was his duty to help under Ward's (the dredgor's) direction, in tying logs to the dredge bucket, and so to aid in the dredging operation. (2) That Ward, the dredgor, was in complete charge and control of the operation of the dredge, and as such was the representative of the master, Hann, in such operation, and was not subject to the orders or direction of Grice, and was not a fellow servant with Grice in such operation of the dredge. (3) That as such representative of the master, Ward had the right to call on Grice to tie the log in question on the dredge bucket, and that Ward and Grice were not fellow servants. (4) That there was no evidence of contributory negligence on the part of Grice. (5) That Ward as a representative of the master, Hann, was negligent in failing to keep the way safe for Grice, by operating the dredge and throwing the log in question swiftly upon the bank along the edge of the ditch and striking Grice therewith knowing that Grice had set out to chain the log, and was on the bank in a position where he would likely be struck and injured if the dredge were operated and the log thrown to the bank while he was there in response to Ward's direction and request, and without giving him warning and opportunity for escape. (6) That Ward, the representative of the master, having directed Grice to chain the said log, and having

brought the log to the surface of the water, was negligent in failing to keep the dredge bucket and log stationary until Grice could chain it to the bucket, and in throwing the same over to the place where he had directed Grice to go, without warning to him or giving him opportunity for escape.

(2) That his honor erred in not holding that there was evidence to go to the jury upon the question of negligence of the master in failing to furnish safe and suitable machinery and appliances for the removal of logs from the ditch in the dredging operation, and which, if furnished, would have prevented the accident, and in not refusing the motion for nonsuit.

(3) In not holding that there was sufficient evidence to go to the jury, and in not submitting same to the jury upon the following questions: (1) That Grice was employed as machinist, and when not employed as machinist was employed to help generally about the work, and that it was his duty to help under Ward's direction in the tying of logs to the dredge bucket, and that Ward and Grice were not fellow servants in the operation of the dredge. (2) That Ward was in complete control and charge of the dredging operation, and was the representative of the master, Hann, therein, and was not under Grice, nor subject to his orders, and that Ward and Grice were not fellow servants in the operation of the dredge. (3) That Ward, as a representative of the master, had the right to call on Grice to tie the log in question to the dredge bucket, and in so doing the relation of Grice and Ward was not that of a fellow servant. (4) That the injury to Grice was caused by the negligence of Ward, the representative of the master, in throwing said log towards and upon Grice without warning or opportunity of escape, while Grice was in a position where he had gone under the direction of Ward, and also by the negligence of the defendant, Collins, in not warning Grice of the approach of the bucket, and in not warning Ward not to throw the log over upon Grice. (5) If there was any evidence from which the contributory negligence of Grice might be inferred, that question should have been submitted to the jury. (6) That it was the duty of Collins to give warning to both Grice and Ward, he being in a position to see the danger to Grice when Ward could not, and that he was negligent in not so doing.

(4) That his honor erred in holding that Grice, under the circumstances disclosed by the evidence, assumed the risk of Ward's throwing the log over upon him as an incident of his work, whereas he should have held that, Ward having directed Grice to go to the place where he was hurt, Grice had the right to assume, and act upon the assumption that Ward would not render the place whither he had sent him unsafe for the operation of the dredge and bucket, without ample notice or warning to him and opportunity for him to get out of the way.

(5) That his honor erred in not holding that the question of assumption of risk, under the facts and circumstances disclosed by the testimony, was for the jury, and in not submitting such question to them, and overruling the motion for nonsuit.

(6) That his honor erred in holding that there was one theory of the case in the plead-

ings and another in the testimony, and that there was no evidence of negligence of the defendant Grant Collins in failing to give warning to both Ward and Grice, whereas he should have held that the negligence of Grant Collins in failing to give warning, combined with the negligence of Ward, the representative of the master, in operating the dredge and throwing the log over and upon the said Grice, under the circumstances disclosed by the testimony, was the direct and proximate cause of the injury and death of Grice, for which the master was liable, and in not overruling the motion for a nonsuit.

(7) That his honor erred in not holding that there was evidence of a joint and concurrent negligence of Ward and Collins, under the circumstances disclosed by the testimony, and in not submitting the question to the jury, and overruling the motion for a nonsuit.

(8) That his honor erred in not holding that the defendant Collins, having by his answer admitted his negligence, that there was sufficient evidence of the negligence of Ward, as a representative of the master, combining and concurring with the admitted negligence of Collins as a proximate cause of the injury, to carry the question of joint and concurrent negligence of the defendants to the jury, and in not submitting the same to the jury, and overruling the motion for a nonsuit.

(9) That his honor erred in not holding that, although under the general employment Grice did not have to obey the orders or directions of Ward to go out and tie the logs, having volunteered to do so when so called on by Ward, Grice placed himself in the position of acting under the direction of the representative of the master, Ward, and recognized the authority of Ward to so direct him, and was entitled to have the place to which he was directed to go by the master's representative kept safe while he carried out the directions of the representative, and was not guilty of contributory negligence in so doing, and is entitled to recover for the negligence of the master or his representative in failing to keep the same safe, and thereby causing his injury and death.

(10) That his honor erred in not holding that if the master put plaintiff's intestate to work where he got hurt, and failed to keep the place safe, by reason of which he received the injury causing his death, the issue of fellow servant does not enter into the case, and that there was evidence upon this point, and in not overruling the motion for a nonsuit.

(11) That his honor erred in not holding that there was evidence to go to the jury of the negligence of the master in failing to provide a safe place for Grice to work, and that under said evidence the master was responsible if injury resulted to the servant, notwithstanding the negligence of a fellow servant might have contributed to the injury as a proximate cause.

Halcott P. Green, of Columbia, and John K. Hamblin, of Union, for appellant.

F. G. Tompkins and H. N. Edmunds, both of Columbia, for respondent.

GARY, C. J. This is an appeal from an order on nonsuit, in favor of the defendant Harry F. Hann, after which the case against

the defendant Grant Collins was withdrawn from the jury, without prejudice.

In order to understand the questions involved, it will be necessary for the complaint (except the formal parts thereof), the reasons assigned by his honor the presiding judge in granting the nonsuit, and the exceptions, to be reported.

There was testimony to the effect that E. C. Ward was in charge of the dredge, as the representative of the owner, Harry F. Hann, at the time of the injury, that some of the machinery which was used was old and defective and that the place where E. C. Ward as the representative of the master directed the deceased to do the work assigned to him was unsafe. His honor the presiding judge was therefore in error in granting the nonsuit.

Reversed and remanded for new trial.

WATTS and FRASER, JJ., concur.

COTHRAN, J. (dissenting). It appears to me that the plaintiff has alleged certain specific acts of negligence in the complaint, and now seeks to recover damages, or rather in this appeal to reverse the order of nonsuit, upon an entirely different theory. She brings her action against the intestate's employee, H. F. Hann, and a coemployee, Grant Collins, alleging that the injuries resulting in the death of the intestate, James A. Grice, were caused by the joint and concurrent negligence of the employee Collins. In a general statement (paragraph 4) the complaint alleges that all of the acts of negligence specified were the joint and concurrent act of those two defendants. Among these acts of negligence are breaches of duty which the defendant Hann as master owed to the intestate, and in which the codefendant Collins could not have participated and could not have been responsible for. Other acts of negligence are necessarily charged to the codefendant Collins as the representative of the master for whose negligence the master was sought to be held liable; the complaint alleging that Collins was in the employment of Hann, "and as such was engaged as a watcher or lookout upon said dredge, whose duty it was to give signals to warn plaintiff's intestate and other employees of any danger in the operation of said derrick in said dredging." The particular acts of negligence of a servant of Hann for which he was sought to be held liable are plainly alleged in the complaint to have been those of Collins.

The plaintiff is now endeavoring to reverse the order of nonsuit, not upon the ground that the evidence tended to establish these alleged acts of negligence on the part of Collins, but that it tended to establish acts of negligence on the part of Ward, another employee, whose conduct is not relied upon in

the complaint, and whose name is not even mentioned.

The inquiry should therefore be: (1) Is there any evidence in the case tending to show any breach as alleged of the duty of the master? (2) Is there any evidence in the case tending to show any breach as alleged of the duty of the defendant Grant Collins?

It is apparent that under the allegations of the complaint the plaintiff has no right to rely upon any inferences of negligence which might be drawn from the conduct of Ward, for the simple reason that there is nothing in the complaint to connect Ward with the injury, and the defendant is entitled to a restriction of the plaintiff to the acts of negligence alleged in the complaint.

The facts which are not in dispute appear to be as follows: The defendant Hann was a contractor, engaged in dredging a creek; he was using what is called a "dipper dredge," which is a boatlike affair, operated by steam. From the front platform of the dredge a boom or crane extends at an angle, reaching out some distance ahead of the dredge proper. Upon this boom or crane is another appliance, a shaft, upon the end of which is attached a dipper or bucket. The boom or crane, the lower end of which is attached to the platform, has a lateral movement, and the shaft to which the bucket is attached a vertical movement; by means of pulleys, wire cables, and levers, the boom or crane is shifted from one side of the stream to the other, and the bucket is lowered from one side of the stream to the other, and the bucket is lowered into the mud, scoops up a load, is raised to the level of the bank, shifted by the lateral movement of the boom to the edge of the bank and by the release of the doors at the bottom deposits its load on the bank. In the progress of the work submerged logs were encountered, which were difficult to balance on the bucket and raise. Just before the accident a particular log had been encountered. Several efforts had been made to balance it on the bucket and raise it 'out of the stream and on to the bank without success. At this time there were three men engaged in the operation of dredging; Grant Collins, E. C. Ward, and the intestate, J. A. Grice. Their relative ranks will be discussed later. Ward was the leverman, in charge of the steam power and the lever and other appliances which shifted the boom or crane in position and lowered, raised, shifted, and unloaded the bucket. Collins was on the platform to give signals to Ward, the leverman. Grice was the machinist of the outfit. After the efforts to raise the sleek log with the bucket had failed, it was decided to raise it to the surface of the water and chain it to the bucket; Ward, the leverman, "requested" Grice, the machinist, to take a pair of tongs and a chain, and when he raised the log to the surface to chain it to the bucket. Col-

lins was directing the movement and in a position to warn Grice of danger. Evidently when the log was raised to the surface it was balanced on the bucket, and the idea of chaining it was abandoned by Collins. In the meantime Grice was walking towards the point where the bucket would emerge, along a narrow ledge between the water and the comparatively steep side of the cut. The log balanced upon the bucket was raised to about the level of the bank of the cut, and as the attempt was made to shift the boom or crane around and deposit the log on the bank out of the way, one end of it struck either the bank or other obstruction, the other end slued around, striking Grice and fatally injuring him.

Much attention is given both in the testimony and in the printed arguments to the question whether Ward or Collins was the representative of the master upon the occasion in question. The respondent in his printed argument admits that Collins was working under Ward, and could not therefore have been the representative of the master, although his complaint is based upon the theory that Collins was such, so far as the negligence particularly charged to him was concerned. Accordingly, if the negligence was that of Collins, the plaintiff admits inability to recover, as under those circumstances Grice and Collins would clearly be fellow servants.

As to Ward: The conclusions of the circuit judge upon this subject are clearly sustained by the testimony. He says:

"The testimony all goes to show that Mr. Chitwood, the man in charge, the representative of the master, Hann, was not there, and that if there was any negligence on the part of the master that resulted in this accident, it was negligence of Ward. Mr. Chitwood, who was in charge of the whole work, and Ward himself, in answer to my questions, said that Grice was in charge of the work generally in the absence of Mr. Chitwood, but that he was not to interfere with Mr. Ward in the management of the machinery part of the work. And Mr. Chitwood, the man in charge, who assigned these various duties, said, in answer to my question, that, under the employment of Grice he was not subject to order of Ward, and he did not have to obey his instructions, or his directions, or his orders, but that he was merely expected, while he was not engaged in work he was actually employed to do, to render such assistance as he might. I cannot see that he could be anything more than a fellow servant with Ward. He was in charge generally, under the testimony, of the whole work when Chitwood was not there."

Chitwood, Collins, and Ward all testified that while Ward had the right to call on Grice to assist in chaining the log, Grice was not obliged to obey him. Ward testified that he "didn't claim to be over Grice in any

way"; that "Grice was representing Mr. Chitwood (the captain foreman) when he was not there." Collins testified: "To a certain extent, Mr. Grice was acting foreman."

Under the law, however, it was immaterial whether the rank or grade of Ward was superior to that of Grice, whether or not Ward was vice principal; for they were both engaged at the time in the common enterprise of removing the log from the stream, and pro hac vice, they were fellow servants, regardless of their respective grades or ranks. See authorities upon this subject quoted in the opinion of the writer in the case of *Leopard v. Beaver Duck Mills*, 108 S. E. 190, recently filed.

The suggestion that any of the instrumentalities were defective and worn cannot be relied upon, for the reason that there is no allegation of such fact in the complaint.

The testimony does not show that the master failed in any duty which he owed to the servant in the furnishing of a reasonably safe place to work or reasonably safe instrumentalities with which to work; it clearly demonstrates that whatever lack of safety existed in either was due to the want of care on the part of the intestate or negligence on the part of his fellow servants, and that if there had been any lack of safety in either the intestate was thoroughly familiar with the entire situation and the dangers, if any, and would be held to have assumed the risk of injury from their operation, particularly as to alleged defects in the machinery, the repair of which was a part of his own duties.

The judgment below should therefore be affirmed.

(130 Va. 548)

TRAYLOR v. ATKINSON et al.

(Supreme Court of Appeals of Virginia.
June 16, 1921.)

1. Appeal and error \S 790(3)—Question held not moot, though it was settled in other suit.

On appeal from a decree holding that purchaser at partition sale was not entitled to be released from the purchase by reason of a cloud raised by a suit attacking the title, the fact that pending an appeal the alleged defect or cloud upon the title disappeared by expiration of time for appeal in that suit did not render the question as to the lower court's action in refusing to release the purchaser moot, so as to require dismissal of appeal.

2. Partition \S 109(4)—Purchaser at partition sale takes subject to clouds upon title.

One purchasing land at a partition sale, title to which was under a cloud, consisting of a suit attacking a deed, which latter suit was referred to in the bill in the cause, was charged with knowledge of the existence and purpose of such suit, and, upon confirmation of the sale,

took the title subject thereto, and, judgment having been entered establishing the validity of the deed, purchaser was bound to raise the question concerning the right of appeal by the party attacking the title before confirmation of the sale; the court having allowed ten additional days for the express purpose of an examination of the title.

3. Judicial sales ¶52—Court never warrants title to land sold under decree.

The court never undertakes to warrant the title to land sold under its decree, and a purchaser at a judicial sale buys at his own risk, but is entitled to relief on the ground of fraud or after-discovered mistake of material facts.

Appeal from Chancery Court of Richmond.

Suit by Ethel Walker Atkinson, in her own right and as administratrix c. t. a. of the estate of her mother, Belle V. Atkinson, against the heirs, for a settlement of the estate and a partition sale of certain realty. From the decree of sale Annie G. Traylor, purchaser, appeals. Affirmed.

R. E. Byrd, R. B. Gwathmey, and Fulton & Wicker, all of Richmond, for appellant.

Brockenbrough Lamb, C. V. Meredith, and R. H. Talley, all of Richmond, for appellees.

KELLY, P. The question in this case is whether the appellant, Mrs. Annie G. Traylor, is entitled to be released from the purchase of certain real estate, sold and confirmed to her under a judicial sale. The lower court held that she was not so entitled, and thereupon she obtained this appeal.

The material facts are these: Mrs. Belle V. Atkinson had a complete record title to the lot known as 811 East Grace street, in the city of Richmond, subject to certain uncontested incumbrances not material here, and disposed of the same by will. This suit was brought in the chancery court of the city of Richmond by Ethel Walker Atkinson, in her own right and as administratrix c. t. a. of the estate of her mother, Belle V. Atkinson, for a settlement of the estate and a partition sale of the lot. The bill was filed in October, 1919. On that date there was pending in the same court another suit wherein Lucy Claire Dudley, a daughter, and Henry Dudley, a grandson of the testatrix (the latter being under age and suing by next friend), were attacking the validity of the deed under which she claimed title to the lot. The bill in the present suit alleged that the suit of Dudley v. Atkinson had been "decided in favor of the defendants, and confirms the title and ownership of Belle V. Atkinson, but the final decree in the said suit has not yet been entered." A few days later, on October 23, 1919, a final decree was entered therein, dismissing the bill, and thus ending the attack on the title of the testatrix; no suspension being asked or provided for, and

the decree therefore becoming effective at once. No appeal from that decree was sought, and it appears that none was ever contemplated.

On August 13, 1920, Henry Dudley, who had then attained his majority, and Lucy Claire Dudley expressly waived their right of appeal by written agreement under seal; and, furthermore, when this appeal was argued, the right of appeal in the Dudley suit was barred by the expiration of the statutory period of one year.

In the meantime, under a decree of sale in the instant case, the Grace street lot was, on February 25, 1920, sold at public auction, and the appellant, Mrs. Annie G. Traylor, offering the highest among a number of competitive bids, became the purchaser at the price of \$42,500, payable all cash, or, at the option of the purchaser, one-third cash and the balance in 6, 12, and 18 months, with interest. The commissioners reported the sale to the court, and on March 1, 1920, a decree was entered confirming the sale, "subject to an examination of the title within 10 days."

It appears from the report of the special commissioners that on March 12, 1920, they met Mrs. Traylor, by appointment, at the office of Mr. Lee, the attorney who had been employed by her to examine the title, the object of this meeting on the part of the commissioners being to receive settlement from Mrs. Traylor in accordance with the decree of confirmation, and that they, on that occasion, were informed that Mrs. Traylor did not at that time have the necessary funds in cash to comply with her purchase, but would arrange to secure the same in a few days and make settlement. The special commissioners directed the attention of Mrs. Traylor and her attorney to the requirements of the decree, and an arrangement was then made pursuant to which she paid to the commissioners the sum of \$4,000, and the parties fixed upon March 26, 1920, as the day upon which she would complete the settlement. No question at that time was raised as to the sufficiency of the title. On the last-named date, March 26, the commissioners were informed by Mr. Lee that he had determined to advise his client not to accept the property, for the reason that the final decree in the above-mentioned Dudley suit had been entered less than a year prior thereto.

The foregoing facts with reference to the failure of Mrs. Traylor to comply with the terms of the sale were reported to the court, and a rule was issued against her to show cause why she should not be required to complete the settlement in conformity with her contract of purchase. In her answer to the rule she pointed out certain apparent objections to the title, but the allegations of the answer itself show that as to all of such de-

facts she was fully protected, with the exception of the alleged cloud on the title occasioned by the possibility of an appeal from the decree of October 23, 1919, in the Dudley suit. This answer to the rule expressed a willingness to take and settle for the property as soon as the title was "free of all valid objections."

Then followed a decree on the 29th of April, 1920, holding that the objections to the title (except as to two executed but unrecorded release deeds, which were thereby ordered to be recorded) were without merit, and ordering Mrs. Traylor forthwith to comply with her purchase. This decree, however, after reciting the fact that Mrs. Traylor had elected to take advantage of the credit terms allowed by the decree of sale, directed that "the purchaser's note for the last and final one-third of the purchase money, being the note to mature on February 25, 1921, be not disposed of or pledged by the court prior to the 23d day of October, 1920, and that no decree of distribution be entered in this cause making or directing any distribution of said last and final one-third of the purchase money, or any part thereof, prior to the 23d day of October, 1920." The manifest and admitted purpose of this latter provision in the decree was to protect Mrs. Traylor against any possible loss resulting from an appeal from and reversal of the final decree in the Dudley suit.

Mrs. Traylor continued in default, and on May 14, 1920, the commissioners notified her counsel that unless she should make settlement in a few days they would ask the court for an order directing a resale of the property at her risk. Following this notice, she filed her petition asking to be released entirely from her purchase, and on May 26, 1920, the court entered a decree holding that there was no merit in the petition, and ordering a resale at her risk, unless she complied with the terms of her purchase within 10 days from that date. This decree, however, before making these adjudications adverse to Mrs. Traylor, recited "that full justice cannot be done and the whole controversy ended in this cause without the presence of Henry A. Dudley as a party," and accordingly a guardian ad litem was appointed to defend his interests, reciting the appearance and answer of the said Dudley by his guardian ad litem, and the docketing and setting of the cause for hearing by consent as to him. It is admitted that the purpose of this provision, like that above referred to with reference to holding in abeyance a portion of the purchase money, was to protect Mrs. Traylor against a possible appeal from and reversal of the final decree in the Dudley suit.

Before coming to a consideration of the present appeal upon its merits, we must advert to the motion of the appellees to dis-

miss the same on the ground that the only point in controversy, as to the validity of the title, has now become a moot question. The argument upon this motion is that the possibility of an appeal from the decree of October 23, 1919, in the Dudley suit is the only objection urged against the title, and that this possibility has now been precluded by the lapse of time, and particularly by the above-recited written waiver of Lucy Dudley and Henry Dudley.

[1] It is perfectly clear that the question as to the right of appeal in the Dudley suit has now been ended, but it perhaps does not necessarily follow from that fact that the existence of the original defect, if defect it was, did not constitute a good defense to the rule against her, and a good ground for granting the relief asked for in her petition. It may be that substantial defects of title if timely objection thereto be made, entitle the purchaser to an absolute release as of the time of such objection, and do not lose their efficacy in this respect upon a subsequent removal effected by fortuitous causes. In this case it is contended on behalf of Mrs. Traylor that when she asked to be released there was a substantial defect in the title, which neither the court nor the parties could with reasonable certainty promise to remove; and that the provision which the court in its decrees of April 29 and May 26 made to this and were insufficient and of no avail. Without passing upon the soundness of this contention, we are nevertheless of opinion that, although the alleged defect or cloud upon the title has now disappeared, the question as to the lower court's action thereon before such disappearance is reviewable, and in that sense has not become moot. The motion to dismiss is therefore denied.

[2] Upon the merits of the case we have no difficulty whatever. We need not discuss the effect of the proceedings by which the court undertook to protect the purchaser against any loss resulting from possible future action by the Dudleys, or either of them, subsequent to the decree of October 23, 1919. The effort on the part of the court to afford Mrs. Traylor such protection (whether sufficient for the purpose or not, we need not decide), was entirely proper and just; but Mrs. Traylor could not, as a matter of right, demand any absolute protection against the alleged defect. The Dudley suit was referred to in the bill in this cause, and Mrs. Traylor, as the purchaser under a sale made herein, was charged with knowledge of the existence and purpose of that suit, and upon confirmation of the sale she took the title subject thereto. She does not claim to have suffered from any fraud or mistake in regard to it. It is true she says in her petition that she did not know about the right of appeal which the Dudleys might have, but if such

right of appeal in fact constituted a defect, she was bound to raise the question, if at all, before confirmation of the sale. The court gave her an additional 10 days, for the express purpose of examination of the title. At the end of that time she made no objection on any ground, and the sale then stood unconditionally confirmed. From that date she occupied the same position she would have occupied if she had purchased from a private individual under a contract for the sale of real estate entitling her to a conveyance with special warranty.

[3] The court never undertakes to warrant the title to land sold under its decree, and a purchaser at a judicial sale buys at his own risk. The law is clearly stated, and with peculiarly appropriate application to the case at bar, by Judge Burks in *Long v. Weller*, 29 Gratt. (70 Va.) 347, 351, as follows:

"In Virginia, the maxim caveat emptor strictly applies to all judicial sales. The court undertakes to sell only the title, such as it is, of the parties to the suit, and it is the duty of the purchaser to ascertain for himself whether the title of these parties may not be impeached or superseded by some other and paramount title; and if he have just grounds of objection for want or defect of title he should present them to the court before the confirmation of the report of sale. Ordinarily, objection after confirmation comes too late. *Young's Adm'r and Bowyer v. McClung et al.*, 9 Gratt. 336, 358; *Threlkeld's v. Campbell*, 2 Gratt. 198; *Daniel et al. v. Leitch*, 13 Gratt. 195, 212, 213; *Watson v. Hoy et al.* (not yet reported), *Virginia Law Journal*, August, 1877, p. 473 et seq., 28 Gratt. 698.

"These authorities would seem to be a sufficient answer to the pretension set up by the appellants in their answer to the rule for resale, to the effect that at the time they purchased the land and mill property, they believed that the right to the use of the entire road mentioned in the answer was annexed or appurtenant as an easement to the property purchased by them, and that since the purchase they have discovered that a claim has been asserted by a third party, which is probably right, and will deprive them of the use of the road, and thus seriously impair the value of the property purchased by them.

"This is nothing but an objection for defect of title. The title to the easement is necessarily connected with the title to the land to which it is appurtenant; and whatever the purchasers believed, they must be taken to know that they could acquire by their purchase only the title that the court sold, which was the title, whatever it might be, of the parties to the suit. They purchased at their own risk, and cannot be heard to object for want or defect of title, at least after confirmation of the sale."

In *Berlin v. Melhorn*, 75 Va. 639, 641, Judge Burks again says:

"We think it may be safely laid down, as a general rule, deducible from the authorities, that after a judicial sale has been absolutely confirmed by the court which ordered it, it will not be set aside except for fraud, mistake, surprise, or other cause for which equity would give like relief, if the sale had been made by the parties in interest, instead of by the court. But where the objection is to the confirmation, the rule is more liberal."

Citations of authority to the same effect as the above might be indefinitely multiplied. We will add only these: *Hickson v. Rucker*, 77 Va. 135, 138; *Kirk v. Oakey*, 110 Va. 67, 68, 65 S. E. 528, 135 Am. St. Rep. 915; *Headley v. Hoopengartner*, 60 W. Va. 626, 55 S. E. 744; 2 *Barton's Chy. Pr.* 1185; 1 *Hogg's Eq. Proc.* § 687; *Lile's Eq. Pl. & Pr.* § 264; *Burks' Notes on Conveyancing* (1906) § 99, p. 118.

Of course, this general rule is subject to the qualification that a purchaser, like a party to a private contract of sale, is entitled to relief on the ground of fraud or after-discovered mistake of material facts, but there is nothing in this case to bring it within that qualification.

The decree complained of is affirmed.

Affirmed.

(151 Ga. 624)

GILLESPIE et al. v. GILLESPIE.

GILLESPIE v. GILLESPIE et al.

(Nos. 2312, 2313.)

(Supreme Court of Georgia. June 17, 1921.
Rehearing Denied Aug. 12, 1921.)

(Syllabus by the Court.)

Evidence sufficient, and no error committed.

The verdict was supported by the evidence. The exceptions to the decree and the failure to charge are without merit.

Error from Superior Court, Gordon County; M. C. Tarver, Judge.

Action between W. J. Gillespie and others and Mrs. S. A. Gillespie. Judgment for the latter, and the former bring error, and Mrs. Gillespie files a cross-bill of exceptions. Judgments affirmed, and cross-bill dismissed.

M. B. Eubanks, of Rome, and J. H. Paschall, of Calhoun, for plaintiffs in error.

Lang & Lang and Geo. A. Coffee, all of Calhoun, for defendant in error.

HILL, J. Judgment affirmed on the main bill of exceptions; cross-bill dismissed.

All the Justices concur.

(151 Ga. 816)

HAMMOND v. MURRAY. (No. 2643.)

(Supreme Court of Georgia. Aug. 11, 1921.)

(Syllabus by the Court.)

1. Habeas corpus \Leftrightarrow 99(3)—Welfare of child is paramount consideration, and court has large discretion.

"In habeas corpus cases for the custody of a minor, the paramount consideration is the welfare and happiness of the minor, and in determining that the trial court is vested with a large discretion."

2. Habeas corpus \Leftrightarrow 99(2)—Court held not to have abused discretion in awarding child's custody to father though sister had procured appointment as guardian.

The evidence in this case examined, and held to show no abuse of discretion by the trial court in awarding the custody of the minor to the defendant, the father of the minor.

Error from City Court of Albany; Clayton Jones, Judge.

Habeas corpus by Mrs. W. A. Hammond against L. D. Murray. Judgment for defendant, and the petitioner brings error. Affirmed.

Mrs. W. A. Hammond filed a petition for habeas corpus against her father, L. D. Murray, to obtain the custody of Sarah Murray. Sarah Murray is the sister of the plaintiff and the daughter of the defendant. She is 13 years old. The defendant had been twice married. The plaintiff and Sarah Murray are daughters of the defendant by his first wife. About 10 years ago L. D. Murray was married a second time, and three children were born to him, the issue of this marriage. About 4 years ago the defendant, who was about to remove from this state, placed Sarah Murray in the care and custody of a female relative. After remaining with this relative for some time, the defendant, through his second wife and the stepmother of Sarah Murray, directed Mrs. Barbre, a daughter of the defendant by his first wife, to take possession of the child. At this time the defendant was a resident of another state. Subsequently Sarah Murray went to live with the plaintiff, Mrs. W. A. Hammond, who resided in Bibb county, this state. Mrs. Hammond was appointed guardian of the person of Sarah Murray by the ordinary of Bibb county, Ga. Some time thereafter Sarah returned to Dougherty county to visit her sister, Mrs. Barbre. From the home of Mrs. Barbre she went to her father's home in Dougherty county, who in the meantime had returned to the state. The judge of the city court of Albany, before whom the application for habeas corpus was brought, after hearing evidence, awarded the custody of the child to the defendant, L. D. Murray, and Mrs. Hammond excepted.

Claude Payton, of Albany, for plaintiff in error.

H. A. Peacock, of Albany, for defendant in error.

GEORGE, J. (after stating the facts as above.) [1, 2] The chief insistence of the plaintiff in error is that the judgment of the ordinary of Bibb county, appointing the plaintiff in error guardian of the person of Sarah Murray, is not open to collateral attack. The defendant in error testified in effect that he was a nonresident of the state at the time of the appointment of the plaintiff in error as guardian of the person of Sarah Murray; that he had not abandoned Sarah Murray, and had not failed to provide for her support and maintenance; that he had no notice or knowledge whatever of the application for letters of guardianship. The plaintiff in error, in addition to other evidence, introduced the letters of guardianship issued to her; and the exception is that the court abused his discretion in awarding the custody of the minor to the defendant in error, since the legal right to the custody of the minor was in plaintiff in error, as the guardian of the person of the minor, and the order appointing plaintiff in error as such guardian could not be collaterally attacked. No objection was made to the introduction of the evidence of the defendant in error indicated above, so far as the record discloses. The right of the defendant in error to attack collaterally the judgment of the ordinary was not therefore directly questioned. No ruling of the court upon the precise question was invoked. The trial court may have considered the legal right to the custody of the minor to be in plaintiff in error, and may have given no consideration to the evidence of the defendant in error, recited above.

While the evidence in the record strongly indicates that plaintiff in error is a proper person to have the care and custody of her sister, and the evidence to the contrary is meagre, there is some evidence tending to show that she was not a proper person to have the care and custody of the minor. There was also evidence tending to show that the father was a proper person to have the care and custody of his child, and that he was able to provide for the child in a manner suitable to her station in life. Upon the well-recognized principle that in habeas corpus for the custody of a minor the chief consideration is the welfare and happiness of the minor (*Lamar v. Harris*, 117 Ga. 993, 994, 44 S. E. 866), the trial court, in the exercise of the large discretion vested in him, may have awarded the custody of the minor in this case to the father, though recognizing the legal right of the plaintiff in error to the custody of the child by virtue of her

appointment as guardian of the person of the minor. Upon a careful consideration of the evidence in the record, this court will not reverse the judgment of the trial court.

Judgment affirmed.

All the Justices concur.

(151 Ga. 763)

McCLURE REALTY & INVESTMENT CO. v. EUBANKS et al. (No. 2350.)

(Supreme Court of Georgia. Aug. 10, 1921.)

(Syllabus by the Court.)

Insane persons **§—73**—When never adjudicated insane, lease cannot be avoided by person succeeding to interest in land.

"The contract of an insane person or one non compos mentis, who has never been adjudicated to be insane or of unsound mind as prescribed by the Code, is not absolutely void but only voidable." "Such a contract may be ratified [or avoided] by him upon afterward becoming sane or during a lucid interval, or, after his death, may be avoided or ratified by his heirs or personal representative." Other persons, such as the petitioners in this case, cannot avoid it.

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action by Mary J. Eubanks and another against the McClure Realty & Investment Company. Judgment for plaintiffs, and defendant brings error. Reversed.

This is an action brought by Mary J. Eubanks and Clara E. Zellars against the McClure Realty & Investment Company, for cancellation of a lease contract as to certain described realty, and for recovery of the premises and meane profits. The allegations of the petition in outline are as follows: For years prior to August 21, 1916, Margaret R. Fuller had been the owner and holder of a life estate in the property, the remainder in fee belonging to the petitioners. On that date Mrs. Fuller executed a contract leasing the premises to defendant for five years, defendant going into possession and since retaining it. In November, 1919, in a suit brought by Mrs. Fuller against Mrs. Eubanks and Mrs. Zellars in Fulton superior court—

"by certain decrees of the court, hereinafter more fully referred to, the life estate of the said Mrs. Fuller was by decree passed and conveyed to your petitioners, and became merged with their remainder interest, and they by said decrees became the holders of the title to the said property in fee simple. * * * In said case a settlement of the controversies therein involved was made, including a controversy over the land in question; and the court, after first appointing a guardian ad litem for Mrs. Margaret R. Fuller, on account of her mental weakness and incapacity, entered a de-

creed effectuating said settlement and decreeing absolute ownership of said property in petitioners, as heretofore recited. Said decrees are in record in this court, and profert thereof is made. In so far as they relate to the present controversy the decrees are material, in that they transfer the title of said life estate as heretofore set out, and after appointing a guardian ad litem because of Mrs. Fuller's mental weakness, and in that also they contain the following provision: "The defendants take the property without regard to the lease said to be held by C. W. McClure, if there be such a lease, but reserve the right to cancel that lease if they can, by law or otherwise."

The lease contract is void, and should be canceled, because at the time of its execution Mrs. Fuller was of unsound mind and mentally incapable of making a valid and binding contract, and the defendant procured the lease from her at a grossly inadequate rental, namely, at \$75 per month, whereas a reasonable rental was then at least \$300 per month, and is now \$500 per month. Petitioners have notified defendant that the lease is invalid, have refused to receive payment of rent at the rate of \$75 per month, have demanded that the rental be paid at its reasonable value, or else that the premises be surrendered; and that the defendant has refused to comply with these demands.

The defendant demurred to the petition generally and specially, but insisted only on the general demurrer, which was overruled, and the defendant excepted.

Weltner, Cheatham & Koplin, of Atlanta, for plaintiff in error.

Little, Powell, Smith & Goldstein, of Atlanta, for defendants in error.

FISH, O. J. (after stating the facts as above). The petition in this case does not disclose the exact character of the action brought by Mrs. Fuller against Mrs. Eubanks and Mrs. Zellars, nor the issues therein involved and decided, further than that case included a controversy over the land covered by the lease contract here sought to be canceled, that a guardian ad litem was therein appointed for Mrs. Fuller, "on account of her mental weakness and incapacity," that a settlement was made of the controversies in the case, and that a decree was rendered by which the life estate of Mrs. Fuller in the property, the subject-matter of the lease contract, was passed and conveyed to the petitioners in the present case, and that they were decreed to be the absolute owners in fee of the entire interest in the leased premises. The petition does not allege that Mrs. Fuller is not still in life, nor that she has not continued to be insane since the execution of the lease contract, nor that she has ever been adjudged to be insane, and a guardian appointed for her property. It will be presumed, therefore, that she is still alive and

insane, and not under guardianship. The petition does allege that Mrs. Fuller was insane at the time she executed the lease contract to the McClure Realty & Investment Company, defendant in this case, and that when the decree was entered in her case against Mrs. Eubanks and Mrs. Zellars she was represented by a guardian ad litem, appointed by the court "on account of her mental weakness and incapacity."

It is well settled in this state that—

"The contract of an insane person or one non compos mentis, who has never been adjudicated to be insane or of unsound mind as prescribed by the Code, is not absolutely void, but only voidable." *Bunn v. Postell*, 107 Ga. 490, 33 S. E. 707, followed in *Orr v. Equitable Mortgage Co.*, 107 Ga. 499, 33 S. E. 708, *Woolley v. Gaines*, 114 Ga. 122, 39 S. E. 892, 88 Am. St. Rep. 22, and *Perry v. Reynolds*, 137 Ga. 427, 78 S. E. 656.

This doctrine has been almost universally recognized by text-writers, and adjudicated cases on the subject.

"Such a contract may be ratified by [the insane person] upon afterward becoming sane or during a lucid interval, or, after his death, may be avoided or ratified by his heirs or personal representative." *Bunn v. Postell*, supra.

The right to disaffirm a voidable contract of an insane person is personal, and can be exercised only by himself, if restored to sanity; or if his infirmity continues till his death, then by his legal representative or his heirs; but neither the other party to the contract nor third persons can avoid it. In support of these legal propositions see the authorities cited in *Bunn v. Postell*, supra; and in 22 Cyc. 1174, notes 90, 92, 93, 94, 95, and page 1209, notes 24, 26, 27, 28; 16 Am. & Eng. Enc. Law, 629, note 2; 9 Eng. Enc. Law, 119, notes 2, 3, 4; 14 R. C. L. 592, notes 10, 12, 13; *Clark on Contracts* (3d Ed.) 231, notes 40, 41, 42, 43, 44; 1 *Devlin on Realty* (3d Ed.) § 73, note 8, and section 75, note 7; 3 *Tiffany on Real Property* (2d Ed.) 2342, note 65, and page 2344, note 71a; 1 *Jones on Real Property*, § 64, note 6; 1 *Williston on Contracts*, § 253, note 28; 1 *Elliott on Contracts*, § 382, notes 84, 85, 87; 4 *Elliott on Contracts*, 3221, notes 95, 3, 4, 5, 6. Also *Vogel v. Zuercher* (Tex. Civ. App.) 135 S. W. 737 (4); *Porter v. Brooks* (Tex. Civ. App.) 159 S. W. 192.

The petitioners in this case, who are seeking to disaffirm the lease contract of Mrs. Fuller on the ground that she was insane when it was executed, do not in any way represent her, nor claim to be proceeding in her behalf, but are contending that they, as her successors in interest and title under the decree referred to in the petition, for themselves have the right to have the lease contract canceled. We cannot, in view of the authorities above cited, concede the soundness of this contention.

Counsel for defendants in error rely upon

the two cases of *Breckenridge's Heirs v. Ormsby*, 1 J. J. Marsh. (Ky.) 236, 19 Am. Dec. 71, and *Clay v. Hammond*, 199 Ill. 370, 65 N. E. 352, 93 Am. St. Rep. 146. In both of these cases it was decided, in effect, that one to whom the grantor, after recovering his sanity transfers the property, has the same right to avoid a conveyance made by his grantor while insane, in favor of another person, as has the grantor himself; seemingly for the reason, as in the case of a conveyance by an infant, that the mere execution of an inconsistent conveyance by the grantor after the removal of his disability involves in itself a repudiation of the voidable conveyance. 3 *Tiffany on Real Property* (2d Ed.) 2345. These rulings are not directly applicable here, nor are they necessarily in conflict with our holding. Whether a guardian of an insane person can, by his own act, and without an order of a court of competent jurisdiction, avoid the contract or deed of his ward, executed while he was insane, and prior to an adjudication of his insanity and the appointment of a guardian, is not necessary to be decided in this case, as there was never an adjudication that Mrs. Fuller, under whom the petitioners claim as successors in interest or title, was insane, nor was a guardian ever appointed for her property. It is true that "on account of her mental weakness and incapacity" a guardian ad litem was appointed for her by the judge of the superior court in the suit she brought against the present petitioners, in which suit the decree was rendered upon which the petitioners base the contention of their right to disaffirm and have canceled the lease contract made between Mrs. Fuller and defendant here; and while under the allegations of the petition a settlement of the controversies involved in that case was made, "including a controversy over the land in question," and the decree rendered effectuated the settlement and adjudicated that the life estate of Mrs. Fuller was passed and conveyed to the petitioners here, and that they are the absolute owners in fee of the entire interest in the leased property, yet the McClure Realty & Investment Company was not a party to that case, nor was the validity of the lease contract it had with Mrs. Fuller directly brought in question, nor expressly decided, even if in the circumstances that could have been legally done. Moreover, the language quoted in the petition from the decree indicates that it was not the intention of the court to pass on the validity of the lease contract, as such language, in effect, declares that the petitioners here took the property without regard to the lease contract, and that they reserved the right to cancel it if they could.

From what has been said we must conclude that the court erred in overruling the general demurrer to the petition.

Judgment reversed. All the Justices concur.

GEORGE, J., concurs specially, because not enough of the pleadings in the case of Fuller v. Eubanks et al., and of the consent decree entered therein [to which the insane person's guardian ad litem consented], is set out in the petition in this case to enable the court to determine whether the insane person, through her guardian, disaffirmed the lease contract.

(27 Ga. App. 273)

COX v. PERKINS. (No. 11113.)

(Court of Appeals of Georgia, Division No. 1.
July 12, 1921.)

(Syllabus by the Court.)

1. Warrant of arrest not based on proper affidavit.

"An affidavit taken before a deputy clerk of the municipal court of Atlanta, not in the presence of a judge of that court, will not furnish a sufficient foundation for the issuance by a judge of the municipal court of Atlanta of a warrant to arrest an accused person." *Cox v. Perkins* (this case), 151 Ga. —, 107 S. E. 863, decided by the Supreme Court on June 18, 1921.

2. Demurrers erroneously overruled.

Under the above ruling by the Supreme Court, the trial court erred in overruling the first and second paragraphs of the demurrer to the plaintiff's petition.

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action between T. E. Cox and W. A. Perkins. Judgment for the latter, and the former brings error. Reversed in conformity to Supreme Court's answers to certified questions (107 S. E. 863).

McCallum & Sims, of Atlanta, for plaintiff in error.

Joseph A. Morris, of Savannah, and Geo. P. Whitman, of Atlanta, for defendant in error.

LUKE, J. Judgment reversed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(27 Ga. App. 323)

WALKER v. CITY OF CAIRO.
(No. 11926.)

(Court of Appeals of Georgia, Division No. 1.
July 28, 1921.)

(Syllabus by the Court.)

Municipal corporations — 555—Affidavit of illegality to execution for sidewalk assessment held good as against general demurrer.

Under the ruling in *Bacon v. Mayor and Aldermen of Savannah*, 86 Ga. 301(1), 12 S. E.

580, the court erred in sustaining the general demurrer to the affidavit of illegality and dismissing it.

Error from Superior Court, Grady County; John R. Wilson, Judge.

Proceeding on an affidavit of illegality filed by W. A. Walker to an execution in favor of the City of Cairo. The affidavit of illegality was dismissed, and Walker brings error. Reversed.

R. C. Bell and S. P. Cain, both of Cairo, for plaintiff in error.

E. D. Rivers, of Milltown, and Jeff A. Pope, of Cairo, for defendant in error.

BLOODWORTH, J. The clerk of the city council of Cairo is authorized under the charter of the city to issue executions to enforce the collection of assessments for street improvements. See Act Aug. 19, 1911 (Ga. L. 1911, p. 884, § 6). The section here cited provides also that—

"The defendant shall have the right to file an affidavit of illegality denying that he owes the same or some part of the sum for which the said execution was issued, and in case he admits owing any amount, stating what amount is due, which amount so admitted shall be paid or collected before the affidavit is received, and the affidavit for such balance, and all affidavits may be filed under this section shall be received, and returned to the superior court of Grady county and there to be tried and the issue determined as in cases of illegality, subject to all the pains and penalties provided in cases of illegality for delay."

An execution was issued against W. A. Walker for the amount assessed against him for certain "sidewalk paving." After this execution had been levied on his property Walker filed an affidavit of illegality, the fifth ground of which, after being amended, is as follows:

"Because the items for which said fi. fa. issued to collect constitute no valid charge as against this affiant, and he is not liable therefor. Defendant denies that he owes the sum for which said execution issued, and denies that he owes any part thereof."

To this affidavit of illegality the city filed a general demurrer and special demurrers. The trial judge overruled the special demurrers, but sustained the general demurrer and dismissed the affidavit of illegality. The defendant excepted. Under the ruling in *Dixon v. Mayor and Aldermen of Savannah*, 20 Ga. App. 511, 93 S. E. 274, ground 5 of the affidavit of illegality would have been subject to a timely and proper special demurrer, but that question is not now before us. The only question for our consideration is: Did the court err in sustaining the general demurrer and dismissing the affidavit of ille-

gality? In *Bacon v. Mayor and Aldermen of Savannah*, 86 Ga. 301(1), 12 S. E. 580, it was held:

"Where the same statute which confers authority for issuing an execution to enforce the payment of an assessment made upon abutting property to defray the cost of improving the street on which such property abuts provides that the defendant shall have the right to file an affidavit denying that the whole or any part of the amount for which the execution issued is due, an affidavit which in one of its grounds sets forth such a denial in express terms as to the whole and every part, entitles the defendant to a trial upon all questions of law and all open questions of fact involved in the controversy."

Under this ruling the judge erred in the case now under consideration in sustaining the general demurrer and dismissing the affidavit of illegality. See *Mayor and Council of Gainesville v. Dean*, 124 Ga. 750(1), 53 S. E. 183.

Judgment reversed.

BROYLES, C. J., concurs.
LUKE, J., disqualified.

(27 Ga. App. 324)

PAYNE, Federal Agent, v. CHESHIRE.
(No. 11956.)

(Court of Appeals of Georgia, Division No. 1.
July 28; 1921.)

(Syllabus by the Court.)

1. Carriers §104—In action for delay evidence of congestion held properly excluded.

The court did not err in excluding from the jury "the testimony of Mr. Walker and Mr. Woodall in so far as anything they may have said tended to bear on the question of the unusual congestion of freight."

2. Certiorari §36—Question as to measure of damages not raised on trial could not be raised on review of judgment on certiorari.

The writ of certiorari lies for the correction of errors committed by the trial court. Accordingly, this court will not consider any question not passed upon by the trial court, but raised for the first time in the briefs of counsel for the plaintiff in error in this court.

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action by T. J. Cheshire against G. B. Payne, federal agent. Judgment for plaintiff, and defendant brings error. Affirmed.

T. J. Cheshire brought suit in the municipal court of Atlanta against Walker D. Hines, Director General of Railroads. When federal control was terminated, under the provisions of the Transportation Act of 1920, John Barton Payne, as federal agent, auto-

matically became the defendant. The petition alleged that on May 7, 1918, there was delivered to the defendant's agents at Norfolk, Va., for the purpose of transportation to Atlanta, Ga., 30 cases of fresh cakes, which were consigned to the plaintiff, and that he was damaged by the negligence of the agents of defendant, in that the cakes "were not delivered to plaintiff in Atlanta until the 16th day of May, 1918, and, when they were delivered, such cakes of bakery goods were badly spoiled and deteriorated, and largely unmerchantable, to the damage and injury of petitioner in the sum of \$281.12." This amount was arrived at by deducting the salvage from the invoice price of the goods. The defendant denied liability. On the trial of the case the plaintiff introduced a bill of lading, issued May 7, 1918 (on which was indorsed "too late for to-day's forwarding"), and a waybill "from Portsmouth, dated May 8, 1918, showing that the car was received at Howells (near Atlanta) at 2:50 a. m. Sunday, May 12th, and that it was placed at Spring Street (Atlanta) at 3 a. m., May 15th, and was delivered by Morrow Transfer Company on May 17th." The plaintiff showed also that the cakes when delivered at Norfolk were in good condition, but that when they were delivered to him in Atlanta they "were moldy and were not fit for human consumption," and were sold for hog feed. The defendant sought to show that the delay was caused "by an accident to another freight train," and "on account of all available power being used to handle troops," and the consequent congestion of freight resulting from these causes. After excluding certain evidence, the court directed a verdict for the plaintiff. To these rulings the defendant excepted.

Lovick G. Fortson and Randolph & Parker, all of Atlanta, for plaintiff in error.

Chas. E. Cotterill and Jos. H. Ross, both of Atlanta, for defendant in error.

BLOODWORTH, J. (after stating the facts as above). [1] 1. In the condition in which we find the record in this case we cannot say that there is any merit in the exception that the court erred in excluding from the jury "the testimony of Mr. Walker and Mr. Woodall in so far as anything they may have said tended to bear on the question of unusual congestion of freight," the objection urged thereto being that "the defendant has failed to couple it up, or to show that it was accidental, or that they had no opportunity to foresee it, or that they gave notice."

[2] 2. In the bill of exceptions error is assigned on "the judgment of the court directing a verdict," because "the same is contrary to law and the evidence." In support of their contention, counsel for the plaintiff in error insist in their brief that "no proof

[was] made as to the market value of the cake at the time and place when it should have been delivered." In the trial of the case the plaintiff confined his claim and his proof of damages to the invoice value of the goods, plus the freight which he had prepaid, and it does not appear from the record that the defendant made in any way in the trial court the point that the plaintiff had chosen an incorrect measure for his damages. This point was raised for the first time by counsel for the plaintiff in error in their brief filed in this court. The writ of certiorari lies for the correction of errors committed by the trial court. Accordingly, this court will not consider any question not passed upon by the trial court, but raised for the first time in the briefs of counsel for plaintiff in error filed in this court. *Masters v. Southern Express Co.*, 23 Ga. App. 642 (1), 99 S. E. 144; *Davis v. Town of Gibson*, 24 Ga. App. 814, 102 S. E. 466, and citations; *Fox v. State*, 151 Ga. —, 104 S. E. 631, 632.

Judgment affirmed.

BROYLES, C. J., and LUKE, J., concur.

(27 Ga. App. 322)

OWENS v. STATE. (No. 12583.)

(Court of Appeals of Georgia, Division No. 1.
July 26, 1921.)

(Syllabus by the Court.)

1. Criminal law §942(1) — New trial not granted for newly discovered evidence to impeach only witness on vital point.

"Though the witness sought to be impeached by newly discovered evidence was the only witness against the prisoner upon a vital point in the case, if the sole effect of the evidence would be to impeach the witness, a new trial will not be granted." *Arwood v. State*, 59 Ga. 391 (1), *Key v. State*, 21 Ga. App. 795 (1), 95 S. E. 269, and citations. Under the above ruling there is no merit in the grounds of the motion for new trial based upon alleged newly discovered evidence.

2. Criminal law §913(4)—Sentence cannot be attacked by motion for new trial.

"Objection that a sentence imposed in a criminal case is excessive, or for any reason illegal or irregular, cannot be properly made

the ground of a motion for a new trial." *Burgamy v. State*, 114 Ga. 852 (2), 40 S. E. 991, *Campbell v. State*, 24 Ga. App. 130 (3), 131 (3), 100 S. E. 18, and citations.

3. Criminal law §828, 1064(7)—Motion for new trial complaining of charge held too general and indefinite; fuller charge on particular issue should have been requested.

The last ground of the motion for a new trial alleges that the charge of the court "does not in its entirety submit all the issues fairly and impartially to the jury, and the said jury was left in a confused and bewildered condition, and not given a legal light leading and showing the jury trying the case all the issues in said case, as the law required him to do." The charge as given is not subject to the foregoing criticism. This ground of the motion is too general and indefinite to raise any issue for determination by this court. The charge as given covered the issues made by the pleadings and the evidence, and, if a fuller charge on any particular issue was desired, it should have been requested by a proper and timely written request, made before the jury retired to consider of their verdict.

4. Criminal law §1156(2)—Trial judge has wide discretion, when verdict apparently against weight of evidence, but Court of Appeals cannot interfere, when judge approves verdict.

"There was some slight evidence authorizing the verdict; and the verdict having been approved by the trial judge, under the repeated and uniform rulings of this court and of the Supreme Court a reviewing court is powerless to interfere. When the verdict is apparently decidedly against the weight of the evidence, the trial judge has a wide discretion as to granting or refusing a new trial; but whenever there is any evidence, however slight, to support a verdict which has been approved by the trial judge, this court is absolutely without authority to control the judgment of the trial court." *Bradham v. State*, 21 Ga. App. 510, 94 S. E. 618. See cases cited.

Error from Superior Court, Wheeler County; Eschol Graham, Judge.

Hither Owens was convicted of an offense, and he brings error. Affirmed.

W. B. Kent, of Alamo, for plaintiff in error.
M. H. Boyer, Sol. Gen., of Hawkinsville, for the State.

BLOODWORTH, J. Judgment affirmed.

BROYLES, C. J., and LUKE, J., concur.

(151 Ga. 827)

BUCKHANON v. STATE. (No. 2694.)

(Supreme Court of Georgia. Aug. 12, 1921.)

(Syllabus by the Court.)

1. Homicide \S 135(1)—Indictment for murder by drowning held not demurrable.

The third count of the indictment alleged that the defendant did "kill and murder one Robert Willcox by forcibly placing the said Robert Willcox in a body of water, and by forcibly keeping the said Robert Willcox under the said water, with the intent to kill him, the said Robert Willcox, until the said Robert Willcox was then and there drowned as a result thereof." The defendant demurred to this portion of the indictment, on the ground that it was insufficient, "for the reason that it does not state what kind of force was used, nor in what way or manner the said force was used to place deceased in the water, nor what kind of force was used to keep the deceased, Robert Willcox, under the water until he was drowned," so that defendant could be put on notice what to defend against. *Held*, that the judgment overruling the demurrer was not erroneous.

2. Circumstantial evidence of venue held sufficient.

The evidence in regard to venue was circumstantial, but was sufficient to authorize the jury to find that the jurisdiction of the case was in the county of Wheeler.

3. Criminal law \S 762(3)—Instruction defining "express malice" held not to express opinion that it had been proved.

The court charged the jury as follows: "Express malice is that deliberate intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstances capable of proof." Error is assigned on this charge, on the ground that there was no evidence to warrant a charge on express malice, and that the court, in so charging on express malice, intimated to the jury and expressed an opinion to them that there had been express malice proved in said case. *Held*, that the charge is in the exact language of the Penal Code, and is not subject to the criticism that it was an intimation or expression of opinion.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Express Malice.]

4. Criminal law \S 784(5)—Instruction as to reasonable doubt held not erroneous, though evidence was circumstantial.

Error is assigned on the following charge to the jury: "If, after you have examined all the evidence in this case, your minds are unsatisfied, unsettled, wavering, and you cannot, viewing the transaction as you do any other ordinary transaction, come to a conclusion beyond a reasonable doubt that the defendant is guilty, you ought to acquit him; but if the evidence shows beyond a reasonable doubt that the defendant is guilty, it is your duty to convict him." The criticism upon the charge is

that "the law in this case is not dependent upon the doctrine alone of reasonable doubt, but is dependent upon the law of circumstantial evidence; and the charge places this case on the doctrine alone of reasonable doubt, when the court should have gone further and placed the case on the doctrine of circumstantial evidence, and charged the jury that, before they would be authorized to convict the defendant, the evidence should exclude all reasonable doubt and every other reasonable hypothesis save that of the guilt of the accused." *Held*, that the charge was not erroneous. "Whether dependent upon positive or circumstantial evidence, the true question in criminal cases is, not whether it be possible that the conclusion at which the testimony points may be false, but whether there is sufficient testimony to satisfy the mind and conscience beyond a reasonable doubt." Pen. Code 1910, \S 1013; McNaughton v. State, 136 Ga. 600, 612 (2), 71 S. E. 1038. The court fully and correctly charged the law of circumstantial evidence.

5. Criminal law \S 762(3), 781(2)—Evidence held to authorize charge on inculpatory statements or admissions; charge on admissions held not to intimate opinion that confession or admission had been proved.

Error is assigned on the following charge to the jury: "All admissions should be scanned with care and should be received with great caution. An admission uncorroborated by other evidence is not sufficient to justify a conviction. To make an admission admissible, it must have been made voluntarily, without being induced by another by the slightest hope of benefit or the remotest fear of injury." The criticism is that there was no evidence in the case to authorize a charge on that subject, and that an instruction by the court on that subject was an expression of "opinion to the jury, and intimated to them that there had been a confession proved, or an admission, criminal admission in the nature of and synonymous with a confession." *Held*:

(a) There was evidence authorizing a charge on the subject of inculpatory statements or admissions.

(b) The charge was not subject to the criticism that it amounted to an expression of opinion or an intimation that there had been a confession or admission.

(c) The court more than once clearly and fairly submitted to the jury the issue as to whether there had been any admissions. See the next succeeding headnote.

6. Criminal law \S 762(3), 781(4), 1172(7)—Instruction applying law of confessions to admissions held not misleading; held not to intimate opinion; instruction applying rule as to confessions to admissions held favorable to defendant; "inculpatory statements"; "incriminatory admissions."

Error is assigned on the following charge: "If you find any admissions were made by the defendant, and that such admissions were made voluntarily without being induced by another by the slightest hope of benefit or the remotest fear of injury, then you would be authorized to consider such admissions as you would any

other testimony in the case; but if such admissions were not made voluntarily, or were induced by another by the slightest hope of benefit or the remotest fear of injury, you would not be authorized to consider such admissions as testimony, but should reject the same. If you find any admissions were made by the defendant, and that same were made voluntarily, without being induced by another by the slightest hope of benefit or remotest fear of injury, and that the same is corroborated by other evidence in the case, then you may consider same along with the other evidence in determining his guilt or innocence, remembering that an admission is a circumstance which requires the aid of other testimony to authorize a conclusion of guilt, and that an admission alone, uncorroborated by other evidence, is insufficient to justify a conviction." The criticism is that the principles of law thus stated constitute the law with reference to confessions, and, there being no confession proved, the charge was unwarranted, inapplicable, and misleading to the jury; that it was argumentative, ambiguous, and intimated to the jury that a confession had been made, or that an admission had been made by the defendant in the nature of a confession, which was sufficiently corroborated in the same manner as the law requires confessions to be corroborated, and was sufficient to convict the defendant. *Held*: "Admissions usually refer to civil cases." Pen. Code 1910, § 1028. When applied to criminal cases such evidence is usually termed inculpatory statements or incriminatory admissions, and these expressions are frequently used as synonymous, and must have been so understood in the instructions of the court in this case. The fact that the judge, in connection with the incriminatory admissions, charged, not only that they should be received with care, but that it must appear that they were freely and voluntarily made, not induced by fear of punishment or hope of reward, was not a defect in the charge of which the defendant can complain, and was in fact favorable to the defendant, as it placed the same restriction upon criminal admissions that the statute requires be placed upon confessions; but it did not imply in any way that the incriminatory admissions were confessions. Consequently the inaccuracy in the charge does not call for the grant of a new trial.

7. Criminal law ⚡781(4)—Instruction applying law of confessions to admissions held not misleading.

Movant complains that the court charged the jury "in reference to what might be termed 'inculpatory admissions of fact,' and erroneously characterized and denominated them as admissions of guilt or a confession which, if corroborated, as provided in the cases of admissions and confessions of guilt would be sufficient to convict. In other words, the court charged the law fully with reference to confessions, but in said charge denominated confessions as an admission, and substituted the word 'admission' only in charging said law, instead of the word 'confession.'" *Held*, that the charge of the court in these respects, considered in the light

of the ruling in the next preceding headnote, will not require the grant of a new trial.

8. Criminal law ⚡338(2), 406(1), 486, 494, 563, 828—Homicide ⚡228(1)—Elaboration of charge on corpus delicti should have been requested; corpus delicti may be proved by circumstantial evidence; evidence held to authorize finding of corpus delicti; proof essential; evidence to be considered in passing on proof stated; opinion of expert entitled to more weight when facts stated.

Complaint is made that: "The court failed to charge the jury in reference to the corpus delicti in said case, this being one of the main contentions of movant in the trial of the case, that the evidence did not show that there had been a homicide or that a person had in fact been killed; nor did he charge the jury the degree of proof necessary to establish the fact that a killing had taken place, or that any one had been murdered. In other words, movant contends that, under the evidence in the case and position taken by counsel for defendant, the court should have charged the jury fully with reference to the necessity of establishing by testimony on the part of the state that the dead man was actually killed, and did not die from other causes, before they would be authorized to go further in their deliberations as to who the party was doing the killing, or did the killing in the case." *Held*:

(a) The court charged the jury that if the evidence did not prove beyond a reasonable doubt that the defendant "did, by any one or more of the means and in the manner alleged in the indictment, unlawfully kill Robert Willcox" with malice aforethought, they should return a verdict of not guilty. If the defendant desired an elaboration on the subject of corpus delicti, he should have duly requested the same in writing.

(b) The corpus delicti may be proved by circumstantial evidence, as well as by direct evidence. In this case the jury were authorized to find that a homicide had been committed.

9. Homicide ⚡250—Circumstantial evidence held to support conviction.

The evidence was circumstantial, but authorized the jury to find that it was consistent with the hypothesis of guilt, and excluded every reasonable hypothesis other than that of the guilt of the accused.

Error from Superior Court, Wheeler County; Eschol Graham, Judge.

J. E. Buckhanon was convicted of murder, and he brings error. Affirmed.

Stephens & Stephens and W. A. Dampier, all of Dublin, for plaintiff in error.

M. H. Boyer, Sol. Gen., of Hawkinsville, Geo. M. Napier, Atty. Gen., Seward M. Smith, Asst. Atty. Gen., and W. S. Mann, of McRae, for the State.

GILBERT, J. [1-7] 1-7. The first, second, third, fourth, fifth, sixth, and seventh headnotes do not require elaboration.

[8] 8. In addition to the count charging

murder by drowning, there were other counts in the indictment charging murder by shooting, cutting, stabbing, striking with clubs and other blunt instruments to the grand jurors unknown. The indictment alleges that the deceased was killed by J. El. Buckhanon and J. C. Thompson. The former was tried and convicted, and upon the overruling of his motion for a new trial the case was brought to this court for review. Counsel for plaintiff in error insist that the grant of a new trial is required, because the court, without request, omitted to instruct the jury in regard to the degree of proof required to establish the corpus delicti. It is also insisted that the grant of a new trial is required, because the evidence was insufficient to authorize a finding that Robert Willcox was actually killed by any one, as alleged in the bill of indictment, and that he did not die from other cause. The court charged the jury that if the evidence did not prove beyond a reasonable doubt that the defendant "did, by any one or more of the means and in the manner alleged in the indictment, unlawfully kill Robert Willcox" with malice aforethought, they should return a verdict of not guilty.

The court also charged the jury:

"One cannot be convicted of the homicide of another when death was brought about by natural causes, or by misfortune or by accident, and should it appear that Robert Willcox is dead, and that he died from natural causes, or that he died by misfortune or accident, or if you have a reasonable doubt that he is dead, or if dead that his death was produced by natural causes, misfortune, or accident, then the defendant should be found not guilty."

If the accused had desired an elaboration on the charge on the subject of corpus delicti, he should have duly requested the same in writing.

In regard to the sufficiency of the evidence to prove the corpus delicti, it must be borne in mind that the jury of the vicinage deemed the evidence sufficient, and their finding has been approved by the trial court. The trial court and jury are in better position than this court to form a clear conception of what are the facts and what is the truth. The evidence in regard to corpus delicti before the trial court was uncontradicted, and to the effect that Robert Willcox, alleged in the indictment to have been killed, was found dead on "Steamboat Bite" Island in the Oconee river, in Wheeler county, everything indicating that he had been washed ashore by a freshet. He had been missing about seven weeks, and his body was partly decomposed. He was fully recognized by his clothing and other indicia. He was about 19 years of age, a splendid specimen of manhood, suffering from no impairment of health, and had experienced no business depression or other trouble so far as known. He had gone into the river swamp to make a record of cross-

ties, and thereafter to hunt. The last persons with whom he had been seen were Buckhanon and Thompson, charged with his homicide. His hat, a gun, some shells, hunting sack, and the book in which he had recorded the number of cross-ties were found covered with straw, a short distance from the river on the outer edge of the swamp and about one mile downstream from where the body was found. It was impossible for him to have followed the bank of the river from this point to where the body was found, because the swamp was impenetrable. The only way of going from the point where his effects were buried to the point where searchers discovered his body was to go about two miles around the outside of the swamp or to go up the stream of the river in a bateau, canoe, or similar water craft. Subsequently to his disappearance, and before his body was found, there had been heavy rains, and the stream of the river had been greatly swollen. Blood was found on the inside of the bateau used by the defendant Buckhanon and kept at and about the landing on the river near where the hat, gun, etc., were found, and where Willcox had last been seen in life in company with the defendants. Dr. Leroy Napier, a practicing physician since the year 1898, who knew Robert Willcox and who saw him on the afternoon before his disappearance, swore that the deceased had "never been afflicted with paralysis or anything like that that impaired his limbs." He further testified that—

When the body was recovered he examined it, and found it in a very badly decomposed condition; "the left eye and left cheek and also the flesh on the neck, all the left side, was sloughing, falling away; the left eye was practically gone; there was a little loblolly mess in the socket; a portion of his cheek had disappeared, exposing the upper and lower jaw underneath. We could not find any evidence of any cuts or punctures on his body; the skin was thick and doughy, pretty well water-logged. In the condition the flesh was in it is possible there could have been a bullet wound and we overlooked it; we made a pretty thorough examination. So far as we could tell, the bony structure of the head was intact; in fact there was no fracture down to the base; of course the skin was mummified like heavy parchment paper. We did not find any blow on the head. The skull was in such condition we could not tell if there had been blow on the head, unless it had been sufficient to break the skull; he could have had a blow on the head sufficient to have killed him without fracturing the skull. In my opinion we found something about the body that indicated he had received a blow about the head, and that was the peculiar position of his right hand. His left hand was flexed partially, something in this position, while his right hand was very tightly clinched, and was back like that [indicating]. That indicated a blow on the side of his head prior to his death, or some injury to the skull that would produce a hemorrhage inside on the brain tissue;

or at least that was the way I interpreted it. I don't know that that would indicate that he died in agony, but it indicated to me that he received an injury just before his death. His hand at that time was rigid; it had not been changed from the time he was found until I saw it. What we call rigor mortis had never been broken up in that hand or arm; the arm was stiff. I think it was in the same condition it was in when he died, the fingers pulled down tightly and the hand in that position. I do not think that is usual in an ordinary case of death. I think if he had died with both hands clinched in the same condition, they would not have been clinched back in that position; we find that in paralysis; even a living subject will carry his hand like that; does not seem to be able to get it out of that position. I don't know that a lick on the head usually causes paralytic condition; the usual cause of paralysis is a hemorrhage on the brain; a lick would have produced that condition."

On cross-examination there was considerable elaboration of the opinions expressed in the above quotation, but the substance of the entire evidence of Dr. Napier is included in the above quotation.

It is well established that without satisfactory proof of the corpus delicti a conviction for crime cannot stand. *Langston v. State*, 151 Ga. —, 106 S. E. 903. In passing on the question of whether the corpus delicti has been proved, all admissions of independent facts and all circumstantial evidence bearing on that question should be considered. *Wilburn v. State*, 141 Ga. 510, 513 (10), 81 S. E. 444. Whether the corpus delicti was established in this case depends largely on the weight and value of the evidence of Dr. Napier, considered in connection with the fact that the hat, etc., belonging to the deceased, were found a short distance from the river, that blood was found in the bateau, and that the body was found about a mile up stream. It would seem that the inference is justified that the deceased would not himself have buried his personal effects underneath a bed of straw had he planned self-destruction. The force of logic would also drive us to the conclusion that, had the deceased thrown himself into the river at or near the point where his effects were buried, his body would have drifted downstream, and could not have been found a mile further up the river. It must be remembered that the opinion evidence is that of an expert in respect to the stated facts about which the opinion was expressed. It is proper and desirable that expert testimony should be kept within proper bounds, especially in criminal cases, where the life or liberty of the accused is at stake. It is also true that opinions are entitled to more weight where facts are stated, and not mere opinions or conclusions. The statement of facts is made essential, under the laws of this state, in the case of nonexpert witnesses, and the latter cannot testify to opinions

or conclusions without stating the facts upon which the same are based. Of an expert witness this is not required, but in the present case the expert witness does state with clearness and precision the facts upon which his opinions were founded. For this reason the opinion is entitled to more weight than would otherwise be the case had he failed to state the facts.

"Expert testimony is to be weighed and judged like any other, and the same tests are to be applied thereto. It is not necessarily conclusive or controlling, even when uncontradicted by the testimony of other experts; but its weight and value are to be determined by the jury, who should consider it in connection with all the other evidence in the case, the means of knowledge of the expert, the reasons which he assigns for his opinions, and the truth or falsity of the facts assumed in the hypothetical questions put to him. However, where witnesses, although experts, describe symptoms and conditions actually observed by them, and their testimony stands unimpeached, it cannot be ignored, any more than any other credible evidence in the case can be; and where the subject of discussion is not on the border line between the domains of general and expert knowledge, but concerns a highly specialized art of which a layman can have no knowledge at all, the court and jury necessarily must depend to a great extent on the opinions of qualified experts." 16 O. J. 758, § 1556; 11 Ruling Case Law, 586, § 16; page 611, § 84, and notes; Penal Code 1910, § 1048; Civil Code 1910, § 5876; *Yates v. State*, 127 Ga. 813 (4), 816, 56 S. E. 1017, 9 Ann. Cas. 620.

Applying the foregoing principles of law to the evidence, we conclude that the jury were authorized to find that the corpus delicti was established as required by law.

[§] 9. In addition to the facts stated in the foregoing division of the opinion, the evidence authorized the jury to find the facts hereinafter stated to be true in reference to the connection of the defendant Buckhanon. On Saturday, the 15th of January, 1921, Buckhanon, who seemed to be a roving fisherman, and also the younger man, Thompson, were fishing at Cheney's Ferry, in Wheeler county, and had been there a little more than two weeks. They were accustomed to spend Saturday night at the residence of J. H. Thompson, an uncle of the defendant Thompson, situated four or five miles away. They both kept clothes at this house. On that night they came to the uncle's house from the direction of the river, and their pants seemed to be a little wet. Buckhanon mentioned that Robert Willcox came into the swamp that day, and said that he left Willcox lying by a fire near an oak, and that Willcox was wet and drunk. The witness Vaughn testified that Buckhanon, Thompson, Willcox, and himself were all drinking, and that they consumed about a quart of whisky. On the commitment trial of Thompson Buckhanon swore that the

whisky was his, and that he and Thompson ran it off the night before. The oak is near a gate leading into the swamp, and at this place the gun, hat, etc., were found covered with straw. This point is also near a shanty sometimes used by Buckhanon. At or near this point on this occasion young Robert Willcox was last seen alive with the two defendants by the witness Vaughn. On reaching the home of the uncle, J. H. Thompson, Buckhanon had a conversation with the 13 year old daughter of the former. She testified that he asked her to cut his throat with a razor; that he seemed like there was something the matter with him; he acted funny; did not talk like he always did; that Buckhanon had about 20 gun shells, the same color as those which he had given John Williams, and that Buckhanon said he bought some of the shells from Mr. Willcox, and Mr. Vaughn gave him some [witness Vaughn testified that he loaned Buckhanon the gun, but did not furnish him with any shells], and that he gave the shells to her brother, who in turn delivered them to the witness McKay, who exhibited them on the trial to the court and jury. The gun borrowed by Buckhanon from the witness Vaughn was also turned over to the witness McKay. On the next morning, Sunday, January 16th, Buckhanon left this house, taking with him all of his clothing and other effects, including some meat and vegetables, going to the river. This was the first time he had carried all of his effects with him upon leaving. On reaching the river he took his bateau and proceeded down stream. On Sunday night Buckhanon, traveling in his bateau, approached some raftsmen, who were also going down the river on drifting timber. One of these raftsmen, George Quinn, testified that Buckhanon offered him whisky; that Buckhanon's face was black, and "you could not tell whether he was a white man or a negro;" that he gave Buckhanon a cup of coffee, and when the latter reached his hand over, stretching his arm, "I saw where the black stopped;" that Buckhanon "said he was going on below us to Barker's Landing, that he had a fishery down there; he said his name was Cook." Witness saw Buckhanon again on the next day, Monday, further down the river, and spoke to him, but Buckhanon did not reply. Witness said to him:

"Last night you were a negro; now you have changed to a white man; you have on a collar and tie."

To this Buckhanon made no reply. Another witness on the raft swore that Buckhanon was "black, disguised; I could not tell he was a white man only by his sleeve and his forehead," and that Buckhanon said his name was Cook. J. M. Smith, a witness for the state, testified that on Tuesday, January 18th, he was on the Altamaha river near

Gaitor slide, near the bend of the old river, Ohooppee, White Bluff, in Appling county; that there he saw Buckhanon going down the river in a bateau; that he talked to him, and that Buckhanon gave his name as Vaughn;" that his face was not then blackened; and that Buckhanon sold his bateau for \$2 and a plug of tobacco. Witness carried Buckhanon a mile below Surrency, where Buckhanon got out in the woods. L. W. Hall swore that on Wednesday or Thursday he examined Buckhanon's boat, and found blood stains on the left-hand wall of the boat, like it had been spattered up there; and just opposite the blood stain on the wall it looked like something had been dragged out of the boat. There was also a small amount of blood on the seat. Suspicion having been directed to Buckhanon after the disappearance of Robert Willcox, a search was made for him, and he was finally located about one mile from Offerman, in Pierce county, some 75 or 80 miles from Cheney's Ferry in Wheeler county, where Robert Willcox was last seen alive. He was captured at the home of a man named Hall. Three arresting officers, on arriving at this house, inquired for Buckhanon. The house and kitchen were searched, but Buckhanon was not found in either. Finally he was discovered underneath the house; and when he came out his first words were:

"God knows I don't know nothing about that poor boy. I don't know where that poor boy is at"

—nothing having been said to him about Willcox or as to the cause of the arrest. The prisoner was taken back to Cheney's Ferry; and the gun, hat, etc., belonging to Willcox, having already been found, Buckhanon was asked to point out the place where they had been hidden. He carried the party directly to the place where these things had been found, and showed them how the gun was lying. Another witness testified in substance that Buckhanon said Thompson shot Willcox, and that at another time he explained that he had heard a gunshot and saw something fall in the river, but that his eyesight was bad, and that he could not tell what it was. A. O. Curry, a witness for the state, testified: That he was a county policeman, and with another officer had taken Buckhanon and Thompson on the train to jail. That he heard Buckhanon, who was sitting on the seat with Thompson, tell the latter that if he would take on himself the killing of this young man, he would pay his lawyer's fee and also provide for him while he was in the chain gang. That Buckhanon also said:

"You are a young man; they will not hang you. I am an old man. If you will take it on yourself, I will look out for you."

Buckhanon said also that he could not live more than 10 years, and that before he died

he would admit it and tell how he did it, and that they would be obliged to turn Thompson loose.

After careful consideration of all the facts and circumstances shown by the evidence, we are satisfied that the jury were authorized to find that the proved facts were not only consistent with the hypothesis of guilt, but were sufficient to exclude every other reasonable hypothesis save that of the guilt of the accused. We have dealt with all of the assignments of error, deeming it only necessary, however, to elaborate upon the principles ruled in the eighth and ninth headnotes. The verdict was supported by evidence, and the judgment of the trial court, overruling the motion for a new trial, was not erroneous.

Judgment affirmed.

All the Justices concur.

(151 Ga. 745)

GIBBS et al. v. GIBBS et al. (No. 2137.)

(Supreme Court of Georgia. Aug. 10, 1921.)

(Syllabus by the Court.)

1. Executors and administrators \S 473, 474 (1)—Grounds for interference with administration by injunction and receivership not shown.

Under the pleadings and the evidence in this case the court erred in granting an interlocutory injunction and appointing a receiver.

(Additional Syllabus by Editorial Staff.)

2. Execution \S 228—Executrix who was also life tenant held authorized in her individual capacity to purchase remainder interest at execution sale.

Though a trustee cannot purchase an interest adverse to his trust, where an executrix, who was also life tenant, had no control over the remainders, and was charged with no trust in respect thereto, she had a right in her individual capacity to purchase a remainder interest sold under execution, whether or not she had money in hand as executrix with which she might have purchased it.

3. Execution \S 245—Remaindermen not entitled to complain that executrix purchased interest of another remainderman under execution, and he could not do so where he accepted purchase price.

Even though an executrix, who was also life tenant, had no right in her individual capacity to purchase a remainder interest sold under execution, the owners of the other remainder interests could not complain and the owner of the interest sold could not do so where he ratified the purchase by accepting the purchase money after payment of the execution.

4. Trusts \S 81(2)—That wife persuaded husband to take title in her name to protect family did not create resulting trust.

Where deeds to a wife for land purchased by her husband were absolute deeds, the fact

that she importuned and persuaded him to take title in her name for the benefit of herself and their heirs and children, so that in case he should become unfortunate or have judgments entered against him provision would be made for the family, did not create a resulting trust.

5. Courts \S 475(2,3) — Court of ordinary permitted to retain jurisdiction acquired before institution of suit in equity to remove executor.

Under Civ. Code 1910, \S 4540, providing that, where law and equity have concurrent jurisdiction, the court first taking will retain it unless a good reason can be given for the interference of equity where an application for the removal of an executor was pending in the ordinary's court when a suit was instituted by parties to such proceeding for the same purpose, the court of ordinary should retain jurisdiction, unless good reason can be given for the interference of equity.

Error from Superior Court, Ben Hill County; O. T. Gower, Judge.

Suit by C. A. Gibbs and another against J. B. D. Gibbs and others. Judgment granting an injunction and appointing a receiver, and defendants bring error. Reversed.

Thomas S. Gibbs died testate in 1912. By his will he bequeathed all his personal property to his wife, Mary E. Gibbs, for life, with remainder to his children and a grandson (the son of a deceased daughter) jointly; he devised his real estate to his wife for life with remainder in specific devises to his children and grandson. Two of the testator's sons were named testamentary trustees for the grandson, who was a minor. Mary E. Gibbs, wife, and Early Gibbs, a son, were named executors of the will. They qualified as such. Mary E. Gibbs died intestate on February 13, 1920. T. W. Gibbs, a son of Thomas S. and Mary E. Gibbs, was in writing selected by all the heirs at law of Mary E. Gibbs, except Early Gibbs, as administrator of Mary E. Gibbs. He was duly appointed and qualified as administrator on April 12, 1920, giving bond with an approved surety in the sum of more than \$20,000.

On May 6, 1920, C. A. Gibbs and Mrs. Julia McSwain, children of Thomas S. and Mary E. Gibbs, legatees and devisees in remainder of Thomas Gibbs, and heirs at law of Mary E. Gibbs, as aforesaid, filed an equitable petition in Ben Hill superior court, against the other legatees and devisees of Thomas S. Gibbs and heirs at law of Mary E. Gibbs, T. W. Gibbs, administrator of Mary E. Gibbs, and two named banks alleged to be holders of certain funds belonging to the estate of Thomas S. Gibbs. The petition alleged substantially the following:

Early Gibbs, some time before the death of his mother, had ceased to take any part in the administration of the estate of Thomas S. Gibbs, and Mary E. Gibbs had for several

years managed the estate. The lands devised in remainder to Early Gibbs by the will of Thomas S. Gibbs consisted of lots 14, 15, and 16 in square 5, block 16, of the city of Fitzgerald. On March 5, 1918, Early Gibbs being insolvent, his remainder interest in the said city lots was sold by the sheriff of Ben Hill county under execution, and was purchased by Mary E. Gibbs for the sum of \$331. After paying the amount of the execution (\$31), the balance of the money derived from the sale was paid over to and accepted by Early Gibbs. The purchase of the remainder interest in these city lots was not necessary for the protection of the life estate of Mary E. Gibbs; and, inasmuch as Mary E. Gibbs had sufficient funds in hand, as executrix of Thomas S. Gibbs, to pay for said remainder interest, she was estopped from acquiring any interest in the same adverse to the estate and devisees in remainder of Thomas S. Gibbs, and now holds the same in trust for said devisees, including Early Gibbs, who should be required to account for the sum of money paid over and accepted by him as aforesaid.

At the time Mary E. Gibbs intermarried with Thomas S. Gibbs she had no property in her own right, and was without capacity to earn money or acquire property, except by gift; and Thomas S. Gibbs did not acquire any property by or through Mary E. Gibbs, except a tract of land in the third district of Ben Hill county devised by Thomas S. Gibbs to his minor grandson. Thomas S. Gibbs in his lifetime purchased and paid the purchase money of all the property held by Mary E. Gibbs at the time of her death, particularly certain property in the third district of Ben Hill county. Mary E. Gibbs "importuned and finally persuaded Thomas S. Gibbs to take title" to the several tracts of land described in the petition in her name "for the benefit of herself and all of the heirs and children of the said Thomas S. Gibbs, so that in case the said Thomas Gibbs should at any time become unfortunate, or thereafter have judgments entered against him, he would have made some provision for his family; and the said Mary E. Gibbs accepted said title and allowed the same to be made to her with the purpose and understanding" that she would hold the said described lands "for the benefit of herself and the heirs collectively of the said Thomas Gibbs, and it was never contemplated by the said Thomas or the said Mary E. Gibbs that she should have the unlimited right of disposition of said land."

Mary E. Gibbs was a woman of no business ability, illiterate, and was for a long time prior to her death in feeble health. She was incapable of contracting. Two of the defendants, J. B. D. Gibbs and Rosa Belle Gibbs, unduly influenced Mary E. Gibbs to execute to J. B. D. Gibbs and Rosa Belle Gibbs a deed to the city lots in Fitzgerald

purchased at the sheriff's sale as aforesaid, a deed to Rosa Belle Gibbs to a tract of land in the third district of Ben Hill county, and a deed to J. B. D. Gibbs to another tract of land in Ben Hill county. The deed from Mary E. Gibbs to J. B. D. Gibbs and Rosa Belle Gibbs to the city lots in Fitzgerald is void, as a cloud upon petitioners' title, because Mary E. Gibbs was estopped to acquire title to the remainder interest in said lots, and the deeds from Mary E. Gibbs to the named defendants, and each of them, are void for want of capacity in Mary E. Gibbs to execute the same, and for fraud and undue influence practiced and exercised by the named defendants upon Mary E. Gibbs. The administrator of Mary E. Gibbs is colluding with J. B. D. and Rosa Belle Gibbs, and fails to take any steps to have the said deeds canceled or to recover the lands described therein for the benefit of the heirs at law of Mary E. Gibbs.

J. B. D. and Rosa Belle Gibbs, after the death of Mary E. Gibbs, took possession of \$600 in money belonging to the estate of Thomas S. Gibbs. Mary E. Gibbs and Early Gibbs, as executors of Thomas S. Gibbs, sold at private sale certain live stock belonging to the estate. Under the will the life tenant was given merely the use and income of the property, both real and personal. Neither as life tenant nor as executrix did Mary E. Gibbs have authority to sell said personal property and to apply the proceeds of the sale to her use and benefit. The money arising from the sale of the personal property was used by Mary E. Gibbs to acquire title to the reversionary interest of Early Gibbs in the lots in the city of Fitzgerald, or was deposited by her in her name in designated banks, said deposits being evidenced by time certificates. Neither the lots nor the money on deposit constitute a part of the estate of Mary E. Gibbs, but should be administered as the estate of Thomas S. Gibbs. On April 20, 1920, petitioners brought suit against J. B. D. Gibbs, Rosa Belle Gibbs, T. W. Gibbs, individually and as administrator, and others, in Crisp superior court, to restrain T. W. Gibbs, as administrator of Mary E. Gibbs, from administering said certificates of deposit. T. W. Gibbs is not faithfully and impartially administering the estate, and has shown a disposition to favor defendants J. B. D. Gibbs and Rosa Belle Gibbs, by virtue of the facts already alleged, and by reason of the payment by him of a sum of money in discharge of an indebtedness contracted by the named defendants for a monument placed on the family burial lot. The sum of money paid was in fact paid out of the money on deposit as aforesaid. During the lifetime of Mary E. Gibbs a deed from Mary E. Gibbs to Early Gibbs to 400 acres of land in Ben Hill county was placed on record. Mary E. Gibbs instituted against Early Gibbs a suit

to cancel the deed, and this suit is still pending. The administrator of Mary E. Gibbs intends to be made a party in her stead, and said suit is in order for trial.

On April 13, 1920, a petition to remove Early Gibbs as executor of the will of Thomas S. Gibbs was filed in the court of ordinary of Ben Hill county. The petition was filed in the name of all the devisees of Thomas S. Gibbs and heirs at law of Mary E. Gibbs, including petitioners in this suit, but the latter were joined without their authority. A Mrs. Cooper has instituted proceedings against the administrator of Mary E. Gibbs, to foreclose a lien in the nature of a liveryman's lien for the feed of certain live stock alleged to belong to the estate. Early Gibbs, as executor of the estate of Thomas S. Gibbs, has given bond and replevied the stock. T. W. Gibbs administrator of Mary E. Gibbs' estate, has instituted a bill trover proceeding against Early Gibbs, to regain possession of the stock. Said administrator has instituted an equitable suit to restrain petitioners in this suit and Early Gibbs from taking wood off a certain lot of land. Petitioners have no desire to do the acts complained of in the petition, and the suit by Mrs. Cooper was encouraged by the administrator, and the suit of the administrator was brought for the purpose of involving the estate in needless litigation. In addition, a suit was brought by Mary E. Gibbs, as executrix, during her lifetime, to require Early Gibbs to account for certain moneys paid by Thomas S. Gibbs and by the estate of Thomas S. Gibbs for the use and benefit of Early Gibbs individually, which suit is still pending.

The prayers of the petition were that all the suits referred to, except the suit brought by Mary E. Gibbs against Early Gibbs to cancel the deed purporting to have been executed by her to Early Gibbs, be enjoined, and the parties be required to intervene and set up whatever claims they may have against the estates of Thomas S. Gibbs and Mary E. Gibbs in this proceeding; that defendants J. B. D. and Rosa Belle Gibbs be required to deliver up for cancellation the deeds referred to; that said last-named defendants be required to account for the \$600 belonging to the estate of Thomas S. Gibbs; that there be an accounting between the administrator of Mary E. Gibbs and the surviving executor of Thomas S. Gibbs; that the assets of the two estates be marshaled and administered by a receiver; that defendants J. B. D. Gibbs and Rosa Belle Gibbs be enjoined from encumbering or in any manner changing the status of the title to the land they respectively claim; that T. W. Gibbs, individually and as administrator of Mary E. Gibbs, be enjoined from changing the status of the property in his hands as administrator; for general relief; and for process.

The defendants demurred, upon the

grounds, that the petition set forth no cause of action for equitable relief; that there is a misjoinder of parties defendant; that Mary E. Gibbs acquired title under the sheriff's deed to the remainder interest of Early Gibbs in the city lots, under the allegations of the petition; that Mary E. Gibbs did not hold title to the lands described in the petition as trustee under the allegations of the petition; and that the plaintiffs, by reason of the acquiescence of Thomas S. Gibbs and the laches of the plaintiffs, as disclosed by the petition, cannot claim that Mary E. Gibbs held said lands as trustee for the benefit of Thomas S. Gibbs or of his devisees. The defendants demurred specially to several paragraphs of the petition. They also answered, denying all the material allegations. On the interlocutory hearing, had before the appearance term, the demurrers were urged as a reason why the relief prayed should not be granted. There is some conflict in the evidence on minor matters, but there is no substantial conflict on the real issues raised by the pleadings except as noted in the opinion. The court granted the injunction and appointed a receiver, as prayed. The defendants excepted.

Cutts & Nicholson, of Fitzgerald, for plaintiffs in error.

F. M. Powers, Wall & Grantham, A. J. & J. C. McDonald, and Clayton Jay, all of Fitzgerald, for defendants in error.

GEORGE, J. (after stating the facts as above). [2, 3] The plaintiffs below (defendants in error here) insist that Mrs. Gibbs could not buy the remainder interest of her son, Early Gibbs, at the sheriff's sale, and that such purchase was necessarily for the benefit of the estate of which she was executrix. The general principle that a trustee cannot purchase an interest adverse to his trust is invoked. The principle is fully recognised, but it has no application here. Under the will of Thomas S. Gibbs, a copy of which was attached to the petition, vested remainders were created. The executrix of Thomas S. Gibbs had no control over the remainders. She was charged with no trust in respect thereto. It may or it may not have been necessary for Mrs. Gibbs, the life tenant, who was also executrix of the will of Thomas S. Gibbs, to purchase the remainder interest of Early Gibbs in the city lots for the protection of her life estate. She may or may not have had money in hand as executrix with which to purchase such remainder interest. She had no authority to purchase the remainder interest as executrix. As an individual she desired to purchase the remainder interest. Her right to do so in the circumstances of this case is clear and unquestioned. But if her right to do so were not clear, Early Gibbs alone can complain. He is not complaining. On the contrary he

accepted the purchase money, after the payment of the execution against him, thereby ratifying the sale of his remainder interest to his mother individually. The remainderman is not questioning the validity of the sale, and by virtue of his ratification thereof cannot question the validity of the sale, if there were otherwise any question as to its validity. See *Neal v. Field*, 68 Ga. 534; *Pike v. Stallings*, 71 Ga. 860 (5); *Treadaway v. Richards*, 92 Ga. 264, 18 S. E. 25; *Shepherd v. Todd*, 95 Ga. 19, 22 S. E. 32.

[4] We are also of the opinion that, under the allegations of the petition as it now stands, and the proof offered in support thereof at the interlocutory hearing, no resulting trust arose in favor of the devisees of Thomas S. Gibbs or of the children and heirs at law of Mrs. Mary E. Gibbs. The deeds to Mrs. Mary E. Gibbs, so far as appears, were absolute deeds, and the allegation of the petition is that at the time these deeds were taken Mrs. Gibbs "importuned and finally persuaded Thomas S. Gibbs to take title" to the land in her name, "for the benefit of herself and of all the heirs and children of the said Thomas S. Gibbs, so that in case the said Thomas S. Gibbs should at any time become unfortunate, or thereafter have judgments entered against him, he would have made some provision for his family." The evidence goes no further than the allegations of fact. In principle the case is controlled by the ruling in *Vickers v. Vickers*, 133 Ga. 383, 65 S. E. 885, 24 L. R. A. (N. S.) 1043, and *Jackson v. Jackson*, 146 Ga. 675, 92 S. E. 65.

[1] "Equity will not interfere with the regular administration of estates, except upon the application of the representative, either, first for construction and direction, second for marshalling the assets; or upon application of any person interested in the estate, where there is danger of loss or other injury to his interests." Civil Code 1910, § 4596. As a general rule, equity will not interfere with the regular administration of estates by the representative, and to authorize such interference the facts must clearly show there is good reason for so doing. *Morrison v. McFarland*, 147 Ga. 465, 94 S. E. 569. T. W. Gibbs was selected in writing by all the heirs at law of Mary E. Gibbs, except Early Gibbs. Early Gibbs is not a complainant here. The parties complaining joined in the selection of T. W. Gibbs as administrator. They now assert that the estate is insolvent, but the administrator is under bond, with an approved surety. Within less than one month after his appointment a court of equity is asked to remove him and to appoint a receiver to take charge of the estate. It is said that he is favorable to certain of the heirs as defendants (plaintiffs in error). He has thus far failed to bring certain suits which, in the opinion of the plaintiffs, should be brought. It is said that he has paid an

item of indebtedness which should have been charged to certain of the heirs as individuals. Upon this point the evidence can hardly be said to be in dispute. Before the erection of a monument on the family burial lot the heirs at law were consulted; and the facts strongly indicate, if they do not compel a finding, that all the heirs, including the plaintiffs in the court below, agreed to this expenditure. It would seem to be immaterial whether the money was paid out of the funds belonging to the estate of Thomas Gibbs or of Mary E. Gibbs, the children of Mary E. Gibbs in either event being entitled to the fund. But the payment of an improper item by the administrator will furnish no ground for the appointment of a receiver and for injunction, since this matter and similar matters set out in the petition are easily relievable in the court of ordinary.

[5] The petition does set forth grounds for the removal of Early Gibbs as executor of the estate of Thomas S. Gibbs. An application for his removal was pending in the ordinary's court of Ben Hill county at the time of the filing of the suit. The plaintiffs in the equity suit were parties to that proceeding. It is true that there is some evidence tending to show that they were not made parties by their consent, but nevertheless a proper proceeding is pending in a proper court for the removal of the executor, and a resort to equity in the premises is entirely unnecessary.

The courts of ordinary have jurisdiction in the administration of estates of deceased persons. While courts of equity have concurrent jurisdiction with courts of ordinary in the administration of such estates, in all cases where equitable interference is necessary or proper to the full protection of the rights of the parties at interest, the court of ordinary of Ben Hill county having assumed jurisdiction in this case should retain it, unless good reason can be given for the interference of equity. Civil Code 1910, § 4540. Under the evidence in the record, a finding that the administrator of Mary E. Gibbs' estate was colluding with third persons, or encouraging them to institute suits against the estate for the purpose of involving the estate in needless litigation, was unauthorized. In one respect only is the petition meritorious. Where it appears that—

"an administrator is seeking to administer property, the title to which clearly appears to be in another, then a receiver should be appointed, if the circumstances indicate that the rights of all the parties would thereby be more effectually and expeditiously protected and enforced." *Hill v. Arnold*, 79 Ga. 367, 4 S. E. 751.

Giving full effect to the evidence offered by the plaintiffs, it appears that the administrator is seeking to administer a small amount of property belonging to another es-

tate, to wit, the estate of Thomas S. Gibbs. It is conceded that the property in dispute will go ultimately to the children and representatives of children of Thomas S. and Mary E. Gibbs. It will go to the legatees of Thomas S. Gibbs and to the heirs at law of Mary E. Gibbs in exactly the same proportion. While this fact will not authorize the administrator of Mary E. Gibbs' estate to administer the property, it is a fact which should be taken in consideration by the court of equity. The amount of property in dispute is trifling as compared to the whole estate of Mary E. Gibbs. Indeed, the unadministered estate of Thomas S. Gibbs is itself trifling, and the bare circumstance that a dispute has arisen as to the title to a small amount of property which the administrator of Mary E. Gibbs is seeking to administer as a part of her estate is not of itself sufficient to authorize an injunction and the appointment of a receiver. The legal remedies provided afford to the plaintiffs ample and adequate protection. Conceding that some of their alleged rights can be asserted only in a court of equity, there is nothing in this record to authorize the issuance of an injunction and the appointment of a receiver to take charge of the two estates. The plaintiffs themselves may maintain equitable suits against all necessary and proper parties, to enforce such rights as they here seek to assert, without interfering with the duly appointed representative of the estate.

Judgment reversed.

All the Justices concur.

(151 Ga. 786)

CITY OF LA FAYETTE et al. v. WALKER COUNTY et al.

WALKER COUNTY et al. v. CITY OF LA FAYETTE et al.

(Nos. 2287, 2289.)

(Supreme Court of Georgia. Aug. 11, 1921.)

(Syllabus by the Court.)

1. Dedication §17, 20(1)—Dedication and acceptance may be implied; when intention to dedicate may be inferred stated.

The dedication of land to public use and the acceptance of such dedication may be implied. Intention to dedicate may be inferred from acquiescence by the owner in the use of his land by the public, if the use be of such character as to clearly indicate that the public accepted the dedication to the public use.

2. Dedication §14—Not essential that right should be vested in corporate body; use of land dedicated prior to organization of municipal corporation vests in it.

It is not essential to constitute a valid dedication to the public that the right of use should be vested in a corporate body. If there be a dedication of land to public use prior to

the existence of a municipal corporation, then, upon such corporation being organized, including such land within its limits, the use of the land in trust for the public at once vests in it.

3. Dedication §11, 39, 47, 48—Land held impliedly dedicated as public square, and county permitted to use it not entitled to deny dedication; where county permitted to use public square had abandoned it, municipality entitled to enjoin use of square; privies of one dedicating land cannot afterwards appropriate it to private purposes; public square subject to dedication; dedication inures to benefit of all citizens then or thereafter.

Applying the foregoing legal principles to the allegations of the petition, it was not subject to general demurrer.

4. Appeal and error §1078(3)—Point considered as abandoned when not referred to in brief.

The demurrer on the ground of misjoinder of parties plaintiff was abandoned.

5. Counties §218—In action to enjoin sale or lease of public square, etc., joinder of commissioners held proper.

In view of the allegations of the petition the county commissioners of the county could, in their representative capacity, be joined as codefendants with the county in the action against it.

6. Other ground of demurrer without merit.

The other ground of special demurrer set forth in the statement of facts preceding the opinion was not meritorious.

7. Dedication §53—City entitled to have title to square established and to enjoin sale or lease without showing that it was traversed by highways; unnecessary to prove allegation that county used square by agreement with city.

The evidence submitted on the trial by the plaintiffs tended to support the case laid in the petition, and the grant of a nonsuit was error.

Error from Superior Court, Walker County; Moses Wright, Judge.

Suit by the City of La Fayette and others against the County of Walker and others. Judgment of nonsuit, and plaintiffs bring error, and defendants file a cross-bill of exceptions. Reversed on the main bill of exceptions, and affirmed on the cross-bill.

This case was brought by the city of La Fayette, N. E. Foster, C. L. McCall, and M. S. Jackson, against the county of Walker and its board of commissioners of roads and revenues, and J. N. Tate and S. F. Evans. The substance of the material parts of the petition are to the following effect: About the year 1835 a village existed in the territory now within the corporate limits of the city of La Fayette, Walker county. This village was laid out by the residents of the community into lots or blocks, and a common or public square was left vacant near its

center, which was entered on the north by a street or highway approximately 60 feet wide, and extending south through such square, and two highways entered the square from the east and two from the west. "Said public square was a part and parcel of the highways of said village. That a number of stores, residences, and hotels were constructed, abutting said square and said highway, and that said public square was a reserve for public uses and a common place for the inhabitants of said village and the public generally to use for all public purposes." In 1835 the village was incorporated by the Legislature as the town of Chattooga, and made the county site of Walker county. In 1836 the name of the town was changed by the Legislature to La Fayette, and in 1903 the Legislature made the town of La Fayette a city. About 1839, in accordance with an agreement between the municipal authorities of the then town of La Fayette and the properly constituted authorities of Walker county, the county, by the permission of the municipality, erected a courthouse on the public square, to be used solely as a courthouse for the benefit of the inhabitants of the town, the county and the general public. "There never were any writings between said city and said county, and between said county and any persons, as to the title or the right of possession of Walker county to the land or rights of occupancy thereof by said county." The building was so used until February, 1883, when it was burned, together with all the public records and books. During the same year the county erected a new courthouse on the site of the old one, except that the new building included about 20 feet more on the east, and 20 feet more on the west side than the old building, which new building was used exclusively as a courthouse until 1917, when the building became dilapidated, unsanitary, and inadequate for the growth of the public business. The county then constructed a new courthouse on a site outside the public square, and some 300 or 400 feet east of it, all of the books, records, furniture and property of every description of the county therein being removed from the old building into the new one. Since that time the county has not used the old building or the grounds upon which it is situated for any public purpose. The square, since the settlement of the community, has ever been used by the general public for the purposes to which public squares and parks are ordinarily devoted.

In 1916 the county through its legally constituted authority undertook to contract with the city of La Fayette for the sale to the city of whatever rights the county had as to the building and the public square, and executed a bond to convey the same to the city upon payment of the purchase money. But as the purchase was to be on credit and

a debt of the city to be incurred without an election for the purpose of obtaining the necessary vote of the citizens of the municipality to incur the debt, the proposed sale was abandoned.

"In June, 1917 [the named county commissioners], took a deed of whatever rights, title, and interest that the makers therein had, from J. P. Shattuck, W. O. Davenport, J. E. Patton, and W. E. Withers, for said old courthouse building and for a certain part of said public square [describing it], which included the old courthouse building, and a strip of land on the east and west sides of same, 12 feet outside of the building, and also some 75 feet on the south end of said old building, all of which was then and is now a public common or square, and used by the public in traveling and for public gatherings and for other public purposes. Said deed being only a quitclaim title, petitioners charge and allege that the act of said defendants was void as an act ultra vires. That said commissioners at said time of taking said deed in the name of Walker county knew that said courthouse building was ready to be abandoned, and that the same was inadequate for county purposes, and that the said county had no public uses therefor; and they exceeded their authority in making said transaction, although they took the deed in the name of Walker county."

After the abandonment by the county of the public use of the old courthouse and grounds described in this deed, the five defendant county commissioners began the conversion of the old courthouse and grounds into private use by letting the same to various tenants for the following uses: A cabinet shop, "jitney-bus" station, an express office, shoe shop, a vulcanizing establishment, and one part as living quarters for a family. They have encroached on the north side of the public square by building a platform some 8 feet wide by 20 feet long, and on the south side a platform of the same width by 50 feet long, "thereby impeding the free use to the citizens of said city and to the public in general of the public square as used for public purposes." It is alleged that the old dilapidated and unsanitary courthouse and the private uses for which it has been let by the commissioners, and encroachments made on the public square by them which obstruct the public highways or streets of the city, constitute a public nuisance. On the north, east, and west sides of the square, and facing it, are substantial business houses, used for many named important businesses, and the square is used by the citizens conducting such businesses, and by their patrons, and the general public; and, should the public square and old courthouse be converted to private uses, or sold for private uses, petitioners would be irreparably damaged thereby.

The commissioners advertised the property for sale, sealed bids to be received on April 15, 1920. On April 14, the city filed with its

recorder and the mayor and council an application to remove the old courthouse building, and cited the county and the other defendants "to a trial thereon, which has not yet been held." On April 15, the city, before any bids were received and opened, notified prospective bidders and the commissioners of the proceeding the city had instituted for the removal of the old courthouse. Notwithstanding such notice, the defendants J. M. Tate and S. F. Evans bid for the property, submitting the highest bid, and deposited a certified check in accordance with the requirement of the commissioners. The purpose of such bidders is to obtain the property and convert it to private uses, thus denying its free and public use to the citizens of the city, the county, and the general public, which use would result to the great and irreparable injury and damage to the city, its inhabitants, and the general public. And, moreover, such private use of the premises would be "contrary to the grant of the authority to erect said building and the purposes for which the same was to be used." "Petitioners N. E. Foster, C. L. McCall, and M. S. Jackson" are residents and taxpayers of the city of La Fayette, "owning property adjoining and abutting said public square, that has been acquired for a valuable consideration prior to the abandonment of said courthouse for public uses, and that they acquired their rights in the purchasing of said property with the understanding and belief that said public square would at all times be put to nothing else except public use, and that the old courthouse building should be used for no other purpose than for public use; and, should a sale be made by the county to individuals to be used for private purposes, denying the free use of said public square to the public for public uses, that it would injure and damage each of said petitioners in the diminishing of the value of their property, and in the destruction of the business in which they are engaged, and that the damages would be irreparable."

The prayers were to the effect that the defendants be enjoined from effectuating the proposed trade to convey the premises in question to Tate and Evans; that it be decreed that Walker County has no title to the property in question, and that title to the same be adjudged to be in the city of La Fayette in trust for public uses; that should it be decided that the materials in the old courthouse building belong to Walker county, then the county and its commissioners be required to move such material "from said public square and from the highways of said city within a reasonable time to be fixed by the court"; that the county and its named five commissioners be enjoined from using any of the old building or the ground around the same for the private uses above referred to, or from renting or leasing any of the

premises to others to be devoted to such private uses; and for general relief, etc.

All of the defendants demurred generally and specially to the petition, the grounds of special demurrer being: (1) Misjoinder of parties plaintiff; (2) misjoinder of parties defendant; and (3) "that it is not alleged in the petition that the city of La Fayette or any municipal corporation of which it is the successor ever owned or was in possession of or had the right of possession of the property alleged to have been dedicated for the use specified in said petition; that it is not alleged anywhere in the petition how, or in what way, or at what time said alleged dedication was made, or that there was ever to be a reversion of said property, or, if there was to be such reversion, how or under what circumstances, or to what person or corporation the same was to revert." The demurrer was overruled, and the defendants excepted *pendente lite*. They also answered. The trial resulted in a nonsuit, to which plaintiffs excepted; and the defendants filed a cross-bill, assigning error upon their exceptions *pendente lite*.

Glenn & Napier and Henry & Jackson, all of La Fayette, for plaintiffs in error.

Maddox & Doyal, of Rome, and Shattuck & Shattuck and Rosser & Shaw, all of La Fayette, for defendants in error.

FISH, C. J. (after stating the facts as above). [1, 3] The court properly overruled the general demurrer to the petition. Both the dedication of land to public use and the acceptance of such dedication may be implied. Intention to dedicate may be inferred from acquiescence by the owner in the use of his land by the public, if the use be of such character as to clearly indicate that the public accepted the dedication to the public use. *Healey v. Atlanta*, 125 Ga. 736, 54 S. E. 749; *Chapman v. Floyd*, 68 Ga. 455; *Brown v. Gunn*, 75 Ga. 443. Under section 4171 of the Civil Code, if the owner of land by his acts dedicates it to public use, and it is so used for such length of time that the public accommodation might be materially affected by the interruption of the enjoyment, he cannot afterwards appropriate it to private purposes. And if he cannot, it of course follows that his privies cannot.

A public square or a common in a town or city is the subject of dedication, and a dedication of land to a municipality to public use inures to the benefit of all who at the time are or may afterwards become citizens of the corporation. *Mayor, etc., of Macon, v. Franklin*, 12 Ga. 239. The petition alleges, in effect, that the area of land in question was laid off prior to the year 1835, as a public square in a village, or settlement, which in that year was incorporated as the town of Chattooga, and which subsequently became the town of La Fayette, and afterwards the

city of La Fayette; that the square was used by the people of the community prior to the formation of the municipal corporation, and by the people of the latter, and by the public generally for such public uses to which public squares and parks are usually devoted. This state of affairs continued until 1839, when, in accordance with a parol agreement between the proper officials of the town of La Fayette and those of the county of Walker, the county was permitted to build a courthouse on the public square. The portion of the square not covered by the courthouse has continuously since then been used by the general public as a public square, and the courthouse was used for the public business until it was burned in 1883; and a new courthouse erected in that year was so used until 1917, when the county built a new one on another lot in the city, and abandoned the old building for public use, and let the same for private uses. The petition alleges, in effect, that the county never acquired any rights in and to the public park by any writing from the city, or from any person. These allegations are sufficient to authorize an implied dedication by the owner of the area of land in question to the village, town, and city to use as a public square, and an acceptance by them of such dedication; and as the county, according to the petition, obtained all of its rights to the public square by reason of the permission of the town of La Fayette, the county is not in a position to gainsay such implied dedication and acceptance. Taking the allegations of the petition to be true, they are sufficient to authorize an injunction against the county, its commissioners, and the other defendants, restraining them from using the public square, including that portion of it upon which the old courthouse is situated, and the courthouse itself, for any purpose, as the county has abandoned the right it had to the property for public uses.

[4] 2. The special demurrer on the ground of misjoinder of parties plaintiff is not referred to in the brief of counsel for the plaintiffs in error, and must be considered as abandoned.

[5] 3. There is no merit in the demurrer on the ground of misjoinder of parties defendant. The contention for the county is that the suit is not only against the county of Walker, but against the named county commissioners as individuals. The action is not against them as individuals, but as commissioners representing the county. It is true that a suit against a county must be in the name of the county, and service may be perfected upon a majority of its commissioners. Here it is proper for the commissioners, who, in their capacity as representatives of the county, are doing, or threatening to do, the acts sought to be enjoined. It is not a suit against the commissioners alone,

but really designed as one against the county, as was the case in *Arnett v. Commissioners*, 75 Ga. 782, and *Glaze v. Bogle*, 105 Ga. 295, 31 S. E. 169, cited by counsel for the county.

[6] 4. In view of what we have said in the first division of this opinion, the petition was not subject to the other special ground of demurrer fully set forth in the statement of facts.

[7] There was evidence submitted by the plaintiffs, tending to establish their case substantially as laid; and the trial court erred in granting a nonsuit. It is true, as stated in the brief of counsel for the county and its codefendants, that the city failed to show "that the principal highway or street entered said square on its northern boundary and continued through the center of said square, leaving said square at its southern boundary near its center," and that the property designated as the public square was a part and parcel of the highways of the village"; and that the city also failed to prove that "by and with the consent of the municipal authorities of the city of La Fayette, then the town of La Fayette, the municipal authorities agreed with the properly constituted authorities of Walker county to permit Walker county to erect a courthouse building to be used for public purposes only on the public square of said corporation." The lack of proof to sustain the allegations of the petition in respect to these matters, in view of the other averments therein, did not authorize the grant of a nonsuit. The main contention of the plaintiffs, as set forth in the petition is that the area of land in the city designated as the "public square" is really a public square, and that the city is entitled to possess and control it for public use, and that the county by building a new courthouse not on the square, which it now occupies, and thus ceasing to use the public square for public use, has abandoned and forfeited any right it ever had in the premises for such use. It is not essential to the maintenance of the city's contention for it to prove that the "public square" is traversed by highways, and that it is therefore a part of the city's highways or streets. The main thing to be shown, in view of the petition as a whole, is that the city has a right, as against the county, to the use of the "public square" for public use, whether or not it be traversed by highways.

There was evidence to the effect that in 1837, before a courthouse was erected on the square in question, it was, in size and shape, the same as it now exists, bounded on its four sides with public streets some 30 or 40 feet wide; that these were then business streets of the town, which had some 700 or 800 white inhabitants; that on these streets facing the square were many buildings, most of them used for businesses of various kinds; that these buildings then appeared to be some 15

or 20 years old; that there were then locust trees seven or eight inches in diameter growing in the square; and that it was used as a public square by the general public just as it has been continually used since that time, with the exception of that part of it upon which the courthouses have been built. This evidence tended to show that, years prior to incorporation of the village, there had been an implied dedication of the square by its owner to the village and town for public uses, and an acceptance of such dedication by the village, indicated by the laying out of its streets along the sides of the square, the erection of business houses on such streets fronting the square, and by user on the part of the public. 13 Cyc. 465, notes 55, 56, 57.

[2] It is not essential to constitute a valid dedication to the public that the right of use should be vested in a corporate body. The public, it has been said, is an ever-existing grantee, capable of taking dedications for public uses, and its interests are a sufficient consideration to support them. And it has been held, if there is a common-law dedication of land to public use prior to the existence of a municipal corporation, then, upon such corporation being organized and including such land within its limits, the use of the land in trust for the public at once vests in it. 13 Cyc. 439, notes 13, 14, and 15. There was evidence tending to show that the square had been continuously used by the inhabitants of the village and town and by the general public for such a length of time, prior to the erection of the first courthouse by the county, that the public accommodation would have been materially and adversely affected had the enjoyment of such use been interrupted by the owner of the land appropriating it to other and inconsistent purposes. If the owner could not interfere with the right of the city and the general public to use the square for public purposes, then the owner could not convey the land to any one else, if the grantee had notice, who could deprive the city or the public of its rights under the dedication. As the county, when it erected the first courthouse on the square, was in the circumstances bound to know of the rights of the city and the public in general to use the square for public purposes, the county then necessarily had to take from the city whatever rights the county had to use the square, since there was no other source from which it could procure the right to erect a courthouse on the square. Thus it is apparent that it was not essential to the plaintiffs' case to prove the allegation of the petition that the county by agreement with the city was permitted to use the square for a courthouse site.

Judgment reversed on the main bill of exceptions, and affirmed on the cross-bill.

All the Justices concur.

(151 Ga. 753)

TUCKER et al. v. ROBERTS et al.
(No. 2255.)

(Supreme Court of Georgia. Aug. 10, 1921.)

(Syllabus by the Court.)

1. **Boundaries** §52(1)—Persons holding office of processioners are officers de facto, and return not set aside because not legally appointed.

Where persons holding office as processioners in a militia district in a particular county in this state entertain an application by a landowner to survey and mark a land line as authorized by statute, and after surveying and marking the line file their report with the ordinary, as required by statute, even if such persons do not hold office under lawful appointment, they are officers de facto, and the report filed by them should not be set aside on the ground that the appointment of the officers was unauthorized by law.

2. **Boundaries** §52(1)—Processioners constitute "commission" in statute as to disqualification by relationship; processioners' return set aside when processioner related to applicant or to both parties; related within fourth degree when great-grandfathers were brothers.

The prescribed powers and duties imposed on processioners appointed under provisions of the Civil Code of 1910, § 8817 et seq., are quasi judicial, and the body of processioners in a given district is a "commission" within the meaning of the section 4642, which declares that "No judge or justice of any court, no ordinary, justice of the peace, nor presiding officer of any inferior judicature or commission, can sit in any cause or proceeding in which he is pecuniarily interested, or related to either party within the fourth degree of consanguinity, or affinity. * * *"

(a) Where a processioner in a proceeding to procession land lines is related within the fourth degree by consanguinity or affinity to the applicant alone, or to both the applicant and protestant, he is disqualified, and such disqualification is sufficient ground for setting aside a return of the processioners in which he participated.

(b) Where the respective great-grandfathers of the processioner and parties at interest are brothers, the processioner is related by consanguinity within the fourth degree to such parties.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, 'Commission.]

Error from Superior Court, Irwin County ; R. Eve, Judge.

Proceeding by Walton Tucker and another against Ella Roberts and others, to establish boundary line. Judgment sustaining a plea in abatement to the return of processioners, and the applicants bring error. Affirmed.

In May, 1919, the ordinary of Irwin county appointed Moses Daniels, George Grantham, and John Lisenby as land processioners

the 1529th Georgia militia district of that county. On July 23, 1919, Walton Tucker and Nellie Tucker applied to the processioners in conformity with the statute (Civil Code, § 3818) to have a certain land line "run and marked anew." Notice was duly served on persons to be adversely affected; and subsequently, on August 15, 1919, the processioners, in conjunction with the county surveyor of an adjoining county (the county surveyor of Irwin county being disqualified), proceeded to "run and mark anew" the line; and on August 19, 1919, after completing the work, they filed their return with a certified plat made by the surveyor in the office of the ordinary.

On September 15, 1919, Ella Roberts, as administratrix of the estate of William Roberts, deceased, and Isaac Roberts, as guardian ad litem for the minor children of William Roberts, deceased, filed in the office of the ordinary a motion (called a plea in abatement) to dismiss the entire processioning proceedings, on the grounds: (a) That the processioners were not legally appointed, because they were appointed by the ordinary, whereas under the act approved August 5, 1913 (Acts 1913, p. 403), creating the office of commissioner of Irwin county, the commissioner alone had authority to appoint processioners in Irwin county; (b) that two of the processioners were disqualified on account of relationship to the applicant. On September 18, 1919, the ordinary transmitted all papers in the processioning proceeding to the superior court.

When the case came on for a hearing (August 17, 1920) at an adjourned term of the superior court, Walton Tucker and Nellie Tucker filed a motion to dismiss the "plea in abatement," on the grounds: (a) That under proper construction the language of the act of 1913 (Acts 1913, p. 403), referred to above, does not confer on the commissioner of roads and revenue of Irwin county exclusive jurisdiction to appoint land processioners in that county; (b) if the act purports to confer such jurisdiction, the act is unconstitutional, as violative of article 1, § 4, par. 1, of the Constitution of this state (Civil Code, § 6391), which provides that "no special law shall be enacted in any case for which provision has been made by an existing general law," there being an existing general statute, as embodied in the Civil Code, § 3817, for appointment of land processioners. It was prayed that the allegations as to the relationship of the processioners to the applicants for procession be inquired into by the court.

The judge overruled the motion to dismiss the "plea in abatement," and proceeded to hear evidence on the question of relationship as set up in the plea. The undisputed evidence was to the effect that the great-grandfathers of Walton Tucker, one of the object-

ors, and George Grantham, one of the processioners, were brothers, and that the same relation existed between the processioner George Grantham and William Roberts, deceased, whose administratrix was a party on the opposite side of the case from Walton Tucker. Upon the evidence the judge sustained the "plea in abatement." The applicants for procession came by direct bill of exceptions, and assigned error upon both rulings of the court.

Philip Newbern and Warren Mixon, both of Ocilla, for plaintiffs in error.

Rogers & Rogers, of Ocilla, for defendants in error.

ATKINSON, J. [1] 1. It is urged by the motion to dismiss the processioning proceedings that the appointment of the processioners by the ordinary was illegal, because the act of 1913 (Acts 1913, p. 403), creating the office of county commissioner for Irwin county, withdrew jurisdiction from the ordinary and conferred exclusive jurisdiction over that matter upon the commissioner. On the other hand, it was urged, by the motion to dismiss the above-mentioned motion, that the act of 1913, supra, does not purport to withdraw from the ordinary jurisdiction over the matter, or to confer jurisdiction upon the county commissioner to appoint processioners, but, even if it did, that the act was violative of certain provisions of the Constitution, and void.

These contentions go to the right of the ordinary to appoint processioners, and are collateral to the matter of validity of the official actions of the processioners, which is the controlling question in the case. Under these circumstances no decision will be made as to the merits of any such contentions. In *Brown v. Flake*, 102 Ga. 528, 29 S. E. 287, it was held:

"Where an act of the General Assembly created a board of county commissioners for a given county, and provided for the selection of such commissioners by the grand jury of the county, and subsequently the act creating such board was amended by providing that such commissioners should be elected by the qualified voters of the county, and subsequently to the passage of the amending act such commissioners were continuously elected by the grand jury, and no election by the qualified voters was called or held, and the commissioners so selected continued for several years to perform the duties imposed by law on the commissioners of such county, and their acts as commissioners were recognized and acquiesced in by the people of the county for a long period of time, the persons so selected by the grand jury and discharging the duties of county commissioners were de facto officers, and their acts as such, within the scope of the powers conferred on the board of county commissioners were legal; and a tax authorized by law, levied

by such commissioners for county purposes, was a valid and binding tax."

In *Hawkins v. Jonseboro*, 63 Ga. 527, it was held:

"Though a statute require all voters to be registered, and none are registered, yet, if an election be held, and certain town officers provided for by law be elected by the votes cast, and the persons thus elected enter upon and exercise their functions under color of such election, their predecessors yielding to their supposed right, they are officers de facto, and, until displaced, may exercise all the powers of officers de jure."

In *Smith v. Meador*, 74 Ga. 416, 58 Am. Rep. 438, it was said:

"If, after the expiration of the term for which a commercial notary was appointed, and before that fact was discovered, he attested an affidavit, both parties acting in good faith, if not an officer de jure, he would, in such transaction, be an officer de facto, and his attestation would not be void. The doctrine of the recognition of the acts of de facto officers is founded on considerations of public policy."

Under the principle of the foregoing decisions, the processioners, if not de jure officers, were de facto officers, and their official action done under color of office should not have been set aside on the ground of want of power in the ordinary to appoint them. See, also, *Slate v. Blue Ridge*, 113 Ga. 646 (3), 38 S. E. 977 and citations; *State v. Carroll*, 38 Conn. 449, 9 Am. Rep. 409; 22 R. C. L. 588, § 306; *Hildreth v. McIntire*, J. J. Marsh. (Ky.) 206, 19 Am. Dec. 63, and cases cited in note. But while it was error to set aside the action of the processioners on this ground, the judgment of the court will not be reversed on account of such error, because, as will appear in the next division of this opinion, the action of the processioners was properly set aside on another ground.

[2] 2. Does the proved relationship of the processioner to the applicants for procession render void the return of the processioners? The office of processioner is statutory. Civil Code, § 3817 et seq. The statute providing for the appointment of processioners does not in terms disqualify a processioner on account of relationship to a party at interest in a processioning proceeding. The only language in the statute that might bear on the subject of qualifications of such officers is "three suitable persons in every militia district." The only statutory provision for disqualification on such ground is to be found in the Civil Code, § 4642, which declares:

"No judge or justice of any court, no ordinary, justice of the peace, nor presiding officer of any inferior judicature or commission, can sit in any cause or proceeding in which he is pecuniarily interested, or related to either party within the fourth degree of consanguinity or affinity, nor of which he has been

of counsel, nor in which he has presided in any inferior judicature when his ruling or decision is the subject of review, without the consent of all the parties in interest."

Under this statute, relationship to a party within the prohibited degree will disqualify a judge of a court, and similarly any "presiding officer of any inferior judicature or commission." If processioners as a body are to be classed as a commission within the meaning of this statute, then, under the terms of the statute, relation of a processioner within the prohibited degree to a party at interest will disqualify such processioner from presiding in any particular case. To render processioners such a "commission," their prescribed duties and powers must be judicial in character. The following sections of the Civil Code state the powers and duties of processioners:

"Sec. 3818. * * * Every owner of land, any portion of which lies in any district, though the remainder lies in an adjoining district of an adjoining county, who desires the lines around his entire tract to be surveyed and marked anew, shall apply to the processioners of said district to appoint a day when a majority of them, with the county surveyor, will trace and mark the said lines. Ten days' written notice of the time of such running and marking shall be given to all the owners of adjoining lands, if resident within this state; and the processioners shall not proceed to run and mark such lines until satisfactory evidence of the service of such notice shall be produced to them.

"Sec. 3819. * * * It shall be the duty of the county surveyor, with the processioners, taking all due precaution to arrive at the true lines, to trace out and plainly mark the same. The surveyor shall make out and certify a plat of the same, and deliver a copy thereof to the applicant; and in all future disputes arising in reference to the boundary lines of such tract, with any owner of adjoining lands, having due notice of such processioning, such plat, and the lines so marked, shall be prima facie correct, and such plat, certified as aforesaid, shall be admissible in evidence, without further proof."

"Sec. 3825. * * * The processioners shall make a return of their acts within thirty days, together with the plat of the surveyor, to the ordinary of the county, to be kept on file in his office."

"Sec. 3820. * * * In all cases of disputed lines the following rules shall be respected and followed: Natural landmarks, being less liable to change, and not capable of counterfeit, shall be the most conclusive evidence; ancient or genuine landmarks, such as corner station or marked trees, shall control the course and distances called for by the survey. If the corners are established, and the lines not marked, a straight line, as required by the plat, shall be run, but an established marked line, though crooked, shall not be overruled; courses and distances shall be resorted to in the absence of higher evidence.

"Sec. 3821. * * * General reputation in the neighborhood shall be evidence as to an-

cient landmarks of more than thirty years' standing; and acquiescence for seven years, by acts of declarations of adjoining landowners, shall establish a dividing line.

"Sec. 3822. * * * Where actual possession has been had, under a claim of right, for more than seven years, such claim shall be respected, and the lines so marked as not to interfere with such possession.

"Sec. 3823. * * * Any owner of adjoining lands, who may be dissatisfied with the lines as run and marked by the processioners and surveyor, may file his protest thereto with the ordinary within thirty days after the processioners have filed their returns, specifying therein the lines objected to, and true lines as claimed by him; and it shall be the duty of the ordinary to return all the papers, including the plat made by the surveyor, with said protest, to the clerk of the superior court of the county or counties where the disputed land lies (copies being sent to the adjoining counties); and it shall be the duty of the clerk to enter the same on the issue docket, as other causes, to be tried in the same manner and under the same rules as other cases. The verdict of the jury, and the judgment of the court, shall be framed to meet the issue tried and decided: Provided, it shall not be necessary to run any lines between adjoining landowners except the lines in dispute.

"Sec. 3824. * * * The applicant shall pay to each of the processioners [two dollars] per day for his services, and to the county surveyor [five] dollars per day for his services. If a protest is filed, the costs of the court shall abide the issue."

"Sec. 3826. * * * When any water course is one of the boundary lines of a tract of land, and its course shall have been changed by nature or art, so that its present channel shall cut off a part of said land, the processioners and surveyor shall certify the fact, and the plat of the surveyor shall plainly mark the original and present channels, designating the exact quantity of land so cut off."

Referring to these statutes it has been held that—

"Processioners have no power to ascertain and fix new lines, but only to run and mark those which were formerly located and established." *Amos v. Parker*, 88 Ga. 754, 16 S. E. 200; *Wheeler v. Thomas*, 139 Ga. 598, 77 S. E. 817.

The power to "run and mark" lines that were formerly located or established is thus recognized. The conclusiveness of the action of processioners in running and marking pre-existing lines was not decided, but the statute on that subject clearly makes their action *prima facie* binding. For instance, a definite time must be fixed for surveying and marking the line, of which 10 days' written notice shall be given all the owners of adjoining lands, "if residents within this state." Civil Code, § 3818. After the line is surveyed and marked by at least a majority of the processioners in conjunction with the county surveyor, the surveyor shall make out and certify a plat of the same and deliver a copy

thereof to the applicant; and in all future disputes arising in reference to the boundary lines of such tract, with any owner of adjoining lands, "having due notice of such processioning," such plat, and the lines so marked, "shall be *prima facie* correct, and such plat, certified as aforesaid, shall be admissible in evidence without further proof." Civil Code, § 3819. While the action of the processioners is only *prima facie* binding, it establishes to that extent a status between the applicant and the parties notified. In tracing the lines the processioners are required to observe prescribed rules, and among other things give effect to extraneous evidence tending to show the true location of the old line. Civil Code, §§ 3820, 3821, 3822. After action by the processioners and the filing of their report in the office of the ordinary of the county, as provided in the Civil Code, § 3825, any adjoining landowner, dissatisfied with the line, may file a protest; whereupon all the papers, including the plat made by the surveyor, shall be transmitted to the superior court, to be entered on the docket as other causes, "to be tried in the same manner and under the same rules as other cases," and the verdict of the jury and judgment of the court shall be framed to meet the issue tried and decided. Civil Code, § 3823. The judgment so rendered is final and conclusive as to location of the line. *Stovall v. Caverly*, 139 Ga. 243, 77 S. E. 29.

The requirements as to notice to adjoining landowners to be adversely affected, and the provision for prescribed rules under which extraneous evidence shall be considered by the processioners, and the declaration that the plat made by the surveyor and reported by the processioners to the ordinary shall on any future issue be *prima facie* correct as against adjoining landowners who were duly notified, all tend to characterize the duties of processioners as judicial. Further indications of the judicial character of such duties are the provisions that after the report is filed in the office of the ordinary a protest may be filed, and that the ordinary shall transmit the application for procession and return of the processioners, including the plat of the surveyor, to the superior court, to be docketed and tried as other cases; and in such case all the prescribed "costs" shall abide the decision of the court. The action of the processioners in surveying and marking the line involves decision as to the true location of the old line. This and the act of reporting the findings of the processioners to the ordinary are but steps in a legal controversy, which may end at the filing of the report, or at final judgment in the superior court in the event a protest is filed. In this connection the provision that all costs shall abide the final judgment is significant. Why tax the pay provided for processioners as cost to abide the final judgment, if the processioning

was not judicial and connected with the superior court case? In *Wilkowski v. Halle*, 37 Ga. 678, 95 Am. Dec. 374, the question was whether an attorney at law of a party who was a notary public was competent to qualify his client to an affidavit to be used as a basis for an attachment. It was held that the attorney was not competent. In the course of the opinion it was said:

"Shall the attorney of the plaintiff take this bond, which the law provides for the defendant's security, against a wrongful issuing of the attachment? Shall the plaintiff's attorney be the judge as to the sufficiency of the bond, to protect the opposite party and as to the solvency of the surety? Is not this, at least, a quasi judicial proceeding? The officer, taking the affidavit, is in duty bound to take the bond, to decide upon its sufficiency, its legality, and its solvency. Does not this duty come within the prohibitions of section 193, Rev. Code [Civil Code, § 4642], which says: 'No judge or justice of any court, no ordinary, justice of the peace, nor presiding officer of any inferior judicature, or commission, can sit in any cause or proceeding, in which he is pecuniarily interested, or related to either party, within the fourth degree of consanguinity, or affinity, nor in which he has been counsel, without the consent of all the parties in interest'? Is not the taking of the affidavit of the plaintiff, and bond to indemnify the defendant against damages and costs, 'a proceeding,' in which the attorney for the plaintiff, in this case, 'sits'? He decides upon these things."

The decision was not based entirely on the reasons above set forth, but it was evidently the view of the court that one reason for the attorney's disqualification was that his duties were judicial in character. In *Spearman v. Wilson*, 44 Ga. 473, it was held that an arbitrator was disqualified on account of relationship, because his son purchased the property involved pending the arbitration, the basis of the decision being the duty of the arbitrator was judicial in character. Under a proper construction the powers and duties of processoners, as declared in the statutes above quoted, involved such investigation and such decision upon the part of the processoners, and their decision has such effect as to render the functions of the processoners judicial in character and classify the official body of processoners as a commission, within the meaning of the Civil Code, § 4642. This being so, relationship of a processoner to a party within the prohibited degree will disqualify the processoner. Applying this rule, the processoner whose qualification was attacked in the present case was disqualified on account of his relationship to the applicant, because the respective great-grandfathers of the processoner and the applicant were brothers. *Short v. Mathis*, 101 Ga. 287, 28 S. E. 918. The statute disqualifies a judicial officer where his relation to a party at interest is within the fourth degree by

consanguinity or affinity, and makes no exception on account of being related equally or otherwise to a party on the opposite side of the controversy. The fact that the processoner is related within the prohibited degree to the parties on both sides of the controversy does not, as contended, relieve the disqualification. Under Civil Code, § 3818, it would have been competent for two of the processoners to have acted in the matter and made the return, but that would not, as contended, save the return which was participated in by all of the processoners, including the one disqualified. It is similar to a case where a disqualified juror serves upon a jury. In *Georgia Railroad v. Cole*, 73 Ga. 713, it was said:

"A jury composed of men who are not lawful men—men whose relationship to the parties renders them incompetent as jurors—cannot render a lawful verdict. If the parties consent to the jurors, or have knowledge of their incompetency, then they will be held to waive the same. It cannot be said that the defendants in error have had their case tried; certainly not legally, and, although the verdict may be in accordance with the facts, and such as a lawful jury should have rendered, yet it is no verdict, and the court did right to set it aside."

As the processoner was disqualified and participated in the processioning proceedings, the judge did not err in dismissing the proceeding. There was no contention that the protestants waived the disqualification or evidence as to such waiver, and no ruling will be made on that subject.

Judgment affirmed.

All the Justices concur.

(151 Ga. 776)

McMICHAEL et al. v. ATLANTA ENVELOPE CO. et al.

SAME v. WEBB & VARY, Inc.

(Nos. 2372, 2373.)

(Supreme Court of Georgia. Aug. 10, 1921.)

(Syllabus by the Court.)

1. Injunction § 101(3) — Granted against strangers and striking employees, endeavoring to induce employees to violate contract and force unionizing of business; not granted against persuasion by proper argument.

Where employers, whose businesses require the employment of a number of workmen skilled in a particular trade, determine to operate their businesses on nonunion bases, and to that end adopt a policy not to employ members of the union, and to employ nonunion workmen under a contract, terminable at will, providing that such employment shall immediately cease if said employees become members of the union, equity will protect by injunction such contractual status as against strangers and striking

former employees, who, knowing such status, conspire to coerce the employers to abandon the policy of employing only nonunion labor and to cause a breach of the aforesaid contractual relation, and who endeavor by threats, intimidation, and improper persuasion to deprive such nonunion employees of the exercise of their own freedom of will, and thus induce them to violate their contracts of employment by joining the union, and thus force the unionizing of the plants or render it impossible to continue the operation of the business.

2. Appeal and error \S 273(10) — **Injunction** \S 128, 157—Evidence in strike case held to authorize injunction; injunction held not to enjoin any lawful act; judgment, excepted to as a whole, not reversed when justified as to some parties.

Under the pleadings and the evidence the court did not abuse its discretion in granting the interlocutory injunction.

The interlocutory injunction, properly construed in connection with the evidence, enjoins only those acts which we have held in the opinion to be unlawful.

3. Exceptions, bill of \S 8—Exceptions to admission of evidence should show grounds of objection and set forth the evidence.

Exceptions to the admission of evidence, to avail the plaintiff in error here, should show the objections made to the admission of the evidence or the grounds upon which a motion to rule out the same, if admitted, was based, and should also set forth, in connection with the exception itself, the evidence alleged to have been illegally admitted, so that this court would not be compelled to examine the brief of evidence, in order to ascertain the evidence alleged to have been illegally admitted.

(Additional Syllabus by Editorial Staff.)

4. Injunction \S 101(3) — Strikers will not be enjoined from using "persuasion" not amounting to "duress" or "intimidation."

Striking employees will not be enjoined from attempting by proper argument to persuade others from taking their places, when they do not resort to force and intimidation; but the persuasion that the law permits is such as appeals to the judgment, reason, or sentiment, and leaves the mind free to act of its own volition, and when there is no such freedom of action, more than mere persuasion has been exercised, amounting to duress, intimidation, or other improper influence.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Duress; Intimidate—Intimidation; Persuasion.]

Error from Superior Court, Fulton County;
J. T. Pendleton, Judge.

Two suits, by the Atlanta Envelope Company and others and by Webb & Vary, Inc., against O. L. McMichael and others, suits heard together. Interlocutory injunction granted, and defendants bring error. Affirmed.

J. A. Miller and Bond Almand, both of Atlanta, for plaintiffs in error.

Winfield Payne Jones, Wm. J. Davis, Jr., and W. S. Dillon, all of Atlanta, for defendants in error.

GILBERT, J. These two cases were heard together in the trial court, upon the same evidence. One judgment was passed, applicable to both cases. Two bills of exceptions were sued out, and they were argued as one in this court. The bills of exception and the records in the two cases in this court are identical, with the exception of the difference in names. As the same judgment must necessarily be rendered in both cases in this court, they will be decided as one case.

The petitions filed by the plaintiffs in the court below, Atlanta Envelope Company et al. and Webb & Vary, Inc., against McMichael et al., prayed that the defendants, individually and as agents and representatives of Atlanta Printing Pressmen and Assistants' Union, No. 8, be enjoined from interfering with or attempting to interfere with the plaintiffs' employees, present or prospective, for the purpose of inducing those employees to join said union or to leave the employment of plaintiffs without the consent of the latter, by representing to such employees that they would suffer loss or be otherwise injured by remaining in petitioner's employment, and from interfering with or attempting to interfere with the pressmen and feeders employed by the plaintiffs, for the purpose of unionizing, without the consent of plaintiffs, the employees in that branch of their plants, and from seeking to bring about, in aid of such purpose, the breach by present or future employees of the plaintiffs of contracts of employment made between the plaintiffs and their employees, the terms of which contracts were known to defendants, and from inducing or seeking to induce any of plaintiffs' employees to leave their employment, by intimidation, misrepresentation, abusive language, promises of better conditions and shorter hours and better pay, or persuasion, and for general relief and process.

It was alleged that the defendants, acting as representatives of said union, made a demand upon the plaintiffs that they contract with all of the pressmen and feedmen employed by them at that time to give to such employees a large increase in wages; to make a substantial reduction in their working hours, and also to "close" their shops—that is, that the plaintiffs should agree to employ as pressmen and feedmen only persons who were members of said union; that upon the refusal of the plaintiffs to yield to these demands all of the pressmen and feedmen then employed by plaintiffs walked out, rendering it necessary for plaintiffs to secure

nonunion pressmen and feedmen, or to yield to the demands of the defendants and thus be forced into bankruptcy; that they thereupon determined to run nonunion shops so far as their pressmen and feedmen were concerned; that petitioners had at great expense made contracts of employment with certain persons, and expected to be able to contract with others, upon the distinct understanding that such new employees could not work for and be in the employment of plaintiffs and be a member of said union, and that if any one of such new employees should become a member of said union at any time while in the employment of plaintiffs, such employment should immediately cease; that defendants had approached the nonunion men employed by petitioners, and had sought by threats, menaces, intimidation, coercion, and persuasion to induce them to breach their contracts of employment with petitioners, and to leave their employment, and that defendants had openly threatened that they would cause the persons already so employed to leave their employment and would prevent petitioners from contracting with other nonunion employees, or that in cases where contracts of employment were made on the terms above stated they would cause such new employees to become members of the union and leave the service of petitioners, or would prevent them from working for petitioners by making conditions so onerous and unpleasant that petitioners could not run their presses on a nonunion basis; that because of the activities of defendants they were daily losing large sums of money on account of their inability to procure sufficient help to enable them to fill outstanding contracts for printing; and that, unless the defendants are restrained by injunction from committing the acts complained of, petitioners will have to yield to the demands of the union or go out of business, either of which courses will result in irreparable loss and damage to them. The court, after hearing the evidence, granted the following interlocutory injunction:

"It is considered, ordered, and adjudged that the defendants O. L. McMichael, J. A. Alleyn, R. L. Brown, and J. R. Penny [in the judgment in the Webb & Vary case the name Will Walton appears as one of the persons enjoined, and the name of J. R. Penny does not], and their agents and confederates, are enjoined from interfering with or attempting to interfere with the plaintiff's employees for the purpose of inducing the plaintiff's employees to join said labor union without the consent of the plaintiff, by representing that they would suffer no loss by leaving the plaintiff's employment and joining the said union, or because the plaintiff was running a nonunion plant in so far as their pressmen and feeders are concerned. And said defendants, their agents, and confederates are further enjoined from interfering with or attempting to interfere with the plaintiff's employees for the purpose of unionizing the plant of plaintiff in so far as their pressmen and

feeders are concerned without the plaintiff's consent, and in aid of such purpose knowingly and willfully bringing about a breaking by plaintiff's employees of contracts of service known at the time to exist with plaintiff's present or future employees. And the said defendants, their agents and confederates, are further enjoined from inducing or seeking to induce the employees of plaintiff, present or future, to leave the service of the plaintiff, by intimidation, misrepresentation, abusive language, promises of better conditions and shorter hours and better pay, or persuasion."

The question to be determined by this court is whether or not, under the pleadings and the evidence, there was an abuse of discretion by the trial judge. It is well settled and recognized that this court cannot undertake to decide questions of fact on conflicting evidence. We can only say whether there was evidence sufficient to authorize the finding of the trial court. Plaintiffs in error contend that the judgment was unauthorized by the evidence, because their acts, as shown by the evidence, were strictly within their lawful rights. Their brief contains the following statement:

"This case involves the question of just what can striking employees do to win a trade dispute; and, second, just how far the employer can go towards fighting the demands of his employees without injuring the property rights of the employees or the rights of the public. It is a case of employee organization against employer organization. The rights and relations are so intermingled that the one can hardly act without trespassing upon the other."

In reference to what took place after the strike or walkout the brief for the plaintiffs in error says:

"The usual course of operations took place by the union employees doing all within their lawful power to keep others from taking their places and the employers getting in new employees in order to win the fight. On October 12, 1920, the employers started injunction proceedings against the union employees, and alleged, among other things, that since the walkout the various employers had adopted a policy in their shops to employ only pressmen and feeders who did not belong to any union and agreed not to join the union, and if they did so they would be discharged; that after employing a number of new men under such contract the various union employees were inducing and attempting to induce these new employees to break their contracts by joining a union, alleging therein that these union employees were using both unlawful and persuasive means."

[1] 1. We think there are no new principles involved in the present issues. The judgment in these cases, with the exception of the names, is identical with the judgment which was affirmed in the case of Callan v. Exposition Cotton Mills, 149 Ga. 119, 99 S. E. 300. The facts in that case were very similar to the facts in these cases. Callan was

(108 S.E.)

an agent or officer of the union undertaking to unionize the cottonmill, and was denominated a stranger, since he had not been an employee of the Exposition Cotton Mills. In these cases striking former employees, assisted by one or more officers of the union, were sought to be enjoined. The principles of law involved, however, are the same, since former employees, engaged in what they denominate as an industrial warfare with their former employers, would no more be authorized to unlawfully interfere with the business of the latter than would a stranger. In *Iron Molders' Union v. Allis-Chalmers Co.*, 166 Fed. at page 52, 91 C. C. A. 638, 20 L. R. A. (N. S.) 315, in a concurring opinion, Grosscup, Circuit Judge, said:

"Manifestly, then, pending a strike or a lock-out, and as to those who have not finally and in good faith abandoned it, a relationship exists between employer and employee that is neither that of the general relation of employer and employee, nor again that of employer looking among strangers for employees, or employees seeking from strangers employment."

On the other hand, in *Barnes v. Typographical Union*, 232 Ill. at page 431, 83 N. E. 943, 14 L. R. A. (N. S.) 1018, 13 Ann. Cas. 54, Mr. Justice Cartwright said:

"It is true that competition in business justifies action for the benefit of one of the competing parties which results in injury to the other, and a reason frequently given is that the general public benefits outweigh occasional individual losses. One who is seeking employment for himself may offer to work on any terms that he may choose, and the exercise of his legal right may result in the discharge of another laborer. But that rule does not apply to this case. It is not very clear what is meant by competition for the purpose of promoting the welfare of the union and its members, but it is clear that the union and its members were not in competition with the complainants in respect to labor or anything else. The members of the union had left the service of the complainants, and their only purpose was to prevent the complainants from carrying on their business. They were endeavoring to compel the complainants to submit to their dictation by depriving the complainants of their legal right to employ such laborers as they might choose. If there is a combination to injure a person because he refuses to comply with some demand where he has a legal right to refuse, there is no way of classifying acts in furtherance of such purpose as competition. The acts alleged in the bill were directed primarily against the complainants for the purpose of doing them harm, and that sort of action is not lawful competition."

It is not necessary for us to decide in this case whether a strike entirely severs all relations between the parties. The question to be determined is whether the plaintiffs in error in this case exceeded their lawful rights. Plaintiffs in error rely upon the case of *Jones v. Van Winkle Gin & Machine Works*, 131

Ga. 336, 62 S. E. 236, 17 L. R. A. (N. S.) 848, 127 Am. St. Rep. 235, where this court held that—

"Equity will not enjoin employees who have quit the service of their employer from attempting by proper argument to persuade others from taking their places, so long as they do not resort to force or intimidation, or obstruct the public thoroughfares."

We find no fault with that decision, and think that it is sound in principle; and, if striking employees do no more than to attempt, by "proper argument," to persuade others from taking their places, and do not resort to force and intimidation, that a court of equity would not be authorized to interfere. We are equally sure that where such former employees attempt by improper argument to dissuade others from taking their places, and do resort to force, coercion, or intimidation, it would equally be the duty of a court of equity, in a proper case, to interfere by injunction.

"It must be conceded that argument and persuasion are lawful if not directed to the accomplishment of an illegal and unlawful purpose. * * * An act which is naturally innocent, when done with actual malice for the purpose of injuring another, and followed by such injury, is not excused because the act might be innocent under other conditions." *Barnes v. Typographical Union*, supra, 232 Ill. at page 436, 83 N. E. 945, 14 L. R. A. (N. S.) 1018, 13 Ann. Cas. 54.

The persuasion that the law permits in these circumstances is such as appeals to the judgment, reason, or sentiment, and leaves the mind free to act of its own volition. Where there is no such freedom of action, more than mere persuasion has been exercised, and it amounts to duress, intimidation, coercion, or other like influence. Indeed, the case of *Jones v. Van Winkle*, supra, also laid down the following rule:

"An injunction may issue, in a proper case, to restrain persons from attempting, by threats, violence or intimidation, or other unlawful means, to prevent any person from engaging in, remaining in, or performing the business, labor, or duties of any lawful enterprise or occupation, although the acts sought to be restrained, if committed, constitute a crime."

That case also cites the following sections of the Penal Code:

"Sec. 126. If any person or persons, by threats, violence, intimidation, or other unlawful means, shall prevent or attempt to prevent any person or persons in this state from engaging in, remaining in, or performing the business, labor, or duties of any lawful employment or occupation, such offender or offenders shall be guilty of a misdemeanor.

"Sec. 127. If any person or persons, singly or together, or in combination, shall conspire to prevent * * * any person or persons, by threats, violence, or intimidation, from engaging

in, remaining in, or performing the business, labor, or duties of any lawful employment or occupation, such offender or offenders shall be guilty of a misdemeanor.

"Sec. 128. If any person or persons, singly or by conspiring together, shall hinder any person or persons who desire to labor from so doing, or hinder any person, by threats, violence, or intimidation, from being employed as laborer or employee, such offender shall be guilty of a misdemeanor.

"Sec. 129. If any person or persons, by threats, violence, intimidation, or other unlawful means, shall hinder the owner, manager, or proprietor for the time being from controlling, using, operating, or working any property in any lawful occupation, or shall by such means hinder such person from hiring or employing laborers or employees, such offender or offenders shall be guilty of a misdemeanor."

The trial court was authorized to find that the defendants, acting together under a common understanding, which made each of them responsible for the acts of all of their fellows, were guilty of intimidation, threats, and coercion, thus authorizing the grant of the interlocutory injunction. There can be no question that under former decisions of this court, which are controlling in this case, the court was authorized to enjoin the defendants from endeavoring, by the means stated above, to induce the employees to violate their contracts of employment by joining a labor union in such large numbers as would force the employer to consent to the unionizing of their plants or would render it impossible to continue the operation of their businesses. *Callan v. Exposition Cotton Mills*, supra. And this rule is supported by the decision in *Hitchman Coal Co. v. Mitchell*, 245 U. S. 229, 38 Sup. Ct. 65, 62 L. Ed. 260, L. R. A. 1918C, 497, Ann. Cas. 1918B, 461. The case of *Tunstall v. Stearns Coal Co.*, 192 Fed. 808, 113 C. C. A. 132, 41 L. R. A. (N. S.) 453, involved some of the features of the present case. It appears that some of those sought to be restrained were paying sums of money to workmen as inducement for them to quit their work. It was conceded by counsel representing the strikers that such acts were for the purpose of compelling the company to yield its position or close its mine. After elaborate discussion and citation of authorities, the court, in that case, decided that there was "no logical theory" by which the conduct described could be considered "lawful persuasion." It was further said:

"In every case where this right of persuasion is sustained, it is because, in the end, the employee exercises his own free will. If he is persuaded that it is for his best interests to work elsewhere or not to work, he has a right to follow out his conclusion; but, if his conclusion is not reached as the result of his free choice, but that choice is controlled either by a threat or by the promise of an outside, foreign, independent reward, there is a lack of

that foundation upon which the theory of 'lawful persuasion' must stand."

The distinction between the use of proper argument to dissuade others from taking the places of striking former employees where no contract exists and where a contractual relation did exist was made clear by this court in *Burgess v. G., F. & A. R. Co.*, 148 Ga. 415, 96 S. E. 864. What would constitute improper argument to persuade employees to leave their employment obviously must depend upon the facts of each individual case, and no court could possibly lay down a general rule in advance that would be satisfactory in all cases. Any statement of general rules would be binding only in so far as pertinent to the issues made. Any further expression would be obiter dicta. It is proper to say that the right of laboring people to organize and to strike for the purpose of protecting and promoting their common welfare by fair and lawful means is fully recognized by this court, and that right is not challenged anywhere in this case. It is universally recognized by the courts, at least, that labor has as much right as capital to organize for their own protection. It is essential, however, for the protection of the public that neither should be permitted to exceed their lawful rights, nor to exercise other than fair, lawful and peaceable means. The principle is well and fairly stated in *Iron Molders' Union v. Allis-Chalmers Co.*, 166 Fed. at page 52, 91 C. C. A. 638, 20 L. R. A. (N. S.) 315, a case cited by plaintiffs in error:

"To whatever extent employers may lawfully combine and co-operate to control the supply and the conditions of work to be done, to the same extent should be recognized the right of workmen to combine and co-operate to control the supply and the conditions of the labor that is necessary to the doing of the work. In the fullest recognition of the equality and mutuality of their rights and their restrictions lies the peace of capital and labor."

In the case of *Kemp v. Division No. 241*, 255 Ill. at page 237, 99 N. E. 398, Ann. Cas. 1913D, 347, it was well said:

"Every person has the right, under the law, to dispose of his own labor or manage his capital according to his own will, but he must exercise this right so as to make it compatible with the exercise of similar rights by others. Erie on Trade Unions, 12. The legal right of every person is conditioned on the welfare of society, and the latter is more important than the welfare of any individual or class."

[2] 2. The evidence in regard to interference with some of the establishments fully authorized a finding by the court that the defendants were guilty of threats, intimidation, and coercion, and that they offered outside an independent reward to induce the new employees to break their contracts and to leave Atlanta. There was evidence tending

to show that union men had been "planted" in some of the printing shops to gather information; that union men congregated in large numbers around some of the shops at such hours as the employees went to and returned from their work. There was evidence tending to show that defendants informed employers that they would send away employees as fast as they were employed. There was evidence that one employee was forcibly taken hold of by union men who insisted upon arguing with him and a companion about leaving their employment. These employees insisted that they be left alone, and undertook to leave the strikers, who informed them that they—

"would not be on the job in the morning, and that they had better listen to them, and if they wanted to get rough about it, that they [the strikers] would kick hell out of them."

Another employee swore that he was told by strikers that they would "get him." Some were annoyed by strikers until police protection was sought. The evidence showed that the new employees were accepted by the printing establishments under a form of contract adopted by all of the plaintiffs, which said contract provided that the employees should not be members of the union, and, should they become such, the contract would be terminated. One nonunion employee was told by the strikers that he was not going to stay here three months. This employee stated to the strikers that he was under contract for three months, and was going to stay here and fill it out. He was offered his transportation to leave.

S. R. Marks, a vice president of the Pressmen's Union (but not a former employee of the plaintiffs), testified for the defendant strikers, in substance, that he had assisted some of the nonunion men under employment by the employing printers with transportation to leave town; that he did not know whether some of the men assisted were working under contract not to join the union and that he was not concerned about that; that none of them said, when they came to see him, that they were under contract not to join the union. He testified that he had money in his hands and was paying the same to men, who had been working for the employing printers, to leave. He further testified that he intended to win the fight on money he was getting from all sources; that the employers were running nonunion shops; that he considered the strike fight legitimate, legal, honest, and straightforward.

In other instances arguments and appeals were made to new employees not to retain the places of former employees and thus deprive the latter of the means of supporting themselves and families. In each instance the object sought by the defendants unde-

niably was to bring about a severance of the relation of employer and employee between the printing establishments and their new employees. Whether the object was stated in plain terms or not, if successful the effect was to cause a breach of the contract. Whether the evidence in regard to interference with some of the printing shops and as to some of the defendants, considered alone as if in a separate case, would not authorize the grant of an interlocutory injunction, the judgment will not be reversed where the evidence authorized the judgment in behalf of some of the plaintiffs against some of the defendants. The exception is to the judgment as a whole. The plaintiffs brought the actions together against the defendants, the Pressmen's Union acting through their members and officials, charging that the latter were conspiring and acting together against the plaintiffs as a whole.

[3] 3. The third headnote does not require elaboration.

Judgment affirmed.

All the Justices concur.

(151 Ga. 803)

POWELL et al. v. McKINNEY et al.
(No. 2360.)

(Supreme Court of Georgia. Aug. 11, 1921.)

(Syllabus by the Court.)

1. Wills \S 524(2), 634(7)—Members of class ascertained on testator's death; remainder held vested, so that children of deceased remainderman took share.

"As a general rule, when there is a devise to a class, the members of the class are to be ascertained upon the death of the testator, as the will takes effect on that date." The devise in the present instance was to a class of children of the life tenant. The father of the plaintiffs was in life at the death of the testatrix, when the will became operative, but died prior to the period of distribution. At his death his interest passed to his heirs. Applying these principles, it follows that the petition was not subject to the ground of demurrer that the plaintiffs had no interest in the estate because, their father having died before the period of distribution, his interest was divested.

2. Executors and administrators \S 20(9) — Heirs may institute proceeding to set aside appointment without their knowledge.

The heirs of the decedent, who had no knowledge that the application for letters of administration was pending, were proper parties to institute and maintain an equitable proceeding to set aside and vacate the judgment appointing the administrator.

3. Limitation of actions \S 180(2) — Petition not showing bar on its face not subject to demurrer.

The petition was not subject to demurrer on the ground that it was barred by the statute

of limitations. It does not affirmatively appear on the face of the petition that the cause of action is barred by the statute of limitations, and therefore the petition is not subject to demurrer on that ground, but such defense is a matter for plea.

4. Action \S 50(8)—In suit to vacate appointment and for other relief, parties or causes held not misjoined.

The petition is not subject to demurrer on the ground that there is a misjoinder of parties, nor is it subject to demurrer on the ground that there is a misjoinder of causes of action.

5. Executors and administrators \S 20(9) — Suit to vacate appointment and establish plaintiffs' rights in another estate held not prematurely brought.

The petition was not subject to demurrer on the ground that the action is prematurely brought, because it affirmatively appears from the petition that there are no tangible assets of any kind in existence calling for the functions of an administrator de bonis non on the estate of Chapman Powell, deceased.

6. Executors and administrators \S 20(9) — Petition to vacate appointment and establish plaintiffs' rights in another estate not demurrable.

The petition is not subject to demurrer on the ground that, the petition showing that there was an administrator on the estate of H. Chapman Powell, the right to the custody and possession of any property, interests, or assets of such estate was in such legal representative, and petitioners were not entitled to proceed against the executor of the estate of Mrs. M. A. J. Powell.

7. Executors and administrators \S 20(9) — Suit to vacate judgments and orders and establish rights in estate held not barred by adequate remedy at law.

The petition set out a cause of action entitling the plaintiffs to equitable relief, for which they had no adequate remedy at law. The court erred in sustaining the general demurrer and dismissing the petition.

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Suit by H. O. Powell and others against C. D. McKinney, administrator, and others. Judgment dismissing the petition on demurrer, and plaintiffs bring error. Reversed.

Mrs. Mary J. Rucker bequeathed to her sister, Martha A. J. Powell, \$20,000 "during her natural life, she to enjoy the income from the same," with the further direction that "at her death said amount, with accumulations, if any, to be equally divided between her children." Mrs. Powell, the life tenant, died in June, 1917, subsequently to the death of Mrs. Rucker. She had had four children. Three of them survived her. The fourth child, H. Chapman Powell, survived the testatrix, but predeceased his mother, leaving two

children, the plaintiffs in error. H. Chapman Powell had been divorced from his wife; the latter having married again and removed with their two children to the state of Virginia. At a time when the two children of H. Chapman Powell were still minors, without notice to them, and without their knowledge or consent, Frank A. Powell procured from the court of ordinary of Hall county letters of administration on the estate of H. Chapman Powell, and later an order authorizing the sale of a $\frac{5}{12}$ interest in certain described property in Fulton county, Ga., under an application reciting:

"Mrs. Mary J. Rucker left a will devising \$20,000 lifetime estate to Mrs. Martha A. J. Powell; Mrs. Martha A. J. Powell to receive the income from said property during her life, and, at her death, each of her children to receive \$5,000 interest in said investment, with the increments thereof. H. Chapman Powell was a son of Mrs. Martha A. J. Powell, and said interest is invested in the property herein described."

The interest of the estate of H. Chapman Powell in the property was appraised to be of the value of \$3,500, and on the sale was bought by Mrs. M. A. J. Powell, the mother of the deceased, H. Chapman Powell, and of his administrator, for the sum of \$500, which amount was credited on an indebtedness which she claimed was due to her.

H. Chapman Powell and Travis Leigh Powell (the latter being a minor and suing through his mother as next friend), the two children of H. Chapman Powell, the deceased son of Mrs. M. A. J. Powell, filed a petition against McKinney, administrator with the will annexed of Mrs. Rucker, Frank A. Powell, individually and as administrator de bonis non of the estate of H. Chapman Powell, deceased, and John M. Hulsey, as executor of the estate of Mrs. Powell. In addition to the facts above set forth the petition alleges that a one-fourth remainder interest in the bequest above mentioned became vested in the father of petitioners, H. Chapman Powell, and that the same passed and descended to them as his sole heirs at law; also that they are entitled to share as residuary legatees in the distribution of the estate of Mrs. Rucker, and that the value of their interest in said estate amounts to \$8,000; that the application for letters of administration on the estate of their father, made by Frank A. Powell above referred to, was fraudulently made for the purpose of divesting petitioners of their interest in the bequest under the will of Mrs. Rucker; that the same was void, because it recited that the applicant was the next of kin (brother) of the deceased, when the applicant knew that petitioners, the children of the deceased, were the next of kin and were in life, because said application did not show the consent of the other broth-

ers and sisters of the deceased, and because petitioners were at the time minors, and no notice was given to them of said application; that the sale of said property was fraudulent and void, because it was in effect a sale of a one-third interest in the property by the administrator to himself, and nothing was paid by Mrs. M. A. J. Powell for the interest of H. Chapman Powell in said property; that she was at the time a very old and infirm person, dominated by her son, Frank A. Powell, and later executed her will devising all her property to her three children, including Frank A. Powell; that said sale was void, because the land was misdescribed, in that it was not located in a block bounded by Broad street; that said sale was void, because there was no title in the said H. Chapman Powell to the real estate mentioned, the same being in the representative of the estate of Mrs. Mary J. Rucker; that the said legacy was not invested in said property, had never been assented to by the administrator of her estate, and had never been set apart; that petitioners did not know of the above-mentioned sale until about the time of the filing of a certain petition by the administrator upon Mrs. Rucker's estate, seeking construction and direction; that petitioners filed pleadings in said matter, setting up their relationship to H. Chapman Powell; that their addresses were known to or could have been ascertained by Frank A. Powell; that in spite of these facts Frank A. Powell filed in the court of ordinary of Hall county an application for letters of administration de bonis non upon the estate of H. Chapman Powell, making in said application the following averment:

"H. Chapman Powell, resident of said county, departed this life on the 20th day of January, 1915, leaving your petitioner as one of his next of kin, and also leaving possibly an estate of real and personal property, worth the sum of not known at this time; and petitioner has administered on said estate, but there is a possible part thereof not administered, and there is an indebtedness against said estate, and at the time of his death the said H. Chapman Powell was entirely intestate, as your petitioner believes and herein alleges."

Petitioners allege that this application was likewise fraudulent and void, because Frank A. Powell knew at the time it was made that he was not one of the next of kin of H. Chapman Powell; because it did not set forth the existence of any estate to be administered upon, but only a possibility of such, and that a possibility cannot be administered upon; because it undertakes to set up an indebtedness against said estate, without showing to whom the indebtedness was due, and without showing that Frank A. Powell was a creditor. The petition recites that Frank A. Powell and others have filed against McKinney, administrator with the will annexed of Mrs. Rucker, a petition for settlement, and that

the same would shortly thereafter be heard. It also alleges that Hulsey, as administrator of the estate of Mrs. M. A. J. Powell, is claiming for that estate the interest in the estate of Mrs. Rucker to which petitioners, as the sole heirs of H. Chapman Powell, are entitled.

The prayers are that the petition for settlement of the estate of Mrs. Rucker, above referred to, and distribution of the estate, particularly the portion vested in H. Chapman Powell, be stayed by injunction; that McKinney, as administrator of Mrs. Rucker, be enjoined from paying over to Hulsey, as executor of Mrs. Powell, or to Frank A. Powell, individually or as administrator de bonis non of H. Chapman Powell, any portion of the Rucker estate to which petitioners lay claim; that the appointments of Frank A. Powell as administrator and as administrator de bonis non on the estate of H. Chapman Powell, issued by the court of ordinary of Hall county, Ga., be declared void; that the application made by Frank A. Powell, as administrator, for leave to sell the interest of H. Chapman Powell in the land above referred to, and the deed made by him to Mrs. M. A. J. Powell, be declared null and void; that the executor of Mrs. M. A. J. Powell, and Frank A. Powell, as administrator of the estate of H. Chapman Powell, be declared to have no right, title, or interest in the portion of Mrs. Rucker's estate claimed by petitioners; that the interest of H. Chapman Powell in the estate of Mrs. Rucker be declared to be the property of petitioners; and that they have judgment against McKinney, as administrator of that estate.

Frank A. Powell, individually and as administrator de bonis non upon the estate of H. Chapman Powell, and Hulsey, as administrator upon Mrs. Powell's estate, demurred generally: (a) For want of equity and failure to set forth a cause of action, the petition showing that petitioners have an adequate remedy at law; (b) for misjoinder of parties, it appearing from the facts alleged that petitioners cannot recover from the defendants named, jointly; (c) for misjoinder of action, in that a petition for the removal of an administrator under an allegation of fraud cannot be united with a claim for extraordinary relief outside of the mere removal, and cannot be united with an action praying for the setting aside of the alleged sale; (d) because the petitioners are not entitled as a matter of law to proceed in their individual capacity for the relief prayed as against McKinney, administrator of the estate of Mrs. Rucker, in conjunction with John M. Hulsey as executor of Mrs. M. A. J. Powell, or as against John M. Hulsey, executor of the estate of Mrs. Powell, or as against Frank A. Powell individually or as administrator of the estate of H. Chapman Powell, deceased. Frank A. Powell also demurred upon the additional grounds: (e) That the action is pre-

mature, it affirmatively appearing from the petition that there are no tangible assets of any kind in existence calling for the functions of an administrator de bonis non of the estate of Chapman Powell, deceased; (f) because it affirmatively appears from the petition that the judgments and orders of the court of ordinary of Hall county sought to be set aside were rendered more than three years prior to the filing of the petition, and the action is therefore barred by the statute of limitations; (g) because, it affirmatively appearing from the petition that H. Chapman Powell died prior to the death of Mrs. Powell, the life tenant, and the bequest in the will of Mrs. Rucker being to Mrs. Powell, with remainder to her children as a class, the legacy, as to such child, was divested, and no interest passed to his children, the plaintiffs in this case. Hulsey also demurred upon the ground: (h) That, the petition showing there was an administrator upon the estate of H. Chapman Powell, the right to the custody and possession of any property, interests, or assets of such estate was in such legal representatives, and petitioners were not entitled to proceed against him as executor of Mrs. M. A. J. Powell. The demurrers were sustained, and the petition dismissed. The plaintiffs excepted.

Robt. C. & Philp H. Alston, of Atlanta, for plaintiffs in error.

Green, Tilson & McKinney and R. B. Blackburn, all of Atlanta, for defendants in error.

GILBERT, J. [1] 1. One of the grounds of demurrer on which the petition is attacked is as follows:

"It affirmatively appearing from the petition that the legacy referred to was willed to Mrs. M. A. J. Powell for and during her life, and at her death said sum, with its accumulations, if any, to be equally divided between her children, and it further appearing that H. Chapman Powell departed this life prior to the death of Mrs. M. A. J. Powell, the life tenant, the defendants herein named contend that upon the death of H. Chapman Powell no interest in said legacy passed to plaintiffs, and as a matter of law they cannot recover as against these defendants, or as against the estate of Mary J. Rucker, deceased, in any sum or in any amount as charged in said petition; these defendants contending that, the legacy referred to being to one person for life and at her death to the children of the life tenant as a class, upon the death of either of the children before the death of the life tenant, the legacy as to such deceased child was divested, and no interest went to the children of such deceased child, to wit, the plaintiffs."

As shown in the statement of facts, Mrs. Powell, the life tenant, and all of her four children, were in life at the death of Mrs. Mary J. Rucker, the testatrix. After the death of the testatrix, but prior to the death of the life tenant, one of the children of the

latter, H. Chapman Powell, died, leaving two children, the plaintiffs in the trial court and plaintiffs in error in this court. The item of the will under which they claim, and upon which their suit is based, is as follows:

"I give to my sister, Mrs. Martha A. J. Powell, twenty thousand (\$20,000.00) dollars during her natural life, she to enjoy the income from the same, at her death said amount, with the accumulations, if any, to be equally divided between her children. If I should survive my sister Martha, then the legacy herein to be equally divided between her children."

The last sentence in the item of the will just quoted need not be considered, since the condition that "if I should survive my sister Martha" did not occur; the testatrix having predeceased her sister Martha. The correct decision of the question depends upon whether the remainder interests vested at the death of the testator or at the death of the life tenant. By this we mean the vesting of the title, and not the vesting to the right to the possession, use, and enjoyment of the property. 23 Ruling Case Law, p. 526, § 68. Code 1910, § 3680, declares:

"The law favors the vesting of remainders in all cases of doubt. In construing wills, words of survivorship shall refer to the death of the testator in order to vest remainders, unless a manifest intention to the contrary appears."

Section 3677 provides as follows:

"If the remainderman dies before the time arrives for possession his estate in remainder, his heirs are entitled to a vested remainder interest."

In the case of *Irvin v. Porterfield*, 126 Ga. 729, 55 S. E. 946, the will provided for a life estate to the widow of the testator, and further provided:

"At the death of my wife I wish my property equally divided between my children."

In that case (126 Ga. at page 732, 55 S. E. 948) it was held:

"As a general rule, when there is a devise to a class, the members of the class are to be ascertained upon the death of the testator, as the will takes effect on that date. In a devise to children as a class by way of remainder, children in esse at the death of the testator take vested interests. * * * The devise was to a class of children of the testator. This class was fixed by the conditions that existed at the death of the testator. And the interest of any that might die before the period of distribution passed to their heirs."

See *Crawley v. Kendrick*, 122 Ga. 183, 187, 50 S. E. 41, 2 Ann. Cas. 643; *Milner v. Gay*, 145 Ga. 858, 860, 90 S. E. 65; *Gibbons v. International Harvester Co.*, 146 Ga. 467, 91 S. E. 482.

The general rule elsewhere is that where property is devised or bequeathed to one person for life, with remainder over to the

testator's children, the latter take a vested interest on the death of the testator, unless there is a clear manifestation of a contrary intent on the part of the testator. 23 Ruling Case Law, pp. 530, 534, §§ 72, 73. In the present case there seems to be no clear manifestation of an intent to postpone the vesting of the title in the remainderman, and therefore it is to be presumed that the testator intended that the remainder interest should vest at the moment when the will became operative. If there should be doubt on this question, it must be resolved in favor of the earlier vesting. We conclude that the remainder interest of H. Chapman Powell vested at the death of the testatrix, Mrs. Rucker, and that therefore the petition was not subject to demurrer on this ground.

[2] 2. The petition is attacked by demurrer on the ground that, the petition showing that there was an administrator upon the estate of H. Chapman Powell, the right to the custody and possession of any property, interest, or assets of such estate was in such legal representative, and that the plaintiffs could not sue in their individual capacity to recover such property. This ground of the demurrer is without merit, since the petition alleges that the judgment appointing the administrator was void, because obtained by fraud and without the knowledge of the plaintiffs, who resided in the state of Virginia, and that the acts and doings of the administrator were adverse to the plaintiffs and in fraud of their rights. In *Neal v. Boykin*, 129 Ga. 676, 59 S. E. 912, 121 Am. St. Rep. 237, it was said:

"The heirs and creditors of the decedent, who had no knowledge that the application for letters of administration was pending, were proper parties to institute and maintain an equitable proceeding to set aside or vacate the judgment appointing the administrator."

In the opinion in that case (129 Ga. at page 682, 59 S. E. 915, 121 Am. St. Rep. 237) it was said:

"The petitioners in the present case were heirs and creditors of the decedent. They were interested in the assets of the estate and their distribution. They would, therefore, have been heard as caveators when the application for letters of administration was pending. *Towner v. Griffin*, 115 Ga. 966. And it is quite clear that they are the proper parties plaintiff to the proceeding to vacate or set aside the judgment appointing the administrator. See *Jones v. Smith*, 120 Ga. 642. The fact that citation was published would not prevent the plaintiffs, who had no knowledge of the application for letters of administration, from moving in due time to have the judgment appointing the administrator set aside. *Davis v. Albritton*, 127 Ga. 517."

[3] 3. Another ground of the demurrer was that it affirmatively appears from the petition that the judgment and orders of the court of ordinary of Hall county, which were

sought to be set aside, were rendered more than three years prior to the filing of the petition, and therefore that the action is barred by the statute of limitations. It appears from the petition that one of the plaintiffs, Travis Leigh Powell, was still a minor when the present suit was filed. It does not clearly appear when H. Chapman Powell, the other plaintiff, attained his majority.

"Where it does not affirmatively appear upon the face of the declaration that the cause of action is barred by the statute of limitations, this defense cannot be made by general demurrer setting up that the action is barred by the statute, but is matter for plea." *Stringer v. Stringer*, 98 Ga. 320(2), 20 S. E. 242; *Coney v. Horne*, 98 Ga. 723, 726, 20 S. E. 213; *Thorn-ton v. Jackson*, 129 Ga. 700(2), 59 S. E. 905.

It does appear from the petition that on December 27, 1915, Frank Powell filed his final report, as administrator, as to the sale of certain property, and that at that time H. Chapman Powell was a minor. The petition was filed by the plaintiffs on January 21, 1920. Moreover, the demurrer attacks the petition on the ground that both of petitioners are barred by the statute of limitations. The demurrer was based upon the ground that the action was barred as to both plaintiffs, and it affirmatively appears that one of them was still a minor. It is not necessary to decide whether, in view of the allegations of fraud, the statute of limitations began to run as against H. Chapman Powell on the day he attained his majority, or whether it began on his discovery of the rendition of the fraudulent judgment sought to be set aside.

[4] 4. The petition is also attacked by demurrer on the ground that there is a misjoinder of parties and a misjoinder of causes of action. The petition was not subject to demurrer on either of these grounds. All of the parties were necessary to a complete adjudication of the issues. As was said in the case of *Conley v. Buck*, 100 Ga. 187, 193, 28 S. E. 97, 99:

"The principle to be deduced * * * is that a bill against several persons must relate to matters of the same nature and having a connection with each other, and in which all of the defendants are more or less concerned, though their rights in respect to the general subject of the case may be distinct."

Separate suits against the several defendants would not afford effective and complete justice to the plaintiffs. All of the parties defendant are interested in and contesting over the same fund. That fund is the portion of Mrs. Rucker's estate bequeathed to H. Chapman Powell, and which became vested on the death of the testatrix.

"Equity seeks always to do complete justice; and hence, having the parties before the court rightfully, it will proceed to give full relief to

all parties in reference to the subject-matter of the suit, provided the court has jurisdiction for that purpose." Civil Code 1910, § 4522.

The court having taken jurisdiction for the purpose of setting aside a judgment on the ground of fraud, it will proceed to give full relief to all of the parties in reference to the subject-matter of the suit. *McDonald v. Davis*, 43 Ga. 356 (2); *Atlanta, Birmingham & Atlantic R. Co. v. Smith*, 148 Ga. 282, 96 S. E. 562; *Kirkpatrick v. Holland*, 148 Ga. 708, 98 S. E. 265.

[5, 6] 5, 6. The fifth and sixth headnotes do not require elaboration.

[7] 7. The petition is attacked by demurrer on the ground that there is a want of equity and failure to set forth a cause of action. The judgment sustaining the demurrer and dismissing the petition does not indicate the particular ground or grounds of the demurrer to which the court adjudged the petition to be subject. The demurrer was sustained as a whole, and the petition dismissed. It is a necessary conclusion that the trial court was of the opinion that the petition was insufficient to afford any relief upon any of the prayers; for the general demurrer would have been overruled if the petition had been considered sufficient to afford any relief upon any prayer of the petition. It is argued that there is no equity, because the plaintiffs have an adequate remedy at law. We think it obvious, the allegations of the petition being taken as true, that the petitioners have not an adequate remedy at law. The judgments of the court of ordinary completely bar the way of plaintiffs to an adjudication of their rights. These judgments are alleged to have been obtained by fraud, and relief in these matters falls peculiarly within the province of a court of equity. Under the contention that there is a want of equity and a failure to set forth a cause of action generally, it is argued that none of the relief can be obtained, because it appears from the petition that Frank A. Powell has obtained a judgment from the court of ordinary of Hall county, dismissing him as administrator of the estate of H. Chapman Powell, deceased. The petition alleges that Frank Powell obtained his appointments, both as administrator and as administrator de bonis non, by fraud; that these plaintiffs resided in the state of Virginia, and had no notice of his appointment until after the fraud had been accomplished; and they seek to have the judgments appointing him set aside for these reasons. The petition does not allege that Frank A. Powell had obtained a judgment of the court of ordinary of Hall county, dismissing him; but it is shown that he had made his final report as administrator, and

had later made application for and been appointed administrator de bonis non upon the same estate, and from this it is argued that it must be assumed that he had obtained a judgment dismissing him as administrator. The petition does not pray for the setting aside of any such judgment of dismissal. It has been held in a number of cases that such a judgment of dismissal must be set aside before an administrator's sale can be set aside, because until then the administrator making the sale could not be made a party to the suit. *Whitley Grocery Co. v. Jones*, 128 Ga. 791, 58 S. E. 623. It has also been held that, where there has been a judgment of dismissal, this judgment must be set aside before the administrator can be cited to appear in a court of ordinary to account to the heirs or probate the will in solemn form. *Jacobs v. Pou*, 18 Ga. 346; *Thompson v. Chapeau*, 132 Ga. 847, 65 S. E. 127. The rulings made by these decisions are based upon the fact that the administrator was a necessary party; and, if he had been granted letters of dismission, he could not be made a party unless the grant was reopened and he was reinstated in office.

In the present case Frank A. Powell is administrator de bonis non on the estate of H. Chapman Powell. After having his dismission as administrator, apparently, he subsequently had himself appointed administrator de bonis non, and as such representative of the same estate he is made a party to this suit. Nothing could be gained, therefore, and no useful purpose could be served by including a prayer for setting aside the judgment dismissing Frank A. Powell as administrator. Moreover, his entire connection with the administration of that estate, including the sale of the property made by him, is attacked on the ground of fraud, and according to the allegations the fraud runs through the entire transaction from beginning to end, including the judgment of dismissal. *Pass v. Pass*, 98 Ga. 791, 25 S. E. 752; *Pollock v. Cox*, 108 Ga. 430, 34 S. E. 213.

"The superior court in the exercise of its equitable jurisdiction may set aside a judgment of a court of ordinary, procured by fraud, upon proper allegations and proof. The party seeking such relief is not compelled to move to set aside the judgment in the court of ordinary." *Lester v. Reynolds*, 144 Ga. 143(2), 86 S. E. 321; *Wash v. Wash*, 145 Ga. 404, 89 S. E. 364.

Our conclusion is that the petition set out a cause of action, and that the court erred in sustaining the general demurrers and dismissing the case.

Judgment reversed.

All the Justices concur.

(151 Ga. 813)

(108 S.E.)

PATTERSON v. GEORGIA GRAVEL CO.
(No. 2391.)

(Supreme Court of Georgia. Aug. 11, 1921.)

(Syllabus by the Court.)

1. Attorney and client \S 101(1) — Attorney cannot consent to judgment contrary to client's instructions when other party knows of violation of instructions.

An attorney at law has no authority to bind his client by a compromise agreement resulting in a consent judgment in direct opposition to the instructions of his client, and with the knowledge of the adverse party of such violation of instructions.

2. Execution \S 166 — Judgment \S 373 — Defendant cannot go behind judgment on affidavit of illegality though wrongfully consented to by attorney; judgment may be set aside when rendered on attorney's wrongful consent.

The client cannot, by affidavit of illegality, go behind the consent judgment so entered, but such judgment may be set aside upon proper proceedings therefor, duly commenced.

Error from Superior Court, Wheeler County; E. D. Graham, Judge.

Suit by the Georgia Gravel Company against J. C. Patterson and others. Judgment for plaintiff, on demurrer, and defendant named brings error. Affirmed.

J. C. Patterson filed a petition against the Georgia Gravel Company, a corporation, and S. M. Kennedy, seeking to recover a personal judgment against each of the defendants. Subsequently the plaintiff sued out an attachment against the defendants. The defendants employed an attorney at law to defend the actions; and answers were filed by each of the defendants, denying any indebtedness to the plaintiff. During the regular term of the court to which the suit and attachment were made returnable, the attorney for the defendants withdrew as counsel from the cases, and consented that plaintiff take a verdict in each of said cases against each of the defendants for the principal sum sued for, with interest. Verdicts were accordingly taken, without proof or evidence, without notice to the defendants, without their consent, contrary to the instructions of the defendants to their attorney, and with the knowledge of the plaintiff of such violation of instructions.

The defendant, the Georgia Gravel Company, did not know of the taking of the verdicts against it, and the entry of judgment thereon by the plaintiff, until after the term of the court at which the same were taken had adjourned, when it was too late to except to said verdicts or judgments by motion for new trial or otherwise; nor did it know of the withdrawal of the attorney from

the cases, and his consent that plaintiff might take verdicts and judgments, until after the verdicts and judgments were rendered. After the verdicts and judgments were entered, executions were issued against the defendants, and these executions were levied by the sheriff of the county upon certain land belonging to the defendant, the Georgia Gravel Company, and the land was being advertised for sale. Whereupon the defendant, Georgia Gravel Company, filed an equitable petition against the plaintiff, J. C. Patterson, the sheriff, the attorney of record of the defendant in the common-law action and attachment suit, and S. M. Kennedy, its codefendant in said action and suit, seeking to have the consent verdicts and judgments set aside, and for other relief. To the petition J. C. Patterson demurred, upon the ground that it set forth no cause of action, and that the petitioner had an adequate and complete remedy at law, by affidavit of illegality. The demurrer was overruled, and Patterson excepted.

H. W. Nalley, of Alamo, for plaintiff in error.

Eschol Graham and Geo. H. Harris, both of McRae, for defendant in error.

GEORGE, J. (after stating the facts as above). [1] 1. Upon the first question raised by the demurrer, the case is controlled by the decision in *Davis v. First National Bank of Blakely*, 139 Ga. 702, 78 S. E. 190, 46 L. R. A. (N. S.) 750, where it was held:

"Where a suit was brought to cancel a deed, to have the land described in it decreed to belong to the plaintiff, to have an accounting, to recover double the usurious interest alleged to have been paid to the grantee, a national bank, and to obtain other equitable relief, if the plaintiff authorized her attorneys to enter into a consent decree fixing the amount required to be paid by her to the defendant in discharge of all liabilities against her and the property at \$5,000, and expressly instructed them that she would not consent to a compromise or settlement of the case except upon such terms, to which the attorneys agreed, which instructions were known to the adverse party through its leading attorney; and if nevertheless the defendant's leading attorney persuaded the plaintiff's counsel to disregard such instruction, and induced them to consent to a decree fixing such liability at \$15,000, declaring the debt to be hers, and not that of her husband, as she alleged it was, and directing that in default of payment by her the land should be sold as provided therein, a consent decree so entered could be set aside by the client upon proper proceedings therefor, duly commenced."

[2] 2. Upon the second question, the plaintiff in the equity suit cannot go behind the judgments by affidavit of illegality, and attack the judgments upon the ground that they were rendered by the consent of his

counsel, without plaintiff's knowledge or consent, in direct opposition to his instructions to his attorney, and with the knowledge of the adverse party of the violation of such instructions. Civil Code 1910, § 5311; *Tumlin v. O'Bryan*, 68 Ga. 66; *Southern Railway Co. v. Daniels*, 103 Ga. 541, 29 S. E. 761; *Fitzgerald Granitoid Co. v. Alpha Portland Cement Co.*, 15 Ga. App. 174, 82 S. E. 774. It is obvious that illegality was not an available remedy.

Judgment affirmed.

All the Justices concur.

(151 Ga. 818)

CRAWLEY et al. v. STATE. (No. 2376.)

(Supreme Court of Georgia. Aug. 12, 1921.)

(Syllabus by the Court.)

1. Criminal law §953—Statute as to notice of motion for new trial complied with where state had sufficient notice before final hearing.

Where an extraordinary motion for new trial in a criminal case is made in term, upon grounds which were not known to the movant or his counsel before the convening of the court, and the judge entertains the motion, grants a rule nisi thereon, and the solicitor general acknowledges service of the motion and nisi, expressly waiving "all other and further service or notice," and is given 20 days' notice of the motion and of the grounds thereof before final hearing, the judgment overruling the motion and denying the new trial will not be affirmed upon the ground that the movant did not give to the opposite party 20 days' notice of his intention to make the motion.

2. Criminal law §957(1), 1156(4)—Finding on motion for new trial that juror was competent not reversed unless discretion abused; deceased juror's statements on voir dire may be considered on motion for new trial.

When in a criminal case, after verdict, either in an original motion or an extraordinary motion for new trial, an attack is made upon a juror upon the ground that he was not impartial, the trial judge occupies the place of a trier, and his finding that the juror is competent will not be reversed unless under all the facts the discretion is manifestly abused.

(a) The statements of a juror on voir dire may be considered by the trial judge on the hearing of an extraordinary motion for new trial, where the juror died subsequently to the trial and before the making of the motion.

3. Criminal law §923(4)—Jury §90—Juror related to prosecutrix within ninth degree is disqualified; disqualification by relationship when unknown at trial is good ground for extraordinary motion for new trial; juror's ignorance of relationship does not prevent new trial.

A juror in a criminal case who is related either by consanguinity or affinity within the ninth degree to the prosecutrix, ascertained according to the rules of the civil law, is a disqualified juror.

(a) That a juror is related to the prosecutrix in a criminal case within the prohibited degree, unknown to the defendant until after verdict, is a good ground for an extraordinary motion for new trial.

(b) That the juror was unaware of the relationship to the prosecutrix until after verdict will not prevent a new trial.

Error from Superior Court, Union County: J. B. Jones, Judge.

George Crawley and others were convicted of murder, and on error the conviction was affirmed (150 Ga. 586, 104 S. E. 410). An extraordinary motion for new trial below was denied, and they bring error. Reversed.

John A. Sibley and Hughes Spalding, both of Atlanta, for plaintiffs in error.

J. G. Collins, Sol. Gen., and Howard Thompson, both of Gainesville, and Pat Haralson and T. S. Candler, both of Blairsville, for the State.

GEORGE, J. George Crawley, Decatur Crawley, Rosa Crawley, and Blain Stewart were jointly indicted and jointly tried at the October term, 1919, of Union superior court, for the offense of murder. The defendants were convicted. George Crawley and Decatur Crawley were sentenced to be hanged, and Rosa Crawley and Blain Stewart were sentenced to life imprisonment in the penitentiary. The defendants made a motion for new trial, which was overruled, and the judgment of the lower court affirmed by the Supreme Court on September 30, 1920. A motion for rehearing was filed, and this motion was denied on October 2, 1920. 150 Ga. 586, 104 S. E. 410. Union superior court convened on October 4, 1920, and adjourned on October 9, 1920. On October 9, 1920, and before the adjournment of court, the defendants named above filed an extraordinary motion for new trial, upon the grounds that: (1) One of the jurors who had rendered the verdict finding them guilty, to wit, Frank H. Spivia, was disqualified by reason of relationship to the prosecutrix which fact was unknown to the defendants or their counsel; and (2) one of the jurors who rendered the verdict finding them guilty, to wit, Luther Chastain, was disqualified by reason of prejudice and bias against the defendants, which fact was unknown to the defendants or their counsel. On December 7, 1920, the judge of the superior court entered a judgment overruling the extraordinary motion for new trial, and the movants excepted.

[1] 1. Penal Code 1910, § 1001, provides:

"In case of a motion for a new trial made after the adjournment of the court, some good reason must be shown why the motion was not made during the term, which shall be judged of by the court. In all such cases, twenty

days' notice shall be given to the opposite party."

The state contends that the judgment denying the extraordinary motion for new trial should be affirmed, because, if for no other reason, 20 days' notice of movants' intention to move for a new trial upon extraordinary grounds was not given to the solicitor general as required by the Code. The record discloses that the grounds upon which the extraordinary motion was made were not discovered until after the convening of the superior court on October 4, 1920. As stated above, the motion was filed on the last day of the term of the court, to wit, October 9, 1920. The motion for rehearing made in the case was denied by the Supreme Court only 2 days before the convening of the October term, 1920, of Union superior court. A motion for new trial based on extraordinary grounds must be filed in term time, either at the term when the case is tried or at some subsequent term. Due diligence required the movants to make their extraordinary motion for new trial promptly on discovery of the grounds. As stated, the grounds of the motion relied on were discovered by movants and their counsel during the October term, 1920, of Union superior court. It was therefore impossible for the movants to give counsel for the state 20 days' notice of their intention to file the extraordinary motion for new trial at the October term. It appears, however, that the trial judge entertained the motion and granted a rule nisi thereon, calling on the solicitor general to show cause on November 23, 1920, why the motion should not be granted. Upon the motion and nisi the solicitor general acknowledged service in the following language:

"Service of the within extraordinary motion for new trial, with orders thereon, is hereby acknowledged. Copy waived. All other and further service of notice is hereby waived."

On motion of the solicitor general the hearing was postponed until November 6, 1920, and again postponed until November 9, 1920, on which latter date the court took the motion under advisement, and thereafter, on December 7, 1920, entered a judgment overruling the motion. It will be noted that the opposite party had 20 days' notice of the motion before the final hearing thereon, and that he was fully advised of the grounds of the motion. We are of the opinion that this was sufficient. Compare *Brinkley v. Buchanan*, 55 Ga. 342. We do not rest the decision of this point upon the doctrine of waiver alone, nor upon the fact that the court granted the nisi notwithstanding the failure of movants to give the solicitor general 20 days' notice of their intention to file the motion for new trial; but we are of the opinion that 20 days' notice of the filing of the extraordinary motion for new trial before final hearing there-

on is a sufficient compliance with the requirements of the statute. The decision on this point is made upon all the facts as they appear in the record, and it is unnecessary to decide whether the refusal of the judge to grant a rule nisi solely upon the ground that movants had failed to give the solicitor general 20 days' notice of their intention to make the extraordinary motion would be erroneous.

[2] 2. Considering the grounds of the extraordinary motion in their inverse order, we are of the opinion that the court did not err in overruling the motion upon the second ground thereof. This ground is based upon an affidavit of a witness to the effect that prior to the trial of the case *Luther Chastain*, one of the jurors, had stated that "the *Crawley boys* and *Blain Stewart* ought to be hung, and if he got on the jury he would make it had for them," and upon the affidavit of another witness to the effect that this juror, after the trial of the case, had stated that the verdict rendered in the case was in accordance with his previously fixed opinion. After the trial of the case and before the filing of the extraordinary motion for new trial, the juror died. The state was therefore unable to produce an affidavit by the juror; but the state offered certain affidavits detailing facts and circumstances tending to cast suspicion upon the truth of the statements contained in the affidavits offered by the movants and to disprove this ground of the motion. In addition, the juror had been sworn on the *voir dire*. Being dead at the time of the filing of the extraordinary motion for new trial, it was competent for the court to take in consideration the juror's sworn statement that he had not formed or expressed an opinion as to the guilt or innocence of the accused, and that there was no bias or prejudice resting on his mind either for or against the accused. See *Buchanan v. State*, 24 Ga. 282, 286. In view of the counter showing submitted by the state, the case on this point is within the rule announced in *Jefferson v. State*, 137 Ga. 382, 73 S. E. 499; *McNaughton v. State*, 136 Ga. 600, 71 S. E. 1038; *Embry v. State*, 138 Ga. 464, 75 S. E. 604.

[3] 3. On the first ground of the motion it appears that the prosecutrix, the wife of the deceased, is related to the wife of the juror *Spivia*. Upon this point the evidence submitted by the movants and the state is not in conflict. The wife of the juror is five degrees removed from the common ancestor, and the prosecutrix is four degrees removed from the common ancestor. By the rule of the civil law the juror's wife and the prosecutrix are related in the ninth degree; by the canon law in the fifth degree. The movants and their counsel were unaware of this relationship until the judgment of the trial court overruling the original motion for new trial was heard and affirmed by the Supreme

Court. That the movants and their counsel, by the exercise of due diligence, could not have sooner discovered the relation of the juror to the prosecutrix, is not fairly in dispute. The trial court, in overruling the extraordinary motion, expressly found that neither the movants nor their counsel had waived the alleged disqualification of this juror, and waiver necessarily results either from knowledge of such relationship or from ignorance of such relationship, due to the failure to exercise proper diligence. It appears that the prosecutrix and counsel for the state were also unaware of the relationship until after verdict; and the affidavit of the juror himself, to the effect that he did not know of the relationship until after the trial, and that even upon notice and inquiry he was unable to ascertain the exact relationship, was offered by the state upon the hearing of the motion. In view of all the facts and circumstances detailed in the affidavits of movants and of their counsel, it must be held that both movants and their counsel exercised due diligence in the premises. There is no statute in this state expressly declaring what degree of relationship will disqualify a juror in a criminal case. Nor is the rule prescribed by which the degree of relationship is to be determined. In the selection of a juror for the trial of a criminal case the state or the accused may make either of the following objections:

"1. That he is not a citizen, resident in the county. 2. That he is over sixty or under twenty-one years of age. 3. That he is an idiot or lunatic, or intoxicated. 4. That he is so near of kindred to the prosecutor, or the accused, or the deceased, as to disqualify him by law from serving on the jury." Penal Code 1910, § 999.

In *Brown v. State*, 28 Ga. 489 (original motion for new trial), it appeared that one of the jurors was a cousin of the prosecutor, but the degree of the relationship is not stated. It was held that a new trial should be granted "where one of the jury is cousin to the prosecutor, and the fact not known to the accused or his counsel until after his conviction." In *Ledford v. State*, 75 Ga. 856 (original motion for new trial), it was held that a third cousin of the prosecutor in a criminal case is not a qualified juror. In the opinion by Chief Justice Jackson (page 857) it is said:

"The juror was disqualified, being a third cousin and within the ninth degree, which fact was unknown to the defendant and his counsel until after trial."

In *Watkins v. State*, 125 Ga. 143, 144, 53 S. E. 1024, 1025, it is said:

"The ninth degree of relationship, as that expression was used in *Ledford's Case*, has been construed to mean the ninth degree as calculated by the rules of the civil law, and not of the canon law. *Thompson on Trials*, 53;

17 Am. & Eng. Enc. L. (2d Ed.) 1124. * * * Sir Edward Coke stated that relationship in any degree was sufficient to disqualify a juror. Co. Litt. 157a. But later writers state that the relationship must be within the ninth degree, calculated according to the civil law. 3 Bl. Com. 863; 1 Chitty's Crim. L. 541; Finch's Law, 401. Such seems to be the view adopted in this state, as indicated in *Ledford's Case*, supra."

In *Roberts v. Roberts*, 115 Ga. 259, 261, 41 S. E. 616, 617, 90 Am. St. Rep. 108, it is said:

"In *Ledford v. State*, supra, Mr. Chief Justice Jackson says: 'The juror was disqualified, being a third cousin and within the ninth degree.' This statement by the Chief Justice, that relationship within the ninth degree would disqualify, we suppose meant within the ninth degree as calculated by the rules of the civil law, and not by the rules of the canon law, which are of force in this state in reference to matters of inheritance."

See, also, *Moody v. Griffin*, 65 Ga. 304; *McElhannon v. State*, 99 Ga. 672, 26 S. E. 501.

The state insists, however, that upon the point involved, the statements in 75 Ga. and in the other cases cited are obiter dicta. According to 1 Chitty, Criminal Law, 541, a principal challenge will be admitted if the juror is related to either party within the ninth degree, though only by marriage. See 2 Bishop's New Criminal Procedure (2 Ed.) § 901. In *Thompson on Trials* (2d Ed.) § 62, it is said that relation by consanguinity and affinity "is reckoned according to the rule of the civil law, as distinguished from that of the canon law, which law was the English law of descent." Relation is a common-law disqualification, and the statement of the Chief Justice in *Ledford's Case*, supra, is a recognition of the common-law rule. In *Smith v. State*, 2 Ga. App. 574, 59 S. E. 811, it was held that a juror who was related by affinity to the prosecutor within the ninth degree as determined by the rule of the civil law is a disqualified juror, and that a new trial should be granted upon this ground, upon extraordinary motion. In the opinion, by Judge Russell, attention is called to the fact that the movant contended that the juror was related to the prosecutor in the seventh degree, but that the counter showing submitted by the state authorized the trial judge to find that the juror was related to the prosecutor in the ninth degree only. At page 577 of 2 Ga. App., at page 313 of 59 S. E., it is pointed out that—

"The degree of relationship to a party which will disqualify a juror is not the same as will disqualify a judge. At common law favor was not presumed in a judge, while originally the presumption as to a juror was that any relationship whatever, either by affinity or consanguinity, would disqualify a juror, this rule being later modified so that the disqualification by reason of kinship extended no further than to include the ninth degree. The limitation of the disqualification of judges to cases where—

one or more of the parties to the case may be of kin within the fourth degree was the adoption of an arbitrary rule by statute, regardless of the common law, while the rule as to the disqualification of jurors (in the absence of legislation on the subject) is the common law."

It has been held by this court that relation within the fourth degree to either party will disqualify a juror in a civil case. *Roberts v. Roberts*, supra; *Central Georgia Power Co. v. Nolen*, 143 Ga. 776 (2), 85 S. E. 945; *Central Georgia Power Co. v. Pope*, 144 Ga. 130, 86 S. E. 322. The common-law rule, which disqualifies a juror in a case where he is related to one of the parties, is in force in this state, both in civil and criminal cases. Under the statute the judge is disqualified if related to either party within the fourth degree, computed by the canon law (*Short v. Mathis*, 101 Ga. 287, 23 S. E. 918). Under the decisions of this court a juror in a civil case is disqualified if related to either party within the fourth degree, computed by the canon law. Under the common-law rule applied in this state a juror in a criminal case is disqualified if related to the prosecutor by consanguinity or affinity within the ninth degree, computed by the rule of the civil law. It is insisted by the state that, since the statute (Penal Code, § 990) recognizes the relation of the juror to the prosecutor, the accused, or the deceased as ground for challenge for cause, objection to the juror upon this point must be taken before trial. Cases in other jurisdictions support this contention. See 3 *Wharton's Criminal Procedure* (10th Ed.) § 1786, and cases cited in note 10. According to these decisions disqualifications not absolute, which are ground for challenge, are not grounds for new trial, unless urged before trial. In *Georgia Railroad v. Cole*, 73 Ga. 715, it is said:

"A jury composed of men who are not lawful men, men whose relationship to the parties renders them incompetent as jurors, cannot render a lawful verdict. If the parties consent to the jurors, or have knowledge of their incompetency, then they will be held to waive the same. It cannot be said that the defendants in error have had their case tried, certainly not legally, and, although the verdict may be in accordance with the facts, and such as a lawful jury should have rendered, yet it is no verdict, and the court did right to set it aside."

In view of the prior decisions of this court, it must be held that a juror related by consanguinity or affinity within the ninth degree to the prosecutor in a criminal case is a disqualified juror; and, where such relation is unknown to the accused until after verdict, a new trial will be granted.

But it is finally insisted that the juror himself was unaware of the relation and could not have been influenced thereby, and that any such disqualification, if good ground for granting an ordinary motion, cannot be

classified as among the extraordinary grounds recognized by law. In *Ledford v. State*, supra, it was said:

"It would be too dangerous a precedent to allow the juror to assert that he was ignorant of the relationship till after trial, too. The principle on which the law rejects him is that he is not impartial; the same objection lies to his assertion that he was ignorant of the relationship at the time of the trial, after he had assisted in the conviction."

While the reasoning on this point may not be altogether satisfactory, the exact point was ruled and the policy of the state declared. The ruling has been subsequently followed. *Lyens v. State*, 133 Ga. 587, 600, 66 S. E. 792. The suggestion that the disqualification of a juror in a criminal case on account of relation to the prosecutor cannot be classed as among the extraordinary grounds recognized by law is convincingly disposed of by Judge Russell in *Smith v. State*, supra, as follows:

"Counsel argue that 'the question of the relationship of a juror not only ordinarily occurs in the trial of cases, but is of general and constant occurrence. And the motion in this case shows on its face that it did occur in this case and was inquired for.' We will agree with counsel that the inquiry into the subject of the relationship of jurors—questions as to such relationship—is almost a matter of daily occurrence in the courts. But in the opinion that the discovery of disqualification after counsel has called attention to the subject of relationship, and the trial judge has taken the pains to have an investigation in open court touching relationship, and the cautious juror's mind is again indirectly turned to any cause which might bias his judgment by the questions propounded on the voir dire, is a common or ordinary occurrence, we do not concur. We hold such a circumstance to be extraordinary, and the law has long so regarded it; for, contrary to the prevailing rule, it absolutely shuts its ears to the explanation that the juror was not aware of the relationship and that such relationship did not in any wise affect the verdict. The law will not hear or consider that the presence of the disqualified juror did not hurt the losing party. This ground of motion for new trial is extraordinary in the same sense as the ground mentioned in *Cox v. Hillyer* [65 Ga. 572], where one is convicted on the testimony of a witness subsequently found guilty of perjury in giving that testimony. It is lamentably true that perjury is not uncommon, but the law justly considers it an extraordinary circumstance that the falsity of testimony which has been credited by a jury and has induced a solemn verdict of guilty should be established."

See, also, *Harris v. State*, 150 Ga. 680, 104 S. E. 902.

Whether a juror is disqualified on account of bias is a question of fact. Whether a juror is disqualified on account of relationship to the prosecutrix is likewise a question of fact; but the inquiry, in the absence of waiver by the accused, extends only to the existence of the relation and to the degree thereof.

If related to the prosecutrix within the prohibited degree, the law declares the disqualification. We are of the opinion, therefore, that the court erred in refusing the new trial upon this ground of the motion.

Judgment reversed.

All the Justices concur.

(27 Ga. App. 336)

GRESHAM v. RUBIN. (No. 12036.)

(Court of Appeals of Georgia, Division No. 2.
Aug. 3, 1921.)

(Syllabus by the Court.)

Certiorari ¶68—Petition for certiorari properly overruled when evidence supported verdict.

There being evidence to support the verdict rendered in the municipal court, the judge of the superior court did not err in overruling the petition for certiorari, which complained of the verdict only upon the grounds that it was contrary to law and without evidence to support it.

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action by W. B. Gresham against Sol Rubin. Judgment for defendant and petition for certiorari overruled by the superior court, and plaintiff brings error. Affirmed.

Neufolles & Neufolles, of Atlanta, for plaintiff in error.

Rosser, Slaton, Phillips & Hopkins, of Atlanta, for defendant in error.

STEPHENS, J. Rubin contracted with Flury to purchase from Flury a described "house and lot completely furnished," and contracted with Gresham, a real estate broker who negotiated the sale, to pay Gresham's commission in the event that he (Rubin) should wrongfully fail to comply with the contract to purchase. Rubin refused to complete the purchase and also refused to pay Gresham's commission. Upon being sued by Gresham for the commission, Rubin contended that he did not owe it, since he had not wrongfully failed to comply with his contract with Flury, but had been prevented from so doing by reason of Flury's breach of contract in refusing to deliver all the household furniture included in the terms of the contract. This was controverted by Gresham. There was evidence in support of each of these contentions. There was a further issue of fact as to whether Rubin refused to comply with his contract with Flury, upon the ground that Flury would

not deliver all the household furniture. The verdict was for the defendant; the plaintiff's petition for certiorari, based upon the general grounds only, was overruled; and to this ruling the plaintiff excepted.

It is not necessary to add anything further to what is said in the headnote.

Judgment affirmed.

JENKINS, P. J., and HILL, J., concur.

(27 Ga. App. 337)

VESSEL v. HILL. (No. 12040.)

(Court of Appeals of Georgia, Division No. 2.
Aug. 3, 1921.)

(Syllabus by the Court.)

1. Continuance ¶19—Denial because of defendant's absence when not accounted for not abuse of discretion though third person's rights prejudiced.

In the absence of any legal showing demanding a continuance upon the ground of the absence of a party to the case, as required by Civil Code 1910, § 5717, this court cannot hold that the trial judge abused his discretion in refusing to grant a motion to continue, made by the defendant's counsel, upon the ground of the defendant's absence, when upon the hearing on the motion the defendant's absence could in no wise be accounted for, and it affirmatively appeared that he had received actual notice of the time and place of trial. This is true even though the rights of a third person not a party to the record might be prejudiced by the defendant's failure to appear and defend the case when certain property belonging to the defendant, which might be subjected to a judgment in behalf of the plaintiff, might, in the event the defendant prevailed, inure to the benefit of such third person and satisfy a judgment which the latter might obtain in a suit which he has pending against the defendant.

2. Other grounds of motion abandoned.

All other grounds of the motion for a new trial are expressly abandoned.

Error from City Court of Newnan; W. A. Post, Judge.

Action by R. L. Hill against Eph Vessel. Judgment for plaintiff, and defendant brings error. Affirmed.

Wm. Y. Atkinson and Stanford Arnold, both of Newnan, for plaintiff in error.

W. G. Post, of Newnan, for defendant in error.

STEPHENS, J. Judgment affirmed.

JENKINS, P. J., and HILL, J., concur.

(27 Ga. App. 300)

VEAL v. STATE. (No. 12515.)(Court of Appeals of Georgia, Division No. 1.
July 26, 1921.)*(Syllabus by the Court.)*

1. Criminal law §595(10)—Denial of continuance on ground that testimony of absent witness would not be admissible held not an abuse of discretion.

The defendant was charged with an assault and battery, and he made a motion for a continuance of the case on the ground of the absence of a material witness. Upon the hearing of the motion the defendant testified that he expected to prove by the absent witness that a few days before the assault he (the witness) saw the prosecutor pass the defendant and "throw his hand on his pistol," and that he also, prior to the difficulty, heard the prosecutor threaten to kill the defendant. It was not shown, however, that the menacing movement of the prosecutor was seen by the defendant or the threat heard by him, or that he had been informed of either before the assault and battery was committed. The court denied the continuance, holding that the evidence would not be admissible if the witness were present. This judgment was excepted to on the following grounds:

The evidence of the absent witness would have tended strongly to illustrate the motive with which the defendant acted at the time of the difficulty.

Because the ruling of the court was tantamount to declaring that the defendant could not show the previous conduct of the prosecutor as illustrating the necessity on his part for doing something in his defense at the time of the difficulty, when the prosecutor attempted to draw his pistol on the defendant.

Because the ruling of the court was tantamount to declaring that any evidence as to the previous relation between the parties was not admissible, thereby shutting the defendant off from offering any testimony except his own statement going to show that the conduct of the prosecutor at the time of the difficulty was such as to reasonably justify the defendant in apprehending serious bodily injury and to furnish a justification for the assault and battery administered to the prosecutor.

Held, it does not appear that the court, for any reason assigned, abused its discretion in denying the continuance.

2. Instructions not erroneous.

None of the instructions complained of, when considered in connection with the rest of the charge of the court and the facts of the case, show reversible error.

3. Criminal law §1064(4)—Ground of motion for new trial did not raise question, where it did not show to whom excluded testimony referred.

A ground of the motion for a new trial complains that on cross-examination of a nam-

ed witness the court, upon motion of the state, excluded the following testimony: "I have not plotted to kill him, nor made any remarks that I was going to." The ground does not disclose what person the pronoun "him" refers to, and an examination of the brief of evidence would be necessary to ascertain this fact. Under repeated rulings of the Supreme Court and of this court, that a ground of a motion for a new trial will not be considered unless it is complete and understandable within itself, this ground is too indefinite and incomplete to raise any question for determination by this court.

4. Criminal law §935(1)—New trial properly denied when verdict demanded.

The verdict was demanded by the evidence, and the court did not err in overruling the motion for a new trial.

Error from City Court of Dublin; S. W. Sturgis, Judge.

W. T. Veal was convicted of assault and battery, and he brings error. Affirmed.

J. S. Adams and R. Earl Camp, both of Dublin, for plaintiff in error.

Wm. Brunson, Sol., of Dublin, for the State.

BROYLES, C. J. Judgment affirmed.

LUKE and BLOODWORTH, JJ., concur.

(27 Ga. App. 320)

BRINKLEY v. STATE. (No. 12571.)(Court of Appeals of Georgia, Division No. 1.
July 26, 1921.)*(Syllabus by the Court.)*

Motion for new trial properly overruled.

The grounds of the motion for a new trial which have the approval of the trial judge are without merit. The evidence fully authorized the conviction of voluntary manslaughter. For no reason assigned was it error to overrule the motion for a new trial.

Error from Superior Court, Wheeler County; Eschol Graham, Judge.

Edmond Brinkley was convicted of voluntary manslaughter, and he brings error. Affirmed.

Wm. B. Kent, of Alamo, for plaintiff in error.

M. H. Boyer, Sol. Gen., of Hawkinsville, for the State.

LUKE, J. Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(27 Ga. App. 349)

SPARKS & HUDSON v. FORT et al.
(No. 12539.)(Court of Appeals of Georgia, Division No. 2
Aug. 8, 1921.)*(Syllabus by the Court.)***1. Replevin ⚡59—Description of money held insufficient.**

A petition in trover describes the property in the possession of the defendants as "\$2,500 in lawful money which was deposited with said defendants, it being the said \$2,500 which was delivered to said defendants by petitioner on or about the 5th day of November, 1919, and to be returned to your petitioner when said defendants[?] should request the same," and alleges that "the said defendants converted said money and have failed and refused to deliver said money to your petitioners on demand," and "refuse to pay the hire thereof, which is 7 per cent. per annum from the time of the conversion." A further description of the property was added by amendment as follows: "Twenty-five hundred dollars in lawful money of the United States and legal tender for all debts on the 2d day of April, 1920, and said property, to wit, \$2,500, was and is the said sum of \$2,500 which went into the possession of the defendants named in this suit on the 5th day of November, 1919, and was by the defendants to be deposited in the Farmers' State Bank, located in Lumpkin, Ga., and to be returned to plaintiffs after 90 days from November 5, 1919, when called for by the plaintiffs, and plaintiffs aver that the same was deposited in the Farmers' State Bank, which the said defendants agreed to do." *Held*, the description of the property for which a recovery is sought is too vague and indefinite, and the judgment sustaining a demurrer on this ground was proper. *McElhannon v. Farmers' Alliance Warehouse Co.*, 96 Ga. 670, 22 S. E. 686; *Id.*, 98 Ga. 394, 25 S. E. 558.

2. Replevin ⚡59—Property must be so described that it can be seized.

In an action of trover it is essential that the property sought to be recovered be described with such particularity as will enable the court to seize it and make restitution in the event of recovery. *McElhannon Case*, *Supra*; *Cooke v. Bryant*, 108 Ga. 727, 80 S. E. 435.

3. Replevin ⚡59 — Description of property must distinguish it from general class.

In an action of trover "the petition must definitely identify the property by a particular description, or by a general description coupled with such additional allegations as to the time and place or manner of the taking or conversion as plainly to isolate the thing sued

for from the general class to which it belongs." *Collins v. West*, 5 Ga. App. 429, 63 S. E. 540; 28 Am. & Eng. Enc. of Law, pp. 804, 806.

Error from Superior Court, Stewart County; Z. A. Littlejohn, Judge.

Action by Sparks & Hudson against G. A. Fort and others. Judgment for defendants on demurrer, and plaintiff brings error. Affirmed.

Chas. W. Worrill, of Outhbert, and Geo. Y. Harrell, of Lumpkin, for plaintiff in error.

F. A. Hooper & Son, of Atlanta, for defendants in error.

HILL, J. Judgment affirmed.

JENKINS, P. J., and STEPHENS, J., concur.

(27 Ga. App. 300)

FLYNN-HARRIS-BULLARD CO. v. BUTLER. (No. 12479.)(Court of Appeals of Georgia, Division No. 1
July 26, 1921.)*(Syllabus by the Court.)***New trial ⚡70—Properly denied when contrary finding not demanded.**

It is stated in the briefs of counsel for both parties that the only question for determination by this court is whether the jury erred in finding that the account sued upon was not a mutual account between the parties. Under the evidence submitted, a finding that the account was a mutual one was not demanded, and the court did not err in overruling the motion for a new trial.

Error from Superior Court, Bryan County; W. W. Sheppard, Judge.

Action between the Flynn-Harris-Bullard Company and J. L. Butler. Judgment for the latter, and the former brings error. Affirmed.

W. F. Slater, of Eldora, and Edwin A. Cohen, of Savannah, for plaintiff in error.

J. Hartridge Smith, of Savannah, for defendant in error.

BROYLES, C. J. Judgment affirmed.

LUKE and BLOODWORTH, JJ., concur.

(27 Ga. App. 331)

TYGART v. DOMESTIC ELECTRIC CO.**DOMESTIC ELECTRIC CO. v. TYGART.**

(Nos. 11582, 11583.)

(Court of Appeals of Georgia, Division No. 2.
Aug. 3, 1921.)*(Syllabus by the Court.)***Rulings of Supreme Court followed.**

Under the rulings of the Supreme Court on the questions certified to it in this case (107 S. E. 866), the judgment of the lower court is affirmed, and as, under these rulings of the Supreme Court, the questions raised by the cross-bill are no longer involved in the case, the cross-bill is dismissed.

Error from City Court of Nashville; W. R. Smith, Judge.

Action between S. T. Tygart and the Domestic Electric Company. Judgment for the Electric Company, and Tygart brings error, and the Electric Company brings a cross-bill of exceptions. Judgment affirmed, and cross-bill dismissed, in conformity to Supreme Court's answers to certified questions (107 S. E. 866).

Story & Story, of Nashville, for plaintiff in error.

Etheridge, Sams & Etheridge, of Atlanta, and J. P. Knight, of Nashville, for defendant in error.

PER CURIAM. Judgment affirmed. Cross-bill dismissed.

JENKINS, P. J., and STEPHENS and HILL, JJ., concur.

(27 Ga. App. 319)

LATTIMORE v. STATE. (No. 12568.)(Court of Appeals of Georgia, Division No. 1.
July 26, 1921.)*(Syllabus by the Court.)*

1. Criminal law \S 822(1) — Excerpt from charge, not erroneous in connection with entire charge, not ground for new trial.

When considered in connection with the entire charge, there is no error in the excerpt therefrom of which complaint is made in the amendment to the motion for a new trial.

2. Criminal law \S 935(1)—New trial properly denied when evidence ample.

There was ample evidence to authorize the verdict; the presiding judge approved it, and properly overruled the motion for a new trial.

Error from Superior Court, Bibb County; H. A. Mathews, Judge.

Marion Lattimore was convicted of an offense, and brings error. Affirmed.

John R. Cooper and W. O. Cooper, Jr., both of Macon, for plaintiff in error.

Chas. H. Garrett, Sol. Gen., of Macon, for the State.

BLOODWORTH, J. Judgment affirmed.

BROYLES, C. J., and LUKE, J., concur.

(27 Ga. App. 344)

DAVIS v. MESLER. (No. 12310.)(Court of Appeals of Georgia, Division No. 2.
Aug. 3, 1921.)*(Syllabus by the Court.)*

Appeal and error \S 369, 655(2)—Where case submitted subject to payment of cost and admission to bar of attorney bill of exceptions dismissed when conditions not complied with.

This case having, upon its call, been submitted to this court subject to the payment of costs and the admission to the bar of this court of the attorneys appearing for the plaintiff in error within ten days, and no compliance having been made with either of these conditions, the bill of exceptions is hereby dismissed.

Error from Superior Court, Bibb County; H. A. Mathews, Judge.

Action between J. L. Davis and C. H. Mesler. Judgment for the latter, and the former brings error. Bill of exceptions dismissed.

Clements & Clements, C. R. Johnson, and J. L. Wimberly, all of Macon, for plaintiff in error.

Miller & Garrett, of Macon, for defendant in error.

PER CURIAM. The bill of exceptions is hereby dismissed.

JENKINS, P. J., and STEPHENS and HILL, JJ., concur.

(27 Ga. App. 315)

POWELL v. STATE. (No. 12562.)(Court of Appeals of Georgia, Division No. 1.
July 26, 1921.)*(Syllabus by the Court.)*

1. Jury \S 67(2)—Nominal interest of sheriff as prosecutor not ground for challenge to the array.

The challenge to the array of jurors put upon the defendant is without merit, since it does not appear that the sheriff, who performed the mere ministerial act of summoning the jury, had more than a nominal interest in appearing as prosecutor upon the indictment.

2. Criminal law \S 1172(9)—Instruction as to recommending punishment as for a misdemeanor not harmful to defendant.

No error harmful to the defendant was shown by the assignment of error upon the in-

struction of the court that if the jury saw fit to do so they could find the defendant guilty, and recommend that he be punished as for a misdemeanor, and, if the judge should approve the recommendation, he would be punished as for a misdemeanor.

3. Denial of new trial not error.

The evidence authorized the defendant's conviction, and it was not error, for any reason assigned, to overrule the motion for a new trial.

Error from Superior Court, Walker County; Moses Wright, Judge.

Fred Powell was convicted of an offense, and he brings error. Affirmed.

Rosser & Shaw, of La Fayette, for plaintiff in error.

E. S. Taylor, Sol. Gen., of Summerville, and James F. Kelly, of Rome, for the State.

LUKE, J. Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(27 Ga. App. 302)

MARTIN & LANIER PAINT CO. v. DANIELS. (No. 12517.)

(Court of Appeals of Georgia, Division No. 1. July 26, 1921.)

(Syllabus by Editorial Staff.)

1. Appeal and error ¶1040(13) — New trial not granted for error in overruling demurrers from which no injury resulted.

A new trial will not be granted for error in overruling special demurrers to the amended answer where it appears with reasonable certainty that no injury resulted.

2. Evidence ¶185(1)—Carbon copies admissible without notice to produce; "copies."

Duplicate or carbon copies of letters made by the same pencil at the same time are not "copies," but duplicate originals, and could be introduced in evidence without notice to produce.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Copy.]

3. Evidence ¶187 — Letters admissible notwithstanding affidavits on notice to produce stating the letters were not received.

Where, in response to notice to produce certain letters claimed to have been mailed to plaintiff, affidavits of all of the members of the firm stating that no such letters were ever received were read, such affidavits were not admissible evidence on the trial, and where they were not put in evidence they were properly disregarded in passing on the admissibility of duplicates of the letters.

4. Sales ¶340, 358(1)—Remedy for countermand of order is suit for breach; letter countermanding order held admissible, though order not subject to countermand.

Though an order for goods was not subject to countermand, a letter countermanding it

was admissible in a suit on an open account, since if the order was in fact countermanded, the seller's remedy was by suit for breach of the contract, and not by action on open account.

Error from City Court of Blakely; A. H. Gray, Judge.

Action by the Martin & Lanier Paint Company against J. B. Daniels. Judgment for defendant, and plaintiff brings error. Affirmed.

E. L. Smith, of Edison, for plaintiff in error.

B. W. Fortson, of Arlington, for defendant in error.

BROYLES, C. J. 1. The court did not err in allowing the amendment to the defendant's answer.

2. The amended answer was not subject to general demurrer.

[1] 3. Conceding that the court erred in overruling some of the special demurrers interposed to the amended answer, it appears with reasonable certainty from the facts of the case that no injury resulted to the plaintiff in error, and therefore a new trial will not be granted because of such errors. See, in this connection, Wrightsville & Tennille R. Co. v. Vaughan, 9 Ga. App. 371(5), 71 S. E. 691.

4. Upon the call of the case for trial, counsel for the plaintiff company, in response to a notice from the defendant to produce certain letters alleged to have been mailed to the plaintiff, read affidavits from all the partners of the plaintiff company showing that no such letters had ever been received by them or the company. Subsequently, upon the trial, the defendant was permitted, over the plaintiff's objection, to prove that he had written such letters to the plaintiff company, and had properly addressed and stamped the envelopes and placed them in the post office; that his return address was upon the envelopes, and that the letters had never been returned to him; that the letters which he (the defendant) held in his hands were duplicate or carbon copies of the letters mailed to the plaintiff company—that they were made by the same pencil at the same time. The plaintiff objected to this evidence, and also to the introduction of the letters themselves, on the grounds that the originals of the letters had not been sufficiently accounted for to authorize the introduction of secondary evidence, and that the evidence was irrelevant and immaterial, since the uncontradicted affidavits of all the members of the plaintiff company, which were read in response to the notice to produce the letters, showed that the letters had never been received by the company, and therefore the

presumption that they had been received was completely rebutted. Another ground of objection to one of the letters was that it countermanded the order for the goods in question, which order was not subject to countermand. These grounds were properly overruled, for the following reasons:

[2] First, the letters admitted in evidence were not copies, but were "duplicate originals," and could have been introduced in evidence without any notice "to produce." *Bowman & Tarpley v. Atlantic Ice & Coal Co.*, 19 Ga. App. 115(2), 117, 91 S. E. 215, and citations.

[3] Second, the affidavits of the members of the plaintiff company, read in response to the notice to produce, were not admissible evidence, and were not put in evidence during the trial of the case, and were properly disregarded by the court.

[4] Third, the fact that one of the letters countermanded the order which was not subject to countermand did not render the letter inadmissible. The plaintiff was suing upon an open account, and while the order for the goods sold provided that it was not subject to countermand, yet if the defendant did in fact countermand it before the goods were shipped, while this would not relieve him from liability, the plaintiff could not maintain an action upon an open account for goods sold and delivered, but would have to sue for a breach of the contract.

5. The evidence authorized a finding that the goods shipped to the defendant were not the goods ordered by him, and the verdict in his favor was supported by the evidence, and the court did not err in refusing to grant a new trial.

Judgment affirmed.

LUKE and BLOODWORTH, JJ., concur.

(27 Ga. App. 344)

LACEY v. FOREHAND. (No. 12312.)

(Court of Appeals of Georgia, Division No. 2.
Aug. 3, 1921.)

(Syllabus by the Court.)

Master and servant §301(1), 332(1)—Parent and child §13(1)—Evidence held to make question for jury whether son was engaged in father's business when driving car; parent not liable for child's torts unless his agent; relation may arise by implication; "business."

A minor son, while driving an automobile belonging to his father, collided with and damaged the automobile of the plaintiff. The evidence presented an issue for the jury as to whether at the time of the accident the son was acting, expressly or by implication, for his father and within the scope of his father's

business. The judgment of nonsuit was erroneous.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Business.]

Error from City Court of Oglethorpe; R. L. Greer, Judge.

Action by J. H. Lacey against T. C. Forehand. Judgment of nonsuit, and defendant brings error. Reversed.

Jere M. Moore and John B. Guerry, both of Montezuma, for plaintiff in error.

Gilbert C. Robinson, of Montezuma, for defendant in error.

HILL, J. This case is here on exceptions to a judgment awarding a nonsuit. The facts, substantially stated, are as follows: The defendant was the owner of an automobile. He could not drive it himself, but his wife and his son, 18 years of age, when the defendant desired to use the car in his general business, acted as his chauffeur, driving the car for him; and his business included his "going to town with his wife or son driving or attending to his business." This car, while being driven by his son, collided with the plaintiff's car, causing the injuries for which the suit was brought. The collision occurred while the car was coming from the town of Montezuma to the defendant's home, about 3½ miles away. The son had been away from home and was on his way back home. The defendant did not know that his son was returning home, and was absent himself from home at the time. His wife, who did know that the son was returning home that night, took the car in question to Montezuma for the purpose of meeting the son and bringing him home, and when returning home she turned the car over to him to drive home, sitting by his side on the front seat. There were other companions with the son, riding in the car. While the defendant did not know that the son was coming home that night, he recognized that it was his duty as parent to have him brought home from Montezuma, and that the use of the car by his wife for the purposes stated, while without his knowledge, was "all right," and it was "all right" for his son to drive the car on the occasion in question. At the conclusion of the evidence a nonsuit was granted on the ground that the relation of master and servant, or of principal and agent, between the father and the son did not prima facie appear so as to create a liability against the father for the tort of the son. It is well established that such a relationship must appear in order to create a liability for the tort of a minor child.

The controlling question in this case is

fully and exhaustively considered by the Supreme Court in the case of *Griffin v. Russell*, 144 Ga. 275, 87 S. E. 10, L. R. A. 1916F, 216, Ann. Cas. 1917D, 994. In that case Justice Lumpkin, speaking for the court, stated that "it may be taken as settled law in this state that a father is not liable for the tort of a minor child, with which he was in no way connected, which he did not ratify, and from which he did not derive any benefit, merely because of the relation of parent and child," and that ruling is in accord with the decisions of this court in the cases of *Schumer v. Register*, 12 Ga. App. 743, 78 S. E. 731, and *Quinn v. Neal*, 19 Ga. App. 484, 91 S. E. 786. Although these decisions of this court may seem to conflict with that of the Supreme Court, *supra*, a careful consideration of the facts of the cases shows that the conflict is simply apparent; the cases are distinguishable on the facts, and the legal conclusions are entirely harmonious. These decisions are also in harmony with the decisions of other courts involving the same question. Any seeming conflicts in the decisions arise from differences in construing and applying the rule that a master is liable for the negligence of the servant only when the servant is "acting in the scope of his employment"; there being some differences in the opinions as to what was an act within the scope of the servant's employment, or what was an act in regard to the master's business, and what was comprehended by the term "business." The relation of agent or servant frequently arises by implication as well as expressly. As stated in Civil Code 1910, § 8569:

"The relation of principal and agent arises wherever one person, expressly or by implication, authorizes another to act for him, or subsequently ratifies the acts of another in his behalf."

The word "business" is commonly employed in connection with an occupation for livelihood or profit, but it is not limited to such pursuits. And the fact that an agency is not a business agency, or the service of a servant or minor child is not remunerative service, does not illustrate the question as to liability devolving upon the master or parent for the tort of either the servant or the minor child. In the case of *Griffin v. Russell*, *supra*, the Supreme Court extended this relationship of agency to apply to the act of a parent who had furnished an automobile for the comfort and pleasure of himself and family. Some of the cases cited by Justice Lumpkin, in his exhaustive review of the question in that case throw considerable light on the question now under consideration by this court and make a very wide and elastic application of the relationship or agency which must exist between the parent and child or master and servant, in order to

give rise to a liability on the part of the former for the tort of the latter.

In *Lashbrook v. Patten*, 1 Duv. (Ky.) 316, a minor son, while driving his two sisters to a picnic in his father's carriage, drawn by his father's horses, and with his father's approbation, all of the children being members of his father's family, through negligence ran against the carriage of another, causing damage. The Court of Appeals said:

"The son must be regarded as in the father's employment, discharging a duty usually performed by a slave, and therefore must, for the purposes of this suit, be regarded as his father's servant."

In the case of *Stowe v. Morris*, 147 Ky. 386, 144 S. W. 52, 89 L. R. A. (N. S.) 224, a motorcar was kept by a man for the comfort and pleasure of his family, including a minor son and a daughter as members of it. They had the right to use it as often as and when they liked. On the occasion in question the son took the car at his own volition, and at his suggestion carried his sister and three other ladies for a ride. While he was driving the machine he carelessly ran down and injured a boy on a bicycle. The father was held liable on the ground that, the machine having been provided for the comfort and pleasure of the family, and the son having been given the right to use it, the son was to be treated as the servant of his father when operating it (though without a special permission on that occasion) for the entertainment of his sister and her friends, and in the use of the car for that purpose the son was not performing an independent service of his own, but was carrying out what, within the spirit of the matter, was the business of the father. See, also, the case of *McNeal v. McKain*, 33 Okl. 449, 126 Pac. 742, 41 L. R. A. (N. S.) 775, and the case of *Birch v. Abercrombie*, 74 Wash. 486, 133 Pac. 1020, 50 L. R. A. (N. S.) 59. In the latter case the court in its opinion said:

"It seems too plain for cavil that a father, who furnishes a vehicle for the customary conveyance of the members of his family, makes their conveyance by that vehicle his affair—that is, his business—and any one driving the vehicle for that purpose with his consent, express or implied, whether a member of his family or another, is his agent."

Other decisions on the same line are cited by Justice Lumpkin in *Griffin v. Russell*, *supra*. The conclusion which is arrived at—and we think it is a sound one—is that the scope of the employment is necessarily dependent on the circumstances, and that no hard and fast rule can be laid down, but that it is ordinarily a question for the jury whether or not a particular act falls within the scope of the servant's employment or that of a minor child.

In the present case the facts admitted by

the defendant show that the bringing of his minor son home was regarded by him as a part of his parental duty, and for that purpose he made the furnishing of the automobile his affair; in other words, it was the means which he adopted for the performance of his duty. His wife, according to the evidence, was authorized to use the car whenever she desired. This, it would seem, would give her an implied permission to take the car and go to Montezuma for the purpose of bringing the son home. In that act she was acting as an agent of her husband, and in allowing the son to drive the car she did not extend her agency beyond its legitimate scope. Considering this fact, in connection with the testimony of the father that both the son and the wife were permitted to use the car whenever they desired it, the conclusion inevitably follows that the son, on the occasion in question, in driving the car home, was fully authorized to do so, if not expressly on that occasion, yet by implication; and we conclude that these facts should have been submitted to the jury, in order that it might be determined whether or not the son was, on the occasion in question, engaged in the business of his father.

Judgment reversed.

JENKINS, P. J., and STEPHENS, J., concur.

(27 Ga. App. 307)

CHANCE v. STATE. (No. 12526.)

(Court of Appeals of Georgia, Division No. 1.
July 26, 1921.)

(Syllabus by the Court.)

Criminal law §998 — Rule on motion to set aside judgment properly denied because motion not directed to anything apparent on face of record.

As the motion to set aside the judgment in this case was not predicated on a defect apparent on the face of the record, the trial judge properly refused to grant the rule nisi prayed for.

Error from City Court of Carrollton; Leon Hood, Judge.

M. B. Chance was convicted of an offense, and his motion to set aside the judgment was denied, and he brings error. Affirmed.

See, also, 106 S. E. 920.

The bill of exceptions in this case states that—

"The defendant was tried and convicted on June 14, 1920, and sentenced to pay a fine of \$300 or serve 6 months in the county chain gang. Motion for new trial was filed, which was dismissed for failure of defendant to file a brief of evidence. The defendant then filed an extraordinary motion for new trial, which was also dismissed for the reason that defendant had

failed to file a brief of evidence. Defendant then filed a motion or presented same to the court, asking that the judgment and sentence of the court in said case be set aside, on the ground that the accusation was drawn under section 722 of Park's Ann. Penal Code, and that the evidence adduced on the trial showed that, if the defendant was guilty of anything at all, he would be guilty under section 723a of Park's Ann. Penal Code; the defendant asking that a rule nisi be granted, directed to the solicitor of the city court of Carrollton, to show cause why said judgment should not be set aside. Upon the motion's being presented to the judge of the city court of Carrollton, he refused to grant said rule nisi, and passed the following order: 'The within motion to set aside judgment having been presented to me, and after considering same, it is ordered, considered, and adjudged that the rule nisi prayed for be and the same is denied. This May 13, 1921. Leon Hood, J. C. O. C.'"

Smith & Millican, of Carrollton, for plaintiff in error.

Willis Smith, Sol., and Boykin & Boykin, all of Carrollton, for the State.

BLOODWORTH, J. (after stating the facts as above). In *Spence v. State*, 7 Ga. App. 826, 68 S. E. 444, Chief Judge Hill said:

"A motion in arrest of judgment will reach any defect apparent on the face of the record, not cured by the verdict, to which a general demurrer could have been successfully interposed before arraignment. It is also proper procedure where the verdict is for some offense not covered by the charge made in the indictment. As used in this connection, the expression 'the face of the record' means, in a criminal case, the indictment and the verdict; a defect on the face of the record exists when there is any inadequacy in the allegations, not cured by the verdict, or where the verdict does not conform to the charge in the indictment. It is not, in our opinion, broad enough to reach the charge of the court or the brief of the evidence. These are parts of the record subsequent to the trial; and if the verdict is contrary to the charge of the court for any reason, or contrary to law for any reason, or is without evidence to support it, it is ground for a new trial, and not for arrest of judgment."

In *Regopoulos v. State*, 116 Ga. 596, 42 S. E. 1015, Justice Cobb said:

"It has been repeatedly held by this court that a motion to set aside a judgment must be based upon some defect which appears on the face of the record"—citing *Dugan v. McGlann*, 60 Ga. 353; *Pulliam v. Dillard*, 71 Ga. 598; *Artope v. Barker*, 74 Ga. 462; *Clark's Cove Guano Co. v. Steed*, 92 Ga. 440, 17 S. E. 967; *Mize v. Americus Mfg. Co.*, 109 Ga. 359, 34 S. E. 583.

In the *Regopoulos Case*, Justice Cobb further said (116 Ga. p. 598, 42 S. E. 1015):

"It seems to be now settled, so far as the rulings of this court are concerned, that the

only difference between a motion in arrest of judgment and a motion to set aside a judgment is as to the time within which each must be made. The former must be made during the term at which the judgment was rendered; and the latter may be made at any time within three years from the rendition of the judgment."

As the motion to set aside the judgment in this case was not predicated on a defect apparent on the face of the record, the trial judge properly refused to grant the rule nisi prayed for, and the judgment must be affirmed.

BROYLES C. J., and LUKE, J., concur.

(27 Ga. App. 308)

MORROW v. REDDING et al. (No. 12070.)

(Court of Appeals of Georgia, Division No. 1.
July 26, 1921.)

(Syllabus by the Court.)

Motion properly overruled.

The court did not err in overruling the motion to set aside the judgment in this case. See *Chance v. State* (No. 12526) 108 S. E. 249, this day decided by this court.

Error from Superior Court, Fulton County; W. D. Ellis, Judge.

Action between M. T. Morrow against Mrs. W. L. Redding and others. Judgment for the latter, and the former brings error. Affirmed.

Morrow & Morrow, of Atlanta, for plaintiff in error.

W. C. Munday, of Atlanta, for defendants in error.

BLOODWORTH, J. Judgment affirmed.

BROYLES, C. J., and LUKE, J., concur.

(27 Ga. App. 349)

OLIVER et al. v. GORDY. (No. 12497.)

(Court of Appeals of Georgia, Division No. 2.
Aug. 3, 1921.)

(Syllabus by Editorial Staff.)

Appeal and error \S 494—Dismissed when bill or record does not show final judgment.

Where it does not appear, either from the bill of exceptions or the record, that any final judgment was ever rendered, though the record preserves exceptions pendente lite to a judgment sustaining demurrers to the plea and answer, the bill of exceptions will be dismissed.

Error from City Court of Sylvania; T. J. Evans, Judge.

Action by R. W. Gordy against Henry Oliver and others. Demurrers were sustained, and defendants bring error. Writ of error dismissed.

H. S. White, of Sylvania, for plaintiffs in error.

M. R. Lufburrow, of Sylvania, for defendant in error.

HILL, J. The exceptions pendente lite to the judgment sustaining demurrers to the defendant's plea and answer are preserved in the record. It not appearing, however, either from the bill of exceptions or the record, that any final judgment was ever rendered, the motion of the defendant in error to dismiss the bill of exceptions is sustained. *Woodall v. Harris*, 22 Ga. App. 69, 95 S. E. 377; *Pierce v. Felts*, 23 Ga. App. 665, 99 S. E. 139; *Johnson v. Battle*, 120 Ga. 649 (2), 48 S. E. 128.

Writ of error dismissed.

JENKINS, P. J., and STEPHENS, J., concur.

(27 Ga. App. 348)

MAXWELL v. ZIEGLER-FRANKEL MFG. CO. (Nos. 12465-12471.)

(Court of Appeals of Georgia, Division No. 2.
Aug. 3, 1921.)

(Syllabus by the Court.)

Appeal and error \S 78(3) — Judgments sustaining demurrers not final judgments.

In these cases the judgments excepted to were judgments sustaining demurrers of the plaintiffs to pleas filed by the defendant. These were not final judgments, and, on motion of counsel for the plaintiff in error the bills of exceptions are dismissed as having been prematurely brought; but leave is granted to the plaintiff in error to treat as exceptions pendente lite the official copies of the bills of exceptions retained in the office of the clerk of the lower court.

Error from City Court of Carrollton; Leon Hood, Judge.

Seven actions by Ziegler-Frankel Manufacturing Company, the All Star Manufacturing Company, the Totty Trunk & Bag Company, the Queen Costume Company, Greenbaum & Sons, Wilson & Co., and the Eleanor Dress Company, against S. C. Maxwell. Judgments for plaintiffs on demurrer, and defendant brings error. Writs of error dismissed, with directions.

James Beall, of Carrollton, for plaintiff in error.

Boykin & Boykin, of Carrollton, for defendants in error.

HILL, J. Writs of error dismissed, with direction.

JENKINS, P. J., and STEPHENS, J., concur.

(27 Ga. App. 332)

SOUTHERN WOOD PRESERVING CO. v. STRAIN. (No. 11826.)(Court of Appeals of Georgia, Division No. 2.
Aug. 3, 1921.)*(Syllabus by the Court.)***1. Sales \S 33—Accepted order amounts to valid contract.**

A request to furnish goods upon certain terms as to price, time, and place of delivery, which is accepted by the party to whom it is directed, constitutes a valid contract, containing an implied promise by the party making the request to accept and pay for the goods when delivered upon the terms named, and a promise by the party accepting the offer to make deliveries upon the terms named.

2. Sales \S 411—Petition held to allege sufficiently that contract was executed by plaintiff.

Where, in a suit upon a contract evidenced by a written memorandum (attached to the petition as an exhibit) which does not purport to be signed by the plaintiff, there is an allegation in the petition that the plaintiff was one of the parties to the contract, the petition sufficiently alleges that the contract was executed by the plaintiff.

3. Sales \S 411, 418(2)—Measure of damages for breach stated; petition construed as alleging amount sued for was difference between contract price and market value.

The measure of damages for a breach of a contract of sale of personalty is the difference between the contract price and the market value at the time and place for delivery. In a suit by the purchaser against the seller for a breach of contract of sale of lumber, an allegation in the petition that the amount sued for represents the difference between the contract price "and the price which petitioner had to pay for the lumber" will be treated as an allegation that the amount sued for was the difference between the contract price and the market value.

4. Pleading \S 8(7)—Sales \S 411—Petition in action for seller's breach held to state cause of action; paragraph held not to allege mere conclusions, and not demurrable for failure to give dates; allegation that by reason of seller's breach buyer was forced to buy other lumber not a conclusion; paragraph not demurrable for failure to allege when or from whom other lumber purchased; allegation as to plaintiff's loss held not a conclusion; paragraph not demurrable for failure to allege particulars of orders which buyer had; allegation that amount sued for was difference between contract price and amount paid others not a conclusion.

The petition set out a cause of action, and was good against the general and special demurrers interposed. The trial judge erred in sustaining the demurrer to the petition.

Error from Superior Court, Gordon County; M. C. Tarver, Judge.

Action by the Southern Wood Preserving Company against E. E. Strain. Judgment for defendant on demurrer, and plaintiff brings error. Reversed.

The Southern Wood Preserving Company sued E. E. Strain for breach of an alleged contract to furnish certain lumber to the plaintiff, which contract, the petition alleges, "is in the form of a written order placed by" said company with said Strain and accepted by him in writing.

The writing constituting the alleged contract is as follows:

"Southern Wood Preserving Company, Creosoting and Wood Block Paving. Order. Atlanta, Ga., 10-1-17. Placed with E. E. Strain, Hill City, Ga. Please furnish us the following material at prices stated below per M. f. o. b. cars Tunnell Hill, Ga., or other places equal or less frt. rate. Ship to Atlanta, Ga. Delivery start at once—complete sixty days. 10 cars [described], \$16.50. Accepted 10/1/17. [Signed] E. E. Strain. J. N. Jones."

The petition alleges:

"(5) Under said contract, said defendant E. E. Strain, was to furnish petitioner 10 carloads of lumber, which amount to 100,000 feet, of the kind and quality stated in Exhibit A at the price of \$16.50 per M. board feet.

"(6) Said defendant furnished to petitioner on said order and acceptance thereof, only 7,785 feet, leaving a balance due on the order of 92,215 feet of lumber.

"(7) Said defendant failed and refused to furnish said balance of 92,215 feet of lumber, and has breached and violated his said contract by such failure and has continued to fail to comply with said contract, although repeatedly requested by petitioner to comply therewith.

"(8) By reason of said defendant's failure to furnish said balance of 92,215 feet of lumber, petitioner was forced to purchase other lumber to take the place of lumber which defendant agreed to furnish petitioner.

"(9) In rebuying said lumber which was made necessary by failure of said defendant to fill his said contract, petitioner was forced to buy 92,215 feet of lumber at an advance of \$8.50 per M. board feet; said 92,215 feet of lumber costing petitioner \$783.83 over and above the purchase price from defendant, which is the actual loss sustained by petitioner by reason of defendant's breach of and failure to carry out the terms of said contract and to furnish said lumber.

"(10) By reason of said breach and failure, petitioner sustained an actual loss and damage of \$783.83 principal, on which petitioner is entitled to interest at 7 per cent. per annum from December 10th, 1917.

"(11) Petitioner further shows that defendant knew that petitioner was engaged in the manufacture of lumber in various forms and kinds of material for sale for use in the commercial and industrial world, and knew said lumber was purchased by petitioner for such use and for such purpose.

"(12) When defendant failed and refused to

perform his said contract with petitioner, and failed and refused to deliver balance of said lumber, petitioner was thereby compelled to buy other lumber to take its place, and to fill orders which petitioner had accepted for material, which orders could only be filled by petitioner by rebuying lumber, which defendant had failed to deliver. Petitioner did so buy, using all diligence in the purchase thereof.

"(13) Said sum of \$783.83 herein sued for represents and is the difference between the contract price at which defendant agreed to furnish said lumber to petitioner and the price which petitioner had to pay for the lumber petitioner was forced by defendant's breach of said contract to buy to take the place of the lumber which defendant had contracted and agreed to furnish, but failed to furnish."

Judgment for \$783.83 and interest is prayed for.

The demurrer was on the following grounds:

"(1) Because under the facts alleged plaintiff is not entitled to recover.

"(2) Because no cause of action is alleged against defendant in plaintiff's petition.

"(3) Because the contract sued upon is unilateral, wanting in mutuality, in that plaintiff does not agree to receive and pay for the lumber when delivered as per the contract.

"(4) Because the measure of damages under the contract as sued for are not recoverable; the measure of damages under the facts alleged being the difference between the contract price and the market price at the time and place of delivery on the date of the breach of contract. And the damages sued for cannot be measured by profits of a contract of resale, in the absence of an allegation that the seller, that is the defendant, at the time of making the contract of sale, had notice of such contract of resale. That is, that plaintiff had purchased the lumber for the purpose of filling contracts made on the date of the making of the contract sued upon.

"(5) Because under the facts as alleged plaintiff was not authorized to go into the market and buy lumber and charge defendant with the price thereof, in the absence of an allegation that defendant knew at the time of making of the alleged contract that plaintiff had sold the lumber, the prices for which plaintiff had sold it, and to whom plaintiff had sold it, and the profit plaintiff would realize by the sale of the lumber. In the absence of such allegations, the measure of plaintiff's damages would be the difference in the contract price and the market price at the time and place of delivery when the contract was breached.

"(6) Defendant demurs specially to paragraph 7 of plaintiff's petition because the date defendant is alleged to have failed and refused to furnish the balance of said lumber is not alleged. Nor is the date alleged that plaintiff requested defendant to comply therewith. The allegations of this paragraph being mere conclusions, the facts with reference to what is attempted to be alleged should be given.

"(7) Defendant demurs specially to paragraph 8 of plaintiff's petition because what is

therein attempted to be alleged is a mere conclusion.

"(8) Defendant demurs specially to paragraph 9 of plaintiff's petition because it is not alleged from whom plaintiff purchased said lumber, the time it was purchased, and because the facts as alleged incorrectly state the measure of damages plaintiff can recover, if anything.

"(9) Defendant demurs specially to paragraph 10 of plaintiff's petition because what is attempted to be alleged are mere conclusions. The facts with reference to what is alleged should be stated.

"(10) Defendant demurs specially to paragraph 12 of plaintiff's petition because the date when defendant failed and refused to perform the alleged contract is not alleged. The date when defendant failed and refused to deliver the balance of said lumber is not alleged. It is not alleged where and from whom and the date petitioner purchased other lumber to take the place of that alleged to have been purchased from defendant. Nor is it alleged from whom petitioner had taken orders, from whom orders had been accepted, the date of such orders, the amounts thereof. Nor is it alleged why plaintiff could not fill said orders without rebuying lumber. The facts attempted to be alleged in this paragraph being mere conclusions.

"(11) Defendant demurs specially to paragraph 13 of plaintiff's petition because what is alleged therein are mere conclusions. It is not alleged in this paragraph, or elsewhere in the petition, from whom petitioner bought said alleged lumber, the date it was bought, the amount bought from each party, if there was more than one. The facts with reference thereto should be definitely and specifically alleged so as to put the defendant upon his defense."

El. V. Carter, of Atlanta, for plaintiff in error.

Maddox, McCamy & Shumate, of Dalton, for defendant in error.

STEPHENS, J. Judgment reversed.

JENKINS, P. J., and HILL, J., concur.

(27 Ga. App. 323)

TOWNSEND v. STATE. (No. 12543.)

(Court of Appeals of Georgia, Division No. 1.
July 28, 1921.)

(Syllabus by Editorial Staff.)

1. Criminal law §1081½—Assignments of error not considered, when allegations not verified by judge's answer.

On review of a judgment on certiorari, an assignment of error in the petition for certiorari based upon the admission of specified testimony cannot be considered, where the allegations of the petition as to the admission of such testimony were not verified by the trial judge's answer.

2. Criminal law §1178—Reference to certiorari for statement of complaint not sufficient argument of assignment of error.

On review of a judgment on certiorari, an assignment of error in the petition for certiorari complaining of the admission of testimony

will be treated as abandoned, when not argued in the brief for plaintiff in error, though the brief refers to the certiorari for a statement of the complaint under such assignment.

3. Criminal law §1172(1)—Inadvertent reference to wrong statute harmless.

On a trial under Pen. Code 1910, § 703, relative to false representations of respectability, wealth, etc., the inadvertent statement in the charge that defendant was being tried under section 719, relative to other deceitful means, etc., was harmless, where the evidence demanded conviction under section 703, and the charge called the jury's attention to the various allegations, and required all of them to be proved, and charged solely on such allegations, and did not refer to any other deceitful means or artful practices covered by section 719.

4. Criminal law §828—Instruction in precise language of statute should be requested, if desired.

Where the court substantially instructed the jury as to the elements of the offense charged, if the precise words of the statute on which the prosecution was based (Pen. Code 1910, § 703) were desired, a timely written request therefor should have been presented.

Luke, J., dissenting.

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Samuel Townsend was convicted of fraudulent representations. Certiorari was overruled by the superior court, and he brings error. Affirmed.

Sims & Howard, of Atlanta, for plaintiff in error.

John A. Boykin, Sol. Gen., Roy Dorsey, and E. A. Stephens, all of Atlanta, for the State.

BROYLES, O. J. 1. The court did not err in overruling all the grounds of the demurrer interposed to the accusation.

[1] 2. The fourth assignment of error in the petition for certiorari is based upon the admission of specified testimony. The allegations in the petition as to the admission of this testimony are not verified by the answer of the trial judge, and therefore the assignment of error cannot be considered.

[2] 3. The third assignment of error in the petition for certiorari (complaining of the admission of certain testimony) is not argued in the brief of counsel for the plaintiff in error, and therefore is treated as abandoned. The mere statement in the brief, that "for other assignments of error we respectfully refer to the certiorari as a clear statement of complaints as we could make here," cannot be considered as an argument. See, in this connection, O'Neal v. State, 24 Ga. App. 335 (1), 100 S. E. 787, and citations.

[3, 4] 4. The accusation was based upon section 703 of the Penal Code, which makes it a misdemeanor for any person, by false representations of his own respectability,

wealth, etc., to obtain a credit from some other person and thereby defraud him of any money or other valuable thing. Section 719 of the Penal Code provides that—

"Any person using any deceitful means or artful practice, other than those which are mentioned in this Code, by which an individual, or a firm, or a corporation, or the public is defrauded and cheated, shall be punished as for a misdemeanor."

The judge, in the beginning of his charge, read section 719, and inadvertently stated to the jury that the defendant was being tried under that section. This error, however, was harmless, for the following reasons: First, the evidence demanded the defendant's conviction under section 703 of the Penal Code; and second, the judge in his charge specifically called the jury's attention to the various allegations in the accusation, and instructed them, in substance, that all of those averments must be proved by the state, beyond a reasonable doubt, before the defendant could be convicted, and furthermore, the court charged *solely* upon the allegations of the accusation, and did not refer at all to any other "deceitful means or artful practice." Under these circumstances no jury of ordinary intelligence could have been misled or confused by the inadvertent statement of the court as above set forth. The only case cited by counsel for the plaintiff in error to sustain their contention that this error of the court was harmful is *Ratteree v. State*, 77 Ga. 774. In that case, however, the trial judge in his charge *wholly* ignored the offense as set forth in the accusation, and because of that error, and also because, as stated by the Supreme Court, "the evidence and indictment did not correspond, and * * * neither is sufficient to uphold the conviction" (*italics ours*), the case was sent back for a new trial. In the instant case the judge in his charge specifically and fully instructed the jury upon the offense as set forth in the accusation, and the evidence and the accusation corresponded perfectly, and both were amply sufficient to uphold the verdict of guilty.

[4] 5. There is no merit in the assignment of error that the judge failed in his charge to read section 703 of the Penal Code. The court substantially instructed the jury as to the elements of the offense charged, and, if the precise words of the statute were desired, a timely written request therefor should have been presented.

6. The verdict was demanded by the evidence, and the judge of the superior court properly overruled the certiorari.

Judgment affirmed.

BLOODWORTH, J., concura.

LUKE, J. (dissenting). I think that the third assignment of error in the petition for

certiorari was sufficiently argued in the brief of counsel for the plaintiff in error to warrant a consideration thereof by this court; and, in my opinion, the ruling complained of therein was reversible error. Moreover, I cannot agree that the court did not commit error in charging the jury, for the following reason: The accusation charged the defendant with violating section 703 of the Penal Code. This section refers to cheating and swindling by false representations as to one's wealth, etc., and, in my opinion, it was error for the court to instruct the jury that the defendant was charged with a violation of section 719 of the Penal Code, which declares that—

"Any person using any deceitful means or artful practice, other than those which are mentioned in this Code, by which an individual, or a firm, or a corporation, or the public is defrauded and cheated, shall be punished as for a misdemeanor" (*italics mine*).

Neither can I concur with the ruling of the majority that the evidence demanded the defendant's conviction, and, for the reasons stated above, it is my judgment that a new trial should result.

(27 Ga. App. 340)

M. S. CORNETT & CO. v. NEWSOME.
(No. 12309.)

(Court of Appeals of Georgia, Division No. 2.
Aug. 3, 1921.)

(*Syllabus by the Court.*)

1. Appeal and error \S 719(1,4)—Exceptions pendente lite not considered, when error not assigned thereon; overruling of demurrer not considered without assignment of error.

Exceptions pendente lite (although duly allowed and ordered filed as a part of the record), upon which no assignment of error is made in the main bill of exceptions, and upon which no assignment of error is made before the argument of the case before this court, will not be considered.

2. Appeal and error \S 702(1) — Portions of charge not considered, when entire charge not in record.

Isolated and incomplete portions of the charge excepted to cannot be intelligently considered, in the absence of the entire charge, unless the portion of the charge excepted to is without qualification and is inherently erroneous.

3. Sales \S 479(10)—Conditional sale rescinded and canceled by retaking property and not giving buyer credit.

Where, under a contract of sale, property has been sold and delivered to the buyer, and when the debt matures the buyer fails or refuses to pay it, and the seller thereupon retakes possession of the property, without authority under the contract itself or from the maker, and holds it as his own, and does not

sell the property or give to the buyer any credit on the debt for its value, the retaking of the property operates as a complete rescission and cancellation of the contract of sale.

Error from City Court of Sandersville; W. M. Goodwin, Judge.

Proceeding by M. S. Cornett & Co. against D. S. Newsome. To the affidavit of foreclosure defendant filed counterclaim. Judgment for defendant, and plaintiffs bring error. Affirmed.

Cornett & Co. sold to Newsome a pair of mules, to which they retained title by a conditional bill of sale to the mules. As additional security, in the same instrument Cornett & Co. took from Newsome a mortgage covering another pair of mules belonging to Newsome. This instrument was in the usual form, and, as to the two mules sold to Newsome, gave to the seller, upon default in payment, no option to retake without legal process the two mules in question. As to the mortgage on the other two mules, the right to retake by the seller upon default was given in the instrument. Newsome failed to pay part of the purchase price of the two mules on maturity of the obligation in question, and, in the absence of Newsome from home, and without legal process, Cornett & Co. sent to Newsome's farm and took possession of these two mules, and they subsequently sold the mules for their own benefit, giving to Newsome no credit on the instrument for the amount of the purchase price. Subsequently Cornett & Co. foreclosed the instrument in question as a mortgage, alleging that the entire amount of the principal and interest was due, and the mortgage *n. fa.* was levied upon the two mules belonging to Newsome and covered by the mortgage. To the affidavit of foreclosure Newsome filed a counteraffidavit, denying any indebtedness and setting up a rescission of the contract by reason of the retaking and selling by Cornett & Co. of the two mules to which title had been retained.

On the trial Cornett & Co. admitted the retaking and contended that it was with the consent of Newsome and under an express agreement. This was denied by Newsome, who alleged that the retaking was without his consent and without his knowledge, and he asserted that the plaintiffs sent to his home and took the mules without lawful authority, and disposed of them without his consent, and that he had protested against the unlawful retaking. The trial court submitted to the jury the question of rescission, and the jury found in favor of the defendant. The plaintiffs' motion for a new trial was overruled, and the case is before this court on exceptions to that judgment. In the motion for a new trial error is as-

signed upon an extract from the charge of the court, the movant complaining generally that this excerpt was not sufficient to furnish any "comprehensive idea" of the issues as submitted to the jury by the court. The charge as a whole is not a part of the record in the case. The plaintiffs filed also a demurrer to the defendant's counter affidavit to the foreclosure proceeding, the demurrer was overruled, and exceptions pendente lite to this ruling were allowed and ordered filed as a part of the record, but in the main bill of exceptions no assignment of error is made as to this judgment, and no assignment of error on the exceptions pendente lite was made in this court.

Evans & Evans, of Sandersville, for plaintiff in error.

Jordan & Harris, of Sandersville, for defendant in error.

HILL, J. (after stating the facts as above).

[1] 1. The main bill of exceptions fails to show any assignment of error upon the judgment overruling the demurrer, nor does the record show any assignment upon the exceptions pendente lite complaining of that judgment. In the absence of such assignment of error, this court cannot consider the question made on the judgment overruling the demurrer. *Tift v. Shiver & Aultman*, 24 Ga. App. 638, 102 S. E. 47; *Campbell v. State*, 24 Ga. App. 138, 100 S. E. 30; *Smiley v. Smiley*, 144 Ga. 546, 87 S. E. 668.

[2] 2. In the absence of the entire charge of the trial court, this court cannot intelligently pass upon the isolated fragment of the charge specified, and will not consider such detached portion, unless the portion of the charge excepted to is without qualification and is inherently erroneous. *Central R. R. v. Senn*, 73 Ga. 705; *Mixon v. State*, 15 Ga. App. 252, 82 S. E. 935; *Mills v. State*, 133 Ga. 155, 85 S. E. 363.

[3] 3. The main question in the case is whether or not the facts submitted to the jury were sufficient to support the defense set up, that the retaking of the two mules by the sellers without authority, and the appropriation of the proceeds thereof to their own use, amounted in law to a rescission of the contract of sale and to a legal cancellation of the contract. The general proposition is well established that, when property has been sold and delivered to the buyer under a contract of sale, and when the debt has matured, the buyer has refused or failed to pay the debt, and the seller thereupon retakes possession of the property and holds it as his own, or disposes of it for his benefit, and does not give to the buyer any credit on the debt for its value, the retaking of the property operates as a complete rescission and cancellation of the contract of sale. This

principle is thus stated by the Supreme Court:

"When an election is made to take the property itself, and it has been recovered by the plaintiff, this is a rescission of the contract of purchase, and no subsequent action can be had for any further recovery." *Glisson v. Heggie*, 105 Ga. 34, 31 S. E. 118.

In the case of *Pannell v. McGarity*, 107 S. E. 352, the court held, in effect, that where the contract of sale contains a provision that if the note is not paid at maturity the vendor is authorized to repossess himself of the property, to sell it for cash at public outcry, and to credit the proceeds from the sale on the note, this principle is not applicable, and the vendor can also bring suit in trover for the sole purpose of obtaining possession of the property in order that he might sell it and credit the proceeds of the sale on the purchase money note.

There is a great distinction between the case just cited and the facts of the one under consideration. Here no such election was provided for in the contract of purchase, nor did the sellers retake the property and sell it, and apply the proceeds as a credit on the purchase-money note; but, on the contrary, they retook possession of the property without authority and applied it for their own benefit, subsequently bringing a foreclosure suit for the full amount of the note.

We think the present case is controlled in principle by the decision of the Supreme Court in *Glisson v. Heggie*, supra, and that the conduct of the sellers, in retaking the property and in selling it without authority and without giving to the buyer the benefit of the sale, amounted in law to a full rescission and cancellation of the contract of sale, and that under the evidence the jury were fully authorized to find a verdict in accordance with this principle in favor of the defendant, and that there was no error in overruling the motion for a new trial.

Judgment affirmed.

JENKINS, P. J., and STEPHENS, J., concur.

(27 Ga. App. 337)

RIGGS v. KINNEY. (No. 12064.)

(Court of Appeals of Georgia, Division No. 2
Aug. 3, 1921.)

(Syllabus by the Court.)

1. Appeal and error \S 303—Grounds of motion for new trial held unqualifiedly approved.

The grounds of a motion for a new trial are sufficiently certified when certified by the trial judge as being "true and correct." This is true notwithstanding the judge may, supra, in the certificate, have certified that the grounds "are hereby approved subject to correction." In such a certificate the grounds of the motion are unqualifiedly approved as true and correct.

2. Trial \Leftrightarrow 110—Evidence that third person had employed counsel and agreed to make defendant good held improperly admitted.

Upon the trial of an action in trover, where the evidence presented an issue of fact as to the title of the property sued for, it was error, tending to influence the jury in favor of the plaintiff, to admit evidence to the effect that a third person had employed counsel to represent the defendant upon the trial of the case, and that such third person had promised to make good to the defendant the title to the property. See, in this connection, *O'Neill Mfg. Co. v. Pruitt*, 110 Ga. 577, 38 S. E. 59.

3. Other grounds not passed on.

It is unnecessary to pass upon the other grounds of the motion for a new trial.

Error from City Court of Carrollton; James Beall, Judge.

Action by Hoyt Kinney against C. D. Riggs, Judgment for plaintiff, and defendant brings error. Reversed.

Griffith & Matthews, of Buchanan, for plaintiff in error.

Boykin & Boykin, of Carrollton, for defendant in error.

STEPHENS, J. Judgment reversed.

JENKINS, P. J., and HILL, J., concur.

(27 Ga. App. 348)

GOLDSTEIN BROS. v. BROWN et al.
(No. 12394.)

(Court of Appeals of Georgia, Division No. 2
Aug. 8, 1921.)

(Syllabus by the Court.)

1. Garnishment \Leftrightarrow 219—When plaintiffs or counsel not present when claim case called, levy should have been dismissed.

Goldstein Bros. obtained a judgment against Brown and had summons of garnishment issued thereon and served on the La Grange Banking & Trust Company. The garnishee answered that it held a certain sum due the defendant. There was no traverse to the answer. A claim to the fund was filed, and, when the claim case was called, neither the plaintiffs nor their counsel were present. The claimant introduced evidence and took a verdict finding the property "not subject." *Held*:

This was unauthorized by law. When a claim is filed, and at the hearing neither the plaintiff nor counsel representing the plaintiff is present, the levy should be dismissed. *Bell & Co. v. Martin*, 142 Ga. 55 (1), 82 S. E. 444.

2. Garnishment \Leftrightarrow 223—Claimant not entitled to judgment when garnishee's answer admitting liability to defendant not traversed.

The answer of the garnishee admitting indebtedness to the defendant, but no traverse having been filed to the answer, the claimant could not legally obtain a judgment in her favor. *Davis v. Pringle*, 106 Ga. 93, 33 S. E.

815, *Booth v. Brooke & Co.*, 6 Ga. App. 299 (1), 64 S. E. 1103.

Error from City Court of La Grange; Duke Davis, Judge.

Action by Goldstein Bros. against Essie Brown, in which summons of garnishment was served on the La Grange Banking & Trust Company, and a claim to the fund was filed. Judgment in favor of the claimant, and plaintiffs bring error. Reversed.

W. E. Armistead and Hatton Lovejoy, both of La Grange, for plaintiffs in error.

HILL, J. Judgment reversed.

JENKINS, P. J., and STEPHENS, J., concur.

(27 Ga. App. 339)

HENING & HAGEDORN v. GLANTON.
(No. 12145.)

(Court of Appeals of Georgia, Division No. 1
Aug. 8, 1921.)

(Syllabus by the Court.)

1. Appeal and error \Leftrightarrow 1056(2)—Corporations \Leftrightarrow 193—Meeting cannot be held outside state; exclusion of evidence of organization harmless where not in issue.

Under the general rule that a corporation as an artificial person must dwell in the state of its creation, and has no legal existence outside of the boundaries of the sovereignty by which it is created (*Union Branch R. R. Co. v. East Tennessee R. Co.*, 14 Ga. 327, 328 [9], 341; *Port Royal R. Co. v. Hammond*, 58 Ga. 523, 526), its incorporators or stockholders, as the corporate entity, cannot hold meetings in another state for the performance of strictly corporate functions, such as accepting the charter and organizing the corporation (*Duke v. Taylor*, 37 Fla. 64, 19 South. 172, 31 L. R. A. 484, 53 Am. St. Rep. 232, 14 O. J. 112, 343, 886). Hence the court did not err in refusing to admit in evidence the alleged minutes of the first stockholders' meeting of the defendants, held in North Carolina under their alleged Georgia charter. Moreover, the exclusion of such evidence could not have been prejudicial, as the issue was not as to the existence of the corporation (this being undisputed), but solely whether the defendant dealt with the plaintiff and executed the note sued on as a corporation or as a partnership. Nor could the rights of the defendant have been prejudiced by the refusal of the court to admit in evidence the minutes of a meeting of the board of directors of the corporation, offered merely for the purpose of showing its organization, since under the evidence and the charge this was not an issue in dispute.

2. Evidence \Leftrightarrow 213(1)—Admission of liability not inadmissible when no effort to compromise indicated.

"An admission of liability contained in an offer to settle, brought about by a simple demand for settlement, is not inadmissible on

the ground that such admission was 'made with a view to a compromise,' when there is nothing whatever to indicate that there has been an effort to compromise, and when it cannot be inferred from the circumstances under which the offer was made that there has been such an effort." *Teasley v. Bradley*, 110 Ga. 497, 498 (6), 35 S. E. 782, 78 Am. St. Rep. 113; *Akers v. Kirke & Co.*, 91 Ga. 590 (3), 18 S. E. 366.

3. Trial \S 296(2)—Portion of charge held cured by rest of charge.

The remaining grounds of the motion for new trial, all complaining of substantially the same alleged error manifested in various portions of the charge, are without merit. While, as set forth in the third ground of the amendment to the motion, the judge did instruct the jury that, if they found the defendant was a corporation, a verdict should be found for the defendant, and, if a partnership, then for the plaintiff, still, as conceded by all parties, and as repeatedly and plainly stated throughout the charge (including the language immediately preceding the particular excerpt), the one disputed and controlling issue was whether the maker of the note was dealt with as a partnership or as a corporation, and in which capacity the credit was extended and the note executed.

Error from Superior Court, Troup County; J. R. Terrell, Judge.

Action by H. D. Glanton, receiver, against Hening & Hagedorn. Judgment for plaintiff, and defendant brings error. Affirmed.

Hatton Lovejoy, Henry Reeves and E. T. Moon, all of La Grange, for plaintiff in error.

A. H. Thompson, of La Grange, for defendant in error.

JENKINS, P. J. Judgment affirmed.

STEPHENS and HILL, JJ., concur.

(27 Ga. App. 296)

A. W. WATTERS & CO., Inc., v. O'NEILL et al. (No. 11602.)

(Court of Appeals of Georgia, Division No. 1. July 26, 1921.)

(*Syllabus by the Court.*)

1. Attorney's fees recoverable in attachment suit.

"The statutes prescribing procedure in attachment suits make provision for 'a return day' within the meaning of the statute prescribing the conditions on which agreements to pay attorney's fees, in addition to the stipulated principal and interest, may be enforced; and such agreements may be enforced in an attachment suit under conditions specified in the statute." *Watters & Co., Inc., v. O'Neill et al.* (this case), 108 S. E. 35, decided by the Supreme Court, July 13, 1921.

Under the above ruling and the facts of the instant case, the court did not err in including

attorney's fees in the judgment rendered for the plaintiffs.

2. Attachment \S 274, 276—Declaration praying personal judgment not dismissed though attachment void; when attachment abandoned, refusal to pass on motion to dismiss, special plea, and traverse of grounds of attachment, not error.

"Though * * * an attachment be absolutely void, this is no ground for dismissing a declaration thereon, praying for judgment in personam, where the declaration has been properly filed and the defendant duly cited to appear, and general appearance has been made therein." *Falligant v. Bitch*, 19 Ga. App. 675 (2), 91 S. E. 1057, and citations.

In the instant case, while the declaration in attachment did not pray solely for judgment in personam, yet upon the trial counsel for the plaintiffs announced to the court that they would abandon the attachment and ask only for a common-law judgment in personam against the defendant. Under these circumstances the court did not err in refusing to pass upon: First, the defendant's motion to dismiss the attachment proceedings; second, the defendant's special plea setting up that the attachment was void; and third, the defendant's traverse to the grounds of the attachment.

3. Amended declaration not demurrable.

The amended declaration in attachment was not subject to any ground of demurrer interposed, and the court did not err in so ruling.

4. Amendment properly disallowed.

Under all the particular facts of the case the court did not err in disallowing the preferred amendment to the defendant's answer, or in striking the answer itself.

5. Judgment properly rendered.

The court did not err in rendering judgment in favor of the plaintiffs for the full amount of the principal, interest, and attorney's fees sued for.

6. Costs \S 262—Damages denied when prosecution for delay only does not appear.

It not appearing that the writ of error in this case was prosecuted for delay only, the request of the defendants in error, that damages be awarded, is denied.

Error from City Court of Floyd County; W. J. Nunnally, Judge.

Action by J. H. O'Neill and others against A. W. Watters & Co., Inc. Judgment for plaintiffs, and defendant brings error. Affirmed in conformity to Supreme Court's answers to certified questions (108 S. E. 35).

J. Mallory Hunt, of Atlanta, and L. H. Covington and Nathan Harris, both of Rome, for plaintiff in error.

Denny & Wright, of Rome, for defendants in error.

BROYLES, C. J. Judgment affirmed.

LUKE and BLOODWORTH, JJ., concur.

(27 Ga. App. 338)

ANDREWS v. SIMS. (No. 12124.)(Court of Appeals of Georgia, Division No. 2.
Aug. 3, 1921.)*(Syllabus by the Court.)*

1. Landlord and tenant \Leftrightarrow 270(1/4, 10, 15) — Distress warrant is final process; the affidavit converts distress proceeding into ordinary action; distress warrant operative as final process, when counter affidavit dismissed, but otherwise landlord's remedy is on bond.

In November, 1918, the plaintiff in error sued out a distress warrant against his tenant, which was levied upon four bales of cotton, raised on the rented premises during the tenancy. The warrant was arrested by the giving of a counter affidavit and a replevy bond, and the property was released by the sheriff. Afterwards, during the pendency of the case, the tenant executed to another a deed and bill of sale to secure debt, covering certain real estate and personalty, which was duly recorded. Subsequently the landlord obtained a general judgment against the tenant and the surety on the replevy bond. The surety having become insolvent, the *fi. fa.* issued on the general judgment was levied upon certain of the personal property included in the bill of sale as property of the tenant. To this the defendant in error, the vendee under the bill of sale, interposed a claim. None of the property levied upon and so claimed was in fact included in the original levy of the distress warrant, but all of it was included in the bill of sale. The court, in the trial of the claim case, charged as follows: "A distress warrant levied for rent is a general lien on all property of the renter and takes effect from time of levy of distress warrant. If, subsequent to that, bond is given, and the property disposed of, the claimant gets no title against this levy which is regular in form." The jury having found the property subject, the claimant moved for a new trial on the general grounds, and on the ground that this charge was error (1) because the landlord's general lien was released by the filing of counter affidavit and the replevy bond; (2) because such general lien did not cover property not levied upon by the distress warrant; and (3) because the court should not have instructed the jury that the claimant got no title as against such levy. The judge granted a new trial, upon the ground that this portion of the charge was erroneous, and to this judgment the landlord excepted. *Held*, a distress warrant is final process until arrested by counter affidavit and replevy bond. *Gober v. Barry*, 4 Ga. App. 4, 6, 60 S. E. 807. But when the defendant replevies the property the levy becomes functus, and the proceeding is converted into an ordinary action for rent, with the bond standing as security in the event of a judgment for the plaintiff. *Stephens v. McNaughton*, 8 Ga. App. 42, 43, 68 S. E. 459. In such a proceeding the form of the verdict or judgment is general, and is for the amount found to be due. *Hardy v. Poss*, 120 Ga. 385, 47 S. E. 947. If the counter affidavit is dismissed, the distress warrant at once becomes again operative as final process.

Griggs v. Willbanks, 96 Ga. 744, 22 S. E. 327. But when it stands and the property is released under the affidavit and bond, the question of lien is not involved, and the plaintiff's recourse at the end of the suit will be upon his judgment on the bond. *Rountree v. Rutherford*, 65 Ga. 444(2), 448; *Davis v. De Vaughn*, 7 Ga. App. 324, 326, 66 S. E. 956.

2. Landlord and tenant \Leftrightarrow 270(18)—Landlord's lien prior to levy covers no specific property, and after levy covers only that seized.

The general lien of landlord, which by section 3340 of the Civil Code (1910) is given "on the property of the debtor liable to levy and sale," dates "from the time of the levy of a distress warrant to enforce the same." Prior to levy it covers no specific property, and upon levy such general lien attaches only to the particular property seized under the distress warrant issued to enforce the lien. *Henderson v. Mayer*, 225 U. S. 631, 638, 32 Sup. Ct. 699, 56 L. Ed. 1233, 1236.

3. Execution \Leftrightarrow 194(1)—Landlord and tenant \Leftrightarrow 270(10)—Burden on claimant when property in defendant's possession; one to whom property pledged after release from distress warrant held to have good title.

Where property is in the possession of the defendant in *fi. fa.* at the time of levy, the burden is upon the claimant to show that the property was not subject to sale under the plaintiff's execution at the date of the filing of the claim, and that at that time he had some title to or interest in the property, superior to the right of the plaintiff to proceed with the execution. *Deariso & Co. v. Lawrence*, 3 Ga. App. 580, 60 S. E. 330. See, also, *Strickland v. Smith*, 17 Ga. App. 506(3), 506, 87 S. E. 718. In the present case, the claimant showing superior title in himself under the bill of sale executed to him by the defendant in *fi. fa.* prior to the general judgment against the defendant on the replevy bond, and there being in the pleadings no allegation of fraud or other proper allegations and prayers attacking the conveyance to the claimant, the evidence demanded a verdict for the claimant, and the trial judge did not err in granting a new trial upon the error in the charge.

Error from Superior Court, Columbia County; H. C. Hammond, Judge.

Distress proceeding by T. B. Andrews, in which J. A. Sims interposed a claim to property levied on under the *fi. fa.* on the judgment on the replevy bond. After a verdict for plaintiff, a new trial was granted, and plaintiff brings error. *Affirmed*.

See, also, 105 S. E. 641.

B. B. McCowen, of Augusta, for plaintiff in error.

Hamilton Phinzy and J. S. Watkins, both of Augusta, for defendant in error.

JENKINS, P. J. Judgment affirmed.

STEPHENS and HILL, JJ., concur.

(27 Ga. App. 319)

RICHARDSON v. STATE. (No. 12570.)(Court of Appeals of Georgia, Division No. 1.
July 26, 1921.)*(Syllabus by the Court.)***Larceny ¶55—Evidence held insufficient to support conviction.**

The conviction was unauthorized by the evidence, and the court erred in overruling the motion for a new trial.

Error from Superior Court, Cobb County;
D. W. Blair, Judge.

Martha Richardson was convicted of larceny of money supposed to have gone with clothes taken by her to be washed, and she brings error. Reversed.

Mrs. T. W. Black testified that defendant did the witness' washing and would come after the clothes and take them to her house and wash them; that one Monday morning after she had come after the clothes the witness missed some money that she had been carrying on her person in a little tobacco sack pinned to her undershirt; that she pulled off the shirt Monday morning when defendant came for the clothes and did not see the money then, but threw the shirt in with the other clothes, tied them up, and gave them to defendant; that she did not notice that the money was gone until the next day; that the money had been given to her at different times, by her husband, and the last time she saw the tobacco sack with the money in it was when her husband gave her the last money; that she put in what he gave her, tied it up again, and pinned it back on her shirt; that she thought that was Sunday morning; that she did not see it when going to bed and had no recollection of seeing it after pinning it to the shirt; and that she did not know who got the money. Her husband testified that he turned the money over to his wife and she kept it in a little tobacco sack; that he was not at home and did not know what took place Monday morning; that after his wife told him about the money being gone he went to defendant's house and asked her about it, and she said she had not seen it and did not have it and knew nothing in the world about it; that the clothes had then been washed and were hanging on the line; that "she showed me where she said she hung it on the line, but it was gone; she said somebody had stolen it;" that he threatened to call the officers, but defendant still denied having seen the money; that he did call a deputy sheriff who searched the premises, but failed to find any money. The deputy sheriff testified that he searched the place, but did not find any money, and that defendant denied having it or knowing any-

thing about it. Defendant in her statement denied having taken or seen the money, and said that if the shirt was in the washing at all she did not know it; that Mr. Black took all the clothes off the line and carried them home; and that she could not say for certain that the shirt was in the washing at all, but that if it was she never saw the money.—Statement by editor.

Mozley & Gann and H. B. Moss, all of Marietta, for plaintiff in error.

John S. Wood, Sol. Gen., of Canton, and Lindley W. Camp, of Marietta, for the State.

BROYLES, C. J. Judgment reversed.

LUKE and BLOODWORTH, JJ., concur.

(27 Ga. App. 318)

ANDERSON v. STATE. (No. 12567.)(Court of Appeals of Georgia, Division No. 1.
July 26, 1921.)*(Syllabus by Editorial Staff.)***Drunkenness ¶11—Evidence insufficient to show intoxication manifested by boisterousness, etc., on public highway.**

On a trial for intoxication manifested by boisterousness, and indecent condition and acting, vulgar, profane, and unbecoming language, and loud and violent discourse on a public highway, evidence held insufficient to support a conviction.

Error from City Court of Dawson; M. C. Edwards, Judge.

Ed Anderson was convicted of drunkenness on a public highway, and he brings error. Reversed.

Will Rivers testified that defendant and two other negroes passed his house in a buggy; that defendant had a pistol in his hand and was waving it around and said he would shoot the witness' head off; that he was drunk, talking loud and cussing, and whipping the mule; that he drove on over towards the Dawson and Bronwood public road. On cross-examination he testified that where he saw defendant when he was cussing and waving the pistol was "on the little road on the place which runs about 80 feet from my house"; that it ran into the Dawson and Bronwood public road 300 or 400 yards from his house; that they drove to the public road; and that he did not know what they did when they got in that road.

His wife, Macedonia Rivers, testified in substance to the same effect, and likewise testified on cross-examination that the place where she saw defendant and his companions in the buggy was not on the Dawson and

Bronwood public road, but "in the little road in front of our house on Mr. Jennings' place"; and that they drove upon the public road mentioned, but that "I never saw what they were doing on the Dawson and Bronwood public road."

A deputy sheriff testified that on the same day he overtook the buggy and arrested defendant's companions "on the road that goes off from the Dawson and Bronwood public road and goes up by Mr. Kennedy's place, about a mile from Dawson"; that he did not arrest defendant, because he ran away; that they were on the public road when he first saw them, but he was several hundred yards behind and could not tell what they were doing, except that defendant was whipping a mule and standing up in the buggy and beating it with a stick, trying to make it go faster; that he did not see any of them waving any pistol; that he would say defendant was drunk, but not "plumb drunk"; that as defendant ran away he thought he saw something black, like the handle of a pistol, in his pocket, but would not swear that it was a pistol. On cross-examination he testified that the place where he overtook the buggy was not in the Dawson and Bronwood public road, but in the little side road; that he never heard defendant open his mouth then or any other time that afternoon; that the only thing he saw him doing while on the public road was to whip the mule; that he did not find any pistol in the buggy or on the other two negroes; that defendant did not use any obscene language, or in fact say anything, and was not boisterous, and that he did not see him do anything indecent; and that when he caught up with the buggy it had left the Dawson and Bronwood public road 50 or 100 yards.

—Statement by editor.

Parks & Parks, of Dawson, for plaintiff in error.

W. H. Gurr, Sol., of Dawson, for the State.

LUKE, J. The defendant in this case was charged with being upon a certain highway in an intoxicated condition, which intoxication was "made manifest by boisterousness, by indecent condition and acting, and by vulgar, profane, and unbecoming language, and loud and violent discourse of the defendant while so intoxicated." The evidence did not authorize the defendant's conviction, since there was no proof that he comported himself upon the highway named in the manner alleged. It was therefore error to overrule the motion for a new trial. See *Davis v. State*, 14 Ga. App. 569, 81 S. E. 908, and cases cited.

Judgment reversed.

BROYLES, O. J., and BLOODWORTH, J., concur.

(117 S. C. 100)

Ex parte MARYLAND MOTOR CAR INS. CO.

OTIS v. COOPER.

(No. 10628.)

(Supreme Court of South Carolina. June 30, 1921.)

Constitutional law §300—Highways §166
—Due process clause not violated by statute giving lien on stolen auto for injury from its negligent operation.

Acts 1912, p. 737, giving a lien on a motor vehicle for damages caused by its being operated in violation of law or negligently, excepting only one which has been stolen from under secure lock, does not deprive one of property without process where the car had been stolen under other conditions; it being considered the offender.

Appeal from Richland County Court; M. S. Whaley, Judge.

Action by J. C. Otis against N. B. Cooper, with attachment. Claim of the Maryland Motor Car Insurance Company to the car, contested by plaintiff, was decided against claimant, and it appeals. Appeal dismissed.

E. L. Craig, of Columbia, for appellant.

Nettles & Tobias, of Columbia, for respondent.

GARY, C. J. The following statement appears in the record:

"James C. Otis commenced his action in the county court of Richland county, against N. B. Cooper, by the service of a summons dated October 18, 1920, together with a complaint, alleging that on June 20, 1920, he suffered damage by reason of the negligence of defendant in the operation of an automobile on the public highway in Richland county. The summons and complaint were filed October 20, 1920, together with an affidavit in attachment, whereupon a warrant of attachment issued directing the sheriff to seize the automobile referred to in the complaint and affidavit. Service was made October 20, 1920, and the sheriff took the automobile into his possession the same day. At the return of the writ Maryland Motor Car Insurance Company claimed the automobile as its property and made demand in writing on the sheriff that the car be delivered to it forthwith, whereupon the sheriff notified the plaintiff that the insurance company had claimed the car and unless the undertaking required by section 287 of the Code was given he would not keep the car. Plaintiff contested the insurance company's claim and gave the undertaking.

"Thereafter the insurance company served the plaintiff in attachment with notice that it would submit its petition and affidavits to the judge of the county court on the 8th day of November, 1920, and request that an issue be made up under his direction, pursuant to the provisions of section 287 of the Code, to try the question of whether the automobile was

its property and was being unlawfully withheld from it.

"Claimant by its petition and affidavits alleged that the automobile had been stolen from a dealer in the city of Richland, Va., under circumstances more fully set forth in its petition and affidavits, and that claimant had become subrogated to the rights of that dealer and was the owner of the car by reason of having paid for the loss under a policy of insurance issued by it and by a written instrument assigning the right, title, and interest of the dealer to claimant, and that it was entitled to have the car delivered to it forthwith. The petition further alleged that claimant was being deprived of its property without due process of law in violation of the 'due process' clauses of the state and federal Constitutions.

"When the motion was called for a hearing counsel for the plaintiff in attachment admitted, for the sake of argument, that the car was the property of the insurance company, and that it had been stolen in the manner claimed, but contended that, as it did not appear that the car had been stolen by the breaking of a building under a secure lock or while the vehicle was securely locked, the plaintiff in attachment was entitled to have the car sold and the proceeds of the sale applied to the satisfaction of any judgment that might be recovered as the Acts of 1912, p. 737, authorized a proceeding in rem whereby the car was responsible in any event except in cases coming strictly within the exemptions set forth in the statute.

"The court below decided in favor of the plaintiff in attachment, and held there were no issues to submit, and, the order being final as to claimant, this appeal has been taken."

The question raised by the exceptions (which will be reported) is whether the statute adopted in 1912, entitled "An act to further regulate the running of motor vehicles in this state," is constitutional. The statute is as follows:

"When a motor vehicle is operated in violation of the provisions of law, or negligently and carelessly, and when any person receives personal injury thereby, or when a buggy or wagon or other property is damaged thereby, the damages done to such person or property shall be and constitute a lien next in priority to the lien for state and county taxes, upon such motor vehicle, recoverable in any court of competent jurisdiction, and the person sustaining such damages shall have a right to attach such motor vehicle in the manner provided by law for attachments in this state; provided, that this act shall not be effective in case the motor vehicle shall have been stolen by the breaking of a building under a secure lock, or when the vehicle is securely locked."

The question now before us was under consideration in the case of Merchants' & Planters' Bank v. Brigman et al., 106 S. C. 362, 91 S. E. 832, L. R. A. 1917E, 925, and the court held that the statute was constitutional. The principle therein announced was afterwards followed in the case of Stewart v. Collier, 112 S. C. 258, 99 S. E. 838.

The doctrine announced in those cases is reaffirmed in this case. We desire to call special attention to the proviso in the statute, which affords reasonable, if not ample, protection to the owner of the car against theft, in case he places his car in a building under a secure lock, or locks the car securely.

In the case of Grant Co. v. United States, 254 U. S. 505, 41 Sup. Ct. 189, 65 L. Ed. —, the court held that section 3450 of the Revised Statutes of the United States (U. S. Comp. St. § 6352), which provides for the forfeiture of any conveyance, etc., used in the removal of any goods or commodities with intent to defraud the United States of the tax thereon, applies to an automobile used in the unlawful removal of distilled spirits, though a seller of the automobile, who retained title for the unpaid purchase money, was without guilt, and that the statute so applied did not violate the Fifth Amendment of the federal Constitution relative to due process of law, as the thing forfeited was primarily considered the offender. In that case the court said:

"It is the illegal use that is the material consideration; it is that which works the forfeiture, the guilt or innocence of its owner being accidental."

Applying that language to the present case, it is the negligent operation of the motor vehicle, whereby any person receives injury to his person or property, that is the material consideration. It is that which gives rise to the lien on the offending automobile; the guilt or innocence of its owner being accidental.

Appeal dismissed.

WATTS, FRASER, and COTHRAN, JJ., concur.

(117 S. C. 94)

Ex parte SWYGERT.

STATE v. SWYGERT.

(No. 10699.)

(Supreme Court of South Carolina. Aug. 1, 1921.)

Criminal law § 100(3)—Assumption of jurisdiction in county of wound precludes its assumption in county of death.

Under Cr. Code 1912, § 147, providing that, where one is wounded in one county and dies in another, indictment in either of the person causing it shall be good, and he shall be tried in the county where the indictment is found, the court of the county where the wound was inflicted having first assumed exclusive jurisdiction of the case, accused cannot be proceeded against in the county where the person died.

Habeas corpus proceeding by Job C. Swygert, who, pending proceedings against him in the county in which he wounded a man, was

proceeded against in the county in which the man died. Proceedings in second county annulled.

The statement referred to in the opinion is as follows:

Statement.

The petitioner and John C. Nicholson, now deceased, became involved in a difficulty in the town of Leesville, in the county of Lexington and state aforesaid, on the 3d day of April, 1921, in which said difficulty the said J. C. Nicholson received a mortal wound or wounds, from the effects of which he died in a hospital, in the city of Columbia, shortly after midnight on April 4, 1921. In the afternoon on the last-mentioned date an inquest was held in the town of Leesville over the dead body of the said J. C. Nicholson by the coroner and a jury of Lexington county. After the finding made by the coroner's jury, the coroner caused the petitioner, Job C. Swygert, to be committed to the common jail of Lexington county to await an indictment charging him with the murder of the said Nicholson. Thereafter, on the 12th day of April, 1921, Mr. Justice R. C. Watts, of the Supreme Court, admitted the petitioner, Swygert, to bail, and pursuant to the order allowing bail as aforesaid the petitioner, on the 18th day of April, 1921, entered into a recognizance, before the clerk of court for Lexington county, conditioned for his personal appearance before the court of general sessions of said county to answer to a bill of indictment to be preferred against him for murder, and to do and receive what should be enjoined by the court, and not to depart the court without license.

That on the 23d day of May, 1921, the grand jury made a presentment to the court of General sessions, which was then in session in said county, of the case against petitioner, called upon the prosecuting attorney to prepare a bill of indictment in the case for their action thereon, and demanded the production of the witnesses in the case. The prosecuting attorney declined to do this, assigning as the reason for his refusal a letter written by the Attorney General to the solicitor of the Fifth judicial circuit, directing him to hand out a bill of indictment in Richland county, where the deceased died. Later, on or about the 1st of June, after declining to do so, except on instructions from the court, the grand jury of Richland county returned a true bill against the petitioner, charging him with inflicting wounds on the body of the deceased in Lexington county, from the effects of which he died in Richland county. Thereafter, on the 9th day of June, the petitioner was rearrested, while his bond in Lexington county was still of force, on a bench warrant, issued out of the court of general sessions for Richland county, charging him with the murder of the said John C. Nicholson in Lexington county, and he was lodged in the common jail for Richland county, whereupon a writ of habeas corpus was issued out of the Supreme Court, upon the petition of the said Job C. Swygert, asking for his discharge from the custody of the sheriff of Richland county and from the jurisdiction of the court of general sessions for said county.

Issues Stated.

There are two principal questions raised in this proceeding and both are jurisdictional in character. The first contention of the petitioner is that section 147 of the Criminal Code, under which jurisdiction is claimed in Richland county is unconstitutional, null, and void. The second contention of the petitioner is that, admitting, for the sake of argument, section 147 of the Criminal Code to be constitutional, the court of general sessions in Richland county could not acquire jurisdiction of either the person of petitioner or the subject-matter of the offense charged, because the court of general sessions for Lexington county had previously acquired such jurisdiction.

Timmerman & Graham, of Lexington, and E. L. Ashbill, of Leesville, for petitioner.

A. F. Spigner, Sol., of Columbia, C. M. Efrd, of Lexington, Cole L. Blease, of Columbia, and C. J. Ramage and B. W. Crouch, both of Saluda, for the State.

COTHRAN, J. The constitutionality of section 147 of the Criminal Code was directly in issue in the case of State v. McCoomer, 79 S. C. 63, 60 S. E. 237, and by the solemn adjudication of this court was unanimously sustained. We are not disposed to reopen the question, particularly as a decision upon the constitutionality of the section is not necessary to a determination of this matter.

The inquest was held in Lexington county; a warrant was issued for the arrest of the petitioner by the coroner of Lexington county; he was arrested under that warrant, and committed to the jail of Lexington county; a petition for a writ of habeas corpus was filed in Lexington county; it was opposed by the solicitor of the circuit of which Lexington county is a part; an order admitting the petitioner to bail and requiring him to give bond for his appearance at the next term of the court of general sessions for Lexington county was signed by a justice of this court; the bond was accordingly executed by the petitioner, and approved by and filed with the clerk of court of Lexington county. The court of Lexington county has therefore assumed exclusive jurisdiction of the case against the petitioner.

The entire proceedings by which it was sought to arrest the petitioner and hold him to trial in Richland county are annulled and the bond executed by the petitioner under a previous order of three of the justices of this court in the present proceeding is directed to be cancelled by the clerk of this court. The reporter will incorporate in the report of this proceeding the very clear and complete statement of the facts contained in the argument for the petitioner by Mr. Timmerman.

GARY, O. J., and WATTS, J., concur.

FRASER, J. (concurring in result). The petitioner had a difficulty with one John C.

Nicholson, in the town of Leesville, in Lexington county. In that difficulty the petitioner inflicted wounds upon Nicholson that were mortal. Nicholson was carried to a hospital in Columbia, in Richland county, where in a short time he died from the said wounds. The coroner of Lexington county held an inquest in Lexington county, in which they found that the deceased came to his death from wounds inflicted by the petitioner. Mr. Justice Watts, of this court, heard and granted an application for bail, and made the bond conditioned for the petitioner's appearance in the court of Lexington county. The grand jury for Lexington county presented the petitioner for murder, and called upon the solicitor to prepare a formal indictment. This the solicitor declined to do, under instructions from his superior officer, the Attorney General, as it was determined by the prosecuting officers to try the case in Richland county. The grand jury for Richland county took up the matter, and made a presentment to the court of general sessions for Richland county, in which they protested against the prosecution of the petitioner in Richland county. The presiding judge overruled their protest and ordered them to consider the bill. In obedience to this order they passed upon the bill and found a true bill. The presiding judge of the Richland court, on ascertaining that the petitioner would not appear at the Richland court, issued a bench warrant for him, and he was arrested and placed in the Richland jail to await his trial in Richland county.

The state did not appeal from the order of Mr. Justice Watts, and it is the law of this case. No court or judge had the right to order the rearrest of the petitioner until he has failed to comply with the order of Mr. Justice Watts. There is no intimation in the the record that the petitioner has in any way failed to comply with this order. The petitioner has made application to this court for his discharge from the custody of the sheriff of Richland county. It is a serious thing to rearrest one, for the same offense, who has been admitted to bail under habeas corpus proceedings, before he has violated the terms of the order under which he was admitted to

bail. There was an honest mistake and misapprehension as to the law, and no one is to blame.

The mistake arises from a misapprehension of the powers and duties of the grand jury. The duties of the grand jury are twofold: Without fear or favor they are first to present those who, in their untrammelled judgment, should be presented; and, second, they are to refrain from presenting those who in their judgment should not be presented. These two duties are of equal importance. When the grand jury of Lexington county presented the petitioner, he was by that fact indicted in Lexington. In the argument it was said the solicitor did not act upon the Lexington presentment. The grand jury indicts, not the solicitor.

It is the duty of the solicitor to put the indictment of the grand jury in proper legal form. It would doubtless be unsafe to go to trial upon such an informal indictment of a grand jury. The indictment is the official act of the grand jury and not of the solicitor. It lies in no man's mouth to tell the grand jury of the county that they shall not present one who, in their judgment, should be indicted. They may indict the solicitor himself, if in their judgment the public interest demanded his indictment.

The power and duty to refrain from indicting those who, in their judgment, should not be indicted, is equally absolute and of equal advantage to the people. The indictment by the Richland grand jury, after and over their protest, was void. We have before us a case in which the petitioner is held to bail in Lexington county, under valid proceedings. We have the petitioner rearrested in Richland county, under proceedings that are void. The result is inevitable to return the petitioner to the custody of his bail, and he shall remain in that custody until he has failed to obey those proceedings, or is surrendered by his bail.

We are asked to pass upon the constitutionality of the act that in a proper case would give Richland county jurisdiction to try the case. It is evident that the decision is not necessary, and the question in this case academic.

(88 W. Va. 692)

McDERMOTT et al. v. FAIRMONT GAS & LIGHT CO. et al. (No. 4179.)

(Supreme Court of Appeals of West Virginia.
May 17, 1921. Rehearing Denied
September 7, 1921.)

(Syllabus by the Court.)

1. Brokers \S 71—Broker held entitled to commission on full purchase price, though purchaser fails to pay deferred payments.

Under a contract between the owner of property and a broker, by which the broker is to receive 4 per cent. of a stipulated sale price for the property if he finds and produces a purchaser ready, able, and willing to pay that price in cash; and such purchaser is found and produced by the broker, and a sale is made through further negotiations between the owner and such purchaser for part cash and deferred payments, without the knowledge or concurrence of the broker, the broker is entitled to his commission on the full purchase price, although the purchaser afterwards fails to pay the deferred payments, and the property is returned to the owner for such failure, under a clause in the sale agreement.

2. Corporations \S 426(10)—Acceptance by corporation of benefits of unauthorized contract by president a ratification.

Where the president of a private corporation, without authority from the corporation, makes a contract for the sale of corporate property, and the corporation afterwards accepts and retains the benefits of the contract, it thereby ratifies the contract, and will be bound to perform its obligations thereunder.

3. Principal and agent \S 70—When agent may act for two principals stated.

An agent may act for two principals in the same transaction where his duties do not require him to do incompatible acts; or, if the employment does not imply trust and confidence, as where he is a mere middleman who brings them together and then leaves them to bargain for themselves. In such cases he violates no duty in undertaking to perform such service for both, and may properly receive compensation from both.

4. Corporations \S 426(10)—Acts of corporation held a ratification of unauthorized sale of its property.

Where an unauthorized contract is made by a president of a private corporation with a broker for the production of a purchaser of the property of the corporation, for an agreed commission on the agreed sale price, and as a result thereof a sale is made to such purchaser so produced, and the benefits thereof accepted by the corporation, and after such sale a part of the commissions of the broker is paid by the treasurer of the corporation by direction of members of the executive committee of the directors, the contract is thereby ratified, and the corporation will be bound to perform its obligations thereunder.

Appeal from Circuit Court, Marion County.

Action by Joseph H. McDermott and others against Fairmont Gas & Light Company and others. From judgment for alleged insufficient amount, plaintiffs appeal. Reversed and remanded.

Cox & Baker, David C. Reay, and Chas. A. Goodwin, all of Morgantown, for appellants.
Charles Powell, Osman E. Swartz, and Tusca Morris, all of Fairmont, for appellees.

LIVELY, J. Plaintiff instituted suit against Fairmont Gas & Light Company and its stockholders to recover the sum of \$40,000, claimed by him as commissions on the sale of the company's property and assets to Russell Palmer, at the price of \$1,000,000, brought about through his efforts and under a verbal contract made by plaintiff with S. L. Watson, president of the company, and recovered a decretal judgment for the sum of \$7,275, from which he prosecutes this appeal.

The bill alleges, substantially, that McDermott made a verbal agreement with S. L. Watson, president of the defendant company, and claiming to represent its stockholders, at Fairmont, W. Va., in August, 1912, by which it was agreed that if plaintiff would present a purchaser of all the assets and properties of the company, who would pay therefor the sum of \$1,000,000, and purchase, then plaintiff would be paid a commission of 4 per cent., or \$40,000; that in pursuance of the agreement (having associated with himself one A. F. Gressler, in his efforts to procure a purchaser, and who, after this suit was begun, transferred all his claims to plaintiff) he did procure and produce and introduced Russell Palmer, of Mobile, Ala., who, after considerable negotiations, purchased the property, by written agreement for the sum of \$1,000,000, on November 22, 1912, from certain of the stockholders then holding more than 80 per cent. of the capital stock of the company; and that afterwards, on December 20, 1912, the stockholders approved and ratified said sale and agreement, and directed and caused to be executed a deed therefor to a corporation, Fairmont Gas Company, formed by the purchaser, who made a down payment of \$125,000, and on or about the 1st of February, 1913, a further payment of \$125,000. The bill charges that the stockholders had full knowledge of the services rendered by plaintiff when they ratified and confirmed the sale to Palmer, and afterwards, on February 21, 1913, the defendant company paid to plaintiff \$5,000 as part of the commissions due him; that afterwards the defendant company distributed the moneys received by it from Palmer among its stockholders, and then surrendered its charter, and went out of corporate existence, without

paying, or making provision for the payment of, plaintiff's debt, amounting to \$35,000. The bill prays for a discovery, and for recovery of the said sum, and for general relief.

The bill was filed at April rules, 1915, and in June, 1916, the defendant company, S. L. Watson, as president, and in his own right, Fairmont Gas Company, a corporation, and Frank B. Pryor, as secretary of the last-named corporation, and in his own right, filed their joint and several answers, giving the names of stockholders and the number of shares of stock held by them at the time of the dissolution of the defendant company, and distribution of moneys received from the sale, and detailing the transactions with McDermott leading up to the time of the agreement for payment of commissions. They deny that S. L. Watson claimed to represent the company in that agreement with McDermott, or that he represented any of the stockholders on that occasion; on that subject they say that Watson—

"simply stated to the said McDermott that if a purchaser was produced who desired to purchase the entire property at a price of \$1,000,000, to be paid in cash, he, the said Watson, believed and felt that himself and other stockholders associated with him, holding together from 75 to 80 per cent. of the capital stock of said company, would feel disposed and willing to sell the property of said company, if the stockholders of the company should so decide, at the said price of \$1,000,000, to be paid in cash; but the said Watson never, at any time, claimed to said McDermott, or otherwise, to have the right and power to sell and negotiate for the sale of said property; and on the question of commissions on any such sale, the said Watson, in any conversation which he had with the said McDermott, simply stated that, should a purchaser be presented who should purchase said property at the sum of \$1,000,000, to be paid in cash, and who was willing, able, and anxious to purchase the same, and the sale and purchase thereof at said price should be negotiated, consummated, and completed, and the said purchase price so paid, he and those associated with him, holding together from 75 to 80 per cent. of the capital stock of said company, might feel disposed to pay a commission on the said purchase price if the stockholders of said company should so decide; but the said Watson never, at any time, to the said McDermott or otherwise, claimed to have the right to negotiate and contract for the services of the said McDermott, and for the payment of commissions or compensation to him therefor, on behalf of the said company or its stockholders."

The answer then details in full the proceedings subsequent to the agreement for commissions with Watson; the meeting with Palmer at Atlantic City; the sale of the property to him for \$1,000,000, if, upon examination by Palmer's engineers and auditors, the property was as represented; the examination and reports made by them; the conclusion of Palmer to buy at the stipulated

price; further negotiations culminating in the sale to him for that price, but not for cash, but upon payment of \$125,000 cash and the remainder at intervals; the formation by Palmer of a West Virginia company under the corporate name of Fairmont Gas Company, with authorized capital stock of \$3,000,000, to which the property was deeded, and the entire stock of which, except five shares was issued to Palmer, and, with the deed held in escrow awaiting the liquidation of the deferred payments of purchase money; the failure of Palmer to pay the deferred payment of \$250,000; the taking of the property by the defendants under the forfeiture clause of the agreement, together with the \$250,000 paid by Palmer; the taking over of the stock and absolute control of the new corporation formed by Palmer, the Fairmont Gas Co., by defendants; the sale of the entire property and the said stock in the new corporation to J. H. Wheelright by the defendants on January 22, 1914, for \$750,000.

The answer further details the efforts of McDermott to obtain payment of his commissions, and an explanation of the payment to McDermott of \$5,000 on February 21, 1913, as a part of his commissions, in which it is stated that the same was paid out of a fund in bank to the credit of S. L. Watson, trustee, by check of Walton Miller, the treasurer of defendant company, while Watson was in the South, and which payment he, Watson, disapproved on his return. The answer further details the dissolution of the defendant company, the distribution of the assets to the stockholders, consisting of \$750,000 derived from Wheelright and the \$250,000 derived from Palmer. The answer denies any obligation to the plaintiff on his claim for commission; denies that Watson acted for the defendant company or any of the stockholders in his negotiations with McDermott; denies that any of the stockholders, except possibly a few, knew of such negotiations; denies ratification thereof by any act of the stockholders or directors; and explains the payment of \$5,000 to plaintiff on his commission as unauthorized. Answers were filed by other defendants, which contain practically the same averments and denials.

The pleadings and evidence develop the salient facts that Watson, as president of the defendant company, and representing business associates, owing 75 or 80 per cent. of the stock, whom he thought would "join or act with him," made an agreement with plaintiff for the production of a purchaser for the corporate property at a price of \$1,000,000, and if, as a result thereof, a sale was made, then plaintiff should have a commission thereon fixed at 4 per cent. The main controversy exists over the nature and character of this agreement, made in the office of Watson, of Fairmont, in July, 1912. As a result of this agreement, Palmer pur-

chased the property of the defendant for the price stipulated, from Watson and certain of his associates owning in excess of 80 per cent. of the entire stock, afterwards confirmed by legal corporate action, and paid \$250,000, but failed to pay the remainder of the purchase money, and, after failure, the property was on December 3, 1913, taken back by the corporation and the money so paid by Palmer was retained by the stockholders without protest from Palmer; and McDermott was paid \$5,000 on his claim for commission.

Defendants' main defenses may be summed up as follows:

1. Want of inherent power in Watson, as president, to employ or contract with plaintiff concerning a sale of its corporate property; or want of power express or implied in its president to act in its behalf in that regard.

2. Plaintiff did not produce a purchaser who could and did pay \$1,000,000 in cash, thereby failing to perform his contract.

3. The stockholders, except a few, had no knowledge of plaintiff's contract or claim, and made no ratification. No corporate action thereon appears in the records of defendant company.

4. Even if the contract for commissions was binding on the corporation, the fact that plaintiff also participated in compensation paid by Palmer to Gessler would avoid the same because of dual agency.

5. Defendants are not estopped to deny liability for Watson's acts, or liability to plaintiff, because, after suit, they did not formally repudiate Watson's unauthorized act, and restore the benefits received thereby.

It is insisted on behalf of the plaintiff that the defendant company and its stockholders held out Watson to those dealing with him as having authority to dispose of the corporate assets, and he having acted, and his acts having been confirmed, they are estopped from denying his power and authority to bind the corporation; that defendants made the sale to Palmer, and thus took the benefit of plaintiff's services in making the sale possible, and retained the benefits after full notice of plaintiff's services, and are hence estopped from denying the ultra vires act of their president in employing plaintiff to interest a purchaser in the property and effect a sale; that the institution of the suit in April, 1915, and service of process was conclusive notice of plaintiff's contract for commissions, and, having since that time continued to retain the benefits, defendants cannot now interpose want of knowledge; that division between plaintiff and Gessler of commissions on the sale received from the purchaser, Palmer, cannot bar plaintiff from the benefit of his contract with Watson; that because Palmer purchased on part cash and deferred payments, and failed to pay the delayed payments, did not defeat plaintiff's contract for commissions; and that, plaintiff having been the efficient cause of the sale,

he is entitled to compensation on a quantum meruit, even if there had been no express contract.

The lower court came to the conclusion that McDermott and Watson agreed at the Fairmont conference, when Phillips was present, that the purchase price should be \$1,000,000 cash, and that if McDermott did produce such a purchaser, who, in the judgment of the corporation's officials, and especially Watson, was considered as able and willing to pay that price in cash, then McDermott should, upon such sale, receive a commission of 4 per cent. The court further concluded that whatever contract was made by Watson with McDermott was made without previous authority from the stockholders or the corporation, that the president had no such inherent power, and that no mention was made of any such contract with McDermott on the records of the corporation at any of its meetings; but that whatever action Watson took, or whatever contract he made, would be binding only upon the corporation and its stockholders to the extent that it inured to their benefit; and that the only material benefit the corporation and its stockholders derived from the agency or efforts of McDermott was the sum of \$250,000 paid by Palmer and distributed to the stockholders, and therefore they would be responsible to McDermott to the extent of 4 per cent. of this amount, or the sum of \$10,000, and so decreed, giving the corporation credit for the \$5,000 paid in 1913, and awarding interest on the remaining \$5,000, making the sum decreed to be \$7,275.

[1] It will be instantly perceived that the lower court has necessarily changed the terms of the contract, as ascertained by it from the evidence, and has made the plaintiff's compensation depend upon whatever amount in cash was paid by the purchaser. If the down payment had been \$1,000 and nothing further paid, the compensation of McDermott would have been \$40, irrespective of the services performed by him. His pay would depend upon the kind and terms of whatever contract the corporation might make with the purchaser, and the ultimate result thereof. Under that rule or holding, if the officers of a corporation should make a sale to the purchaser produced, resulting in greater loss than gain to the stockholders, the broker or agent would be entitled to no compensation. It would make the broker's commission dependent upon the beneficial outcome of the venture. For instance, if the money paid by the purchaser was \$50,000, and the damage to the property under his management should be an equal or greater amount before it could be recovered by the seller, on what sum would commissions be computed if material benefits received are fixed as the basis of and governing the commission to be paid? The logical result of

such a construction would be to allow the seller to repudiate commissions if no material benefit was derived from the sale into which he entered. It would be a dangerous rule to establish.

[2] If an unauthorized contract be made by an officer of a corporation, afterwards confirmed and approved by the acceptance of benefits arising therefrom by the corporation, it will not be permitted to annul, vary, or emasculate the contract by a change of its terms, based upon the amount of benefits received. If it accepts benefits, it must accept the terms of the contract. If the contract in terms, or reasonably interpreted, makes the commission dependent on the beneficial result of the sale to the vendor, and based on the benefits measured in terms of money, then such a holding would be clearly proper; it would be simply carrying out the contract, and making effective the intention of the parties. Was there such an agreement between Watson and McDermott? We cannot so interpret it. Watson insists that McDermott was to produce a purchaser who would buy at \$1,000,000 and pay in cash, and that, because Palmer did not pay the total purchase price in cash, then McDermott was not entitled to any commissions. He does not even intimate, nor does counsel contend, that the commissions should be 4 per cent. on any sum less than the full sale price. The defense is that McDermott is entitled to no commissions, because he did not find and introduce the kind of purchaser stipulated in the contract. On the other hand, McDermott insists that he was to find a purchaser, then having one in mind, who would pay the price of \$1,000,000, and that the terms of the sale were to be negotiated between the purchaser and Watson. He says that Watson told him to bring on his purchaser who would pay \$1,000,000; "that is our price on this piece of property; we will sell it to him. We will make our own trade."

McDermott stated that all he was to do was interest and find the purchaser, and to have nothing to do with the terms of the trade, and was not present when the trade was made, and knew nothing about the terms agreed upon until after the sale was completed, and had nothing whatever to do with the subsequent modifications. He claimed that he was told by Watson, after Palmer had made the first payment, that his commissions would be taken care of "as soon as we get around to it"; but after the property had been taken back from Palmer and sold to Wheelright, Watson then said that they didn't think they owed him the \$40,000, because Palmer had not completed paying for the property, but that they would pay something for his services. It is to be noted that the \$5,000 which was paid to McDermott on his commission was paid on February 21,

1913, and that the property was not taken back from Palmer until December 3, 1913.

John F. Phillips, who was a director and a member of the executive committee of the defendant company, was present when the commission contract was made, and his understanding of the agreement was that, if McDermott furnished a purchaser who would take the property at \$1,000,000, that a commission of 4 per cent. on that amount would be paid him, and that he was left under the impression "that if the party would make a substantial payment, everything would be right." The testimony of Phillips, although one of the defendants, and closely connected with the management of the defendant company, and possibly testifying against his own interests, strongly corroborates that of McDermott on this very important part of the controversy. Mr. Phillips also testified that, in contracting with McDermott for the commission of 4 per cent. on the sale, Mr. Watson was acting as agent of the corporation, but when pressed to state how he knew he was acting as such, and by what authority, he qualified his statement by saying "he (Watson) was president, member of the board of directors, member of the executive committee and chairman, and his word was final at all times," but that he (the witness) had never heard of any authority given Watson by the directors or executive committee to employ McDermott to find a purchaser for the property. This witness also stated that the executive committee knew of the existence of the McDermott contract with Watson for a commission before the sale agreement with Palmer was made on November 22, 1912.

So the controversy over the contract is whether McDermott is entitled to any commission whatever; and, from the divergent statements of the makers of the contract, we fail to find any basis for limiting the commission to any sum less than 4 per cent. on the purchase price, or on any sum to be ascertained or measured by the benefits derived by the corporation or its stockholders, if a sale should be made resulting therefrom. McDermott is entitled to full commissions, or to none.

The attitude of defendants is well stated by its counsel as follows:

"We insist that no other finding was possible than that the sale was to be for \$1,000,000, to be paid in cash, and it was on this character of sale that the commission depends, and on no other;" and, "If he (Palmer) had had the money, and paid, Watson would have been obliged to pay the \$40,000 to McDermott. Not having the money, and not paying, McDermott was entitled to nothing, for he had accomplished naught."

What principle of law governs, if we view the contract as claimed by the defendant? McDermott produced a purchaser, who met

Watson and some of his associates in Atlantic City, and who then agreed to purchase the property for \$1,000,000 cash if, upon investigation and report, the property was what it was represented to be. Upon investigation, he became satisfied with the property, but advised that he had been disappointed in procuring the purchase money, and asked for terms, which were granted him by the defendant company's officers, culminating, after subsequent modifications, in the purchase, sale, and delivery of the property, by which \$250,000 was actually paid to defendant company; but default was made in the remainder of the purchase price, whereupon the company took back the property, and kept the \$250,000 paid to it. A short time after taking back its property, it sold the same to one of its stockholders, Wheelright, for \$750,000. These changes from and modifications of the cash price originally agreed upon with Palmer were without the knowledge or consent of McDermott, so far as the record discloses. He was to have nothing to do with making the deal. That was to be done by the defendants with the purchaser. There was to be no middleman. Watson told McDermott to bring on his man, he wanted to look him over, and he would make his own deal with him.

Can it be said that McDermott had accomplished naught? Is it not conclusive that, by reason of his contract and his efforts, he has brought to the pockets of the defendants \$250,000, which they yet retain? He was the efficient procuring cause. But defendants assert that the purchaser was to pay the full purchase price in cash before McDermott would be entitled to his commission. If a vendor would be permitted to defeat the commissions of a broker by changing the terms of purchase with the purchaser found and produced by the broker, it would open the door of fraud and collusion between the seller and buyer, and practically defeat recovery of a broker's commission. It was in the power of defendants to require full cash price from Palmer or refuse to sell. If they had refused to sell unless for cash, then McDermott would have no claim, presuming that his contract required a cash purchaser; but, having waived that right, and having made the sale for other than cash, they cannot defeat his commission, nor can they, by so doing, vary his contract without his consent, and limit his commission to the cash actually paid, be it great or small. 4 R. C. L. § 59.

"If a broker has brought the parties together, and, as a result, they conclude a contract, he is not deprived of his right to a commission by the fact that the contract so concluded differs in terms from the one which he was authorized to negotiate." 19 Cyc. 249; O'Toole v. Tucker, 17 Misc. Rep. 554, 40 N. Y. Supp. 696; Keys v. Johnson, 68 Pa. 42; Woods v. Stephens, 46 Mo. 555; Ice v. Maxwell, 61 W.

Va. 9, 55 S. E. 899; Reynolds v. Tompkins, 23 W. Va. 235.

Under the contract, as claimed by Watson and the defendants, they could not, by varying the terms of the sale to Palmer from cash to part cash and part delayed payments, defeat plaintiff's right to compensation. On the other hand, if the terms of the contract were as claimed by McDermott and Phillips, that is, that McDermott was to procure and present a purchaser who would purchase for the price of \$1,000,000 the terms to be negotiated between Watson and his associates and the purchaser, then McDermott is entitled to his commission, notwithstanding the failure of the purchaser to pay the balance of purchase money, or to comply with some of the terms of his purchase. Linton v. Johnson, 81 W. Va. 569, 94 S. E. 945; Hugill v. Weekley, 64 W. Va. 210, 61 S. E. 360, 15 L. R. A. (N. S.) 1262.

Watson has no inherent power, as president of the corporation, to make the contract with McDermott. Ordinarily a president of a corporation can make no binding contract looking to a sale of the corporate assets without first obtaining authority. It is claimed by counsel for plaintiff that the corporation and its stockholders held Watson out to the public as having authority to make such contracts as he might wish, and, by reason of this, his contract was binding on the corporation, and it and its stockholders are estopped from denying his authority, independent of subsequent ratification. There is considerable evidence to sustain this contention. Watson and his friends and associates owned or controlled about 75 per cent. of the stock, and whatever he did appears to have been sanctioned and approved by them. His word governed. He was president, director, member of the executive committee, and chairman thereof, and no important step in corporate affairs or management was taken without consultation with and approval by him. He appears to possess consummate executive ability, and was the central and commanding figure in the corporation. But it is not necessary to pass upon this contention of the plaintiff. It is quite evident, and is not disputed, that the property was sold to Palmer by reason of the contract with McDermott, and that the corporation and its stockholders realized \$250,000 thereby, which they have distributed among themselves. They cannot, after taking the benefit of his services in their behalf, deny him compensation for his services. The principle of law applicable is stated by Judge Ritz, in Chafin v. Main Island Creek Coal Co., 85 W. Va. 459, 102 S. E. 291, as follows:

"Where a private corporation accepts the benefit of a contract made on its behalf by an unauthorized agent, it thereby ratifies the contract in its entirety, and will be bound to per-

form the obligations provided by the contract to be performed on its part."

Authorities sustaining this proposition are collated in that case, and it would serve no useful purpose to make additional citations or comment thereon. Some of the witnesses testified that McDermott's services were worth, on quantum meruit, more than the 4 per cent. contracted for.

It is insisted that Palmer was not able to pay the purchase price, and did not pay, and therefore McDermott is entitled to no compensation under his contract to produce a purchaser who could and would pay \$1,000,000 cash. In addition to what we have said concerning the voluntary change in the terms of a sale by the vendor, without the consent of the agent or broker, it may be observed that there is no direct evidence to show that Palmer was not financially responsible to pay at the time of the purchase, or at the time of the taking back of the property, under the forfeiture clause of the sale agreement by the corporation. The record is replete with failures of Palmer to make his payments when due, and that he had difficulty in raising the \$250,000 which he did pay. No effort appears to have been made to ascertain if the obligation of his purchase could have been successfully asserted; no judgment obtained. The corporation elected to take back its property and keep the money already paid. However, we think his failure to pay has little bearing on the right of McDermott to receive compensation for his services. *Linton v. Johnson*, supra; 19 Cyc. 271.

There is evidence to show that the officers of the corporation, and especially the executive committee of the board of directors, knew that the purchaser, Palmer, was procured by McDermott, and that McDermott was to receive a commission therefor, prior to the agreement of November 22, 1912, although the records of the corporation do not disclose that it was discussed at any of the official meetings. Phillips testified that the executive committee knew of it before that time, and Walton Miller, the treasurer of the company, and M. L. Hutchinson, the vice president, state that they had knowledge of McDermott's contract; and it would be most natural that the close business associates and friends of the president whom he said would "go along with him," and who owned 75 per cent. or 80 per cent. of the stock, would be advised of the full details, at least informally. Those who signed the agreement to sell, and which agreement was unanimously ratified at the stockholders' meeting, do not appear as witnesses to negative such information.

Strongly indicative of this knowledge is the payment of \$5,000 to McDermott on his commission on February 21, 1913, out of the money paid by the purchaser, and then in

bank to the credit of Watson, trustee, by Walton Miller, the treasurer of the corporation, after consulting with and receiving concurrence of members of the directorate. Would they pay out this sum without knowledge? Shrewd, successful business men, responsible to their stockholders, do not usually pay out such sums blindly. Watson disapproved of the payment, after returning from the South, but there was no demand made on McDermott for return of the money as an erroneous or unauthorized payment; neither was any action taken to recover it from him. This payment not only indicated knowledge of the contract and confirmation of it, but recognized that there was merit in the claim. McDermott never claimed less than his full commission agreed upon, and was in Fairmont insisting upon its payment when the check was drawn in his favor for the \$5,000. The law imputes to a person knowledge of facts of which the exercise of common prudence and ordinary diligence must have apprized him. *Cain v. Cox*, 23 W. Va. 594. Knowledge of the acts of an agent and confirmation or acquiescence therein may be deduced from circumstances and facts of the case. *Curry v. Hale*, 15 W. Va. 867.

[3] There was an agreement between McDermott and Gressler that the former should participate with the latter in whatever compensation the latter should receive from Palmer the purchaser, and this fact is interposed by the defense to defeat McDermott's compensation, on the theory of dual agency, or that he was representing principals whose interests were opposed. McDermott had no discretion in making the contract between the vendor and vendee. He did not participate therein, and was not present. All he contracted to do was to find and introduce the purchaser who would take the property at a stipulated price. He was what is termed a middleman. In such cases the doctrine of conflicting dual agency and bad faith does not apply.

"A middleman who acts as a broker in bringing together buyer and seller, and who does not act as the agent of either in making the contract of purchase, is entitled to compensation from both, on an agreement with each." *Runyon v. Morrison*, 71 W. Va. 254, 76 S. E. 457, and authorities there cited; *Peters v. Riley*, 78 W. Va. 785, 81 S. E. 580.

Where an agent is representing two or more principals of divergent and opposing interests, and from the nature of his employment they are entitled to his judgment, discretion or personal influence, he will not be permitted to act unless with their full knowledge and consent; but where neither principal relies upon the judgment or discretion of the agent in some transaction, he violates no duty in undertaking to perform the service for both, and therefore may properly have compensation from both. *Montross v. Eddy*,

94 Mich. 100, 53 N. W. 916, 34 Am. St. Rep. 323; *Knauss v. Gottfried Brewing Co.*, 142 N. Y. 70, 36 N. E. 867; *Green v. Robertson*, 64 Cal. 76, 28 Pac. 448.

[4] Defendants further say that plaintiff is not entitled to the benefit of his commission contract because there never was a purchase of the assets of the corporation by Palmer. They construe the agreement by which he took over the property as an option contract, and hence plaintiff did not find or produce a purchaser as his contract required. An inspection of the agreement of November 22, 1912, afterwards approved and confirmed by the stockholders, impels the conclusion that there was a full and complete sale of the property of the corporation to Palmer. In carrying out that agreement, the stockholders, after reciting the terms thereof, resolved:

"That this company do grant, convey, assign, transfer, and set over unto said Fairmont Gas Company, for said Russell Palmer, the said property rights, privileges and franchises, at the price and upon the terms and conditions in said agreement set out"

—and directed its proper officers to make, execute, and deliver proper deeds." All parties considered a sale had been made, and the purchaser took charge of the property, deeds were made and placed in escrow, money to the amount of a quarter of a million dollars was paid over in pursuance of the purchase. The transaction had few earmarks of an option. An option generally is a contract by which the owner of property agrees with another that he shall have the right to purchase the same at a fixed price within a specified time. It is a contract to sell if the other party shall elect to purchase within the time given.

"An option contract to purchase is but a continuing offer to sell, and conveys no interest in the property." *Caldwell v. Frazier*, 85 Kan. 24, 68 Pac. 1076.

It is a privilege to purchase, and is unlike a contract of sale, which gives mutuality of remedy to both parties, which either can enforce by specific performance. See *John v. Elkins*, 63 W. Va. 158, 59 S. E. 961.

The decree of the circuit court of Marion county, entered on July 20, 1920, is reversed in so far as it adjudges the Fairmont Gas & Light Company to be indebted to the plaintiff in the sum of \$7,275; and proceeding to render such decree as should have been entered by said court, it is adjudged, ordered, and decreed that the plaintiff Joseph H. McDermott do recover of and from the Fairmont Gas & Light Company the sum of \$35,000, with interest thereon from December 21, 1912, being the remainder of the commission or compensation due to said McDermott, in his own right, and as assignee of his coplaintiff, Gressler, at the rate of 4 per cent. on \$1,000,000, less the sum of \$5,000 heretofore paid to said McDermott by said company, and that the stockholders of said company, to whom distribution was made of the assets of said company, are, and each of them, is liable to account for and pay over to said McDermott such prorative part of the amounts received from said assets of said company as shall be necessary to pay off and satisfy said sum of \$35,000 and interest found to be due and owing to said McDermott. And this cause is remanded to the circuit court of Marion county to ascertain and fix the amount to be paid by each stockholder, as herein ordered, and for such other proceedings as may be necessary to effect the relief herein awarded.

Reversed and remanded.

(88 W. Va. 665)

STATE ex rel. A. L. BLACK COAL CO. v. UNITED STATES FIDELITY & GUARANTY CO. (No. 4188.)**(Supreme Court of Appeals of West Virginia.
May 8, 1921. Rehearing Denied
Sept. 7, 1921.)****(Syllabus by the Court.)**

1. Injunction \Leftrightarrow 148(1)—Injunction bond may be made payable to state or to party entitled to its benefit.

In accordance with the provisions of section 5, c. 10, Code 1918 (Code 1913, sec. 255), an injunction bond, given to indemnify those against whom injunctive relief is sought, may be made payable, either to the state of West Virginia, or to the parties entitled to its benefit and protection.

2. Injunction \Leftrightarrow 248—Party entitled to benefit of injunction bond payable to state may sue thereon without joining other beneficiaries.

Where an injunction bond is made payable to the state of West Virginia, one of the parties entitled to the benefit of its penalty may, after dissolution of the injunction, prosecute a suit on such bond in the name of the state, for his own use, without joining the other beneficiaries.

3. Injunction \Leftrightarrow 248—Declaration in suit on injunction bond held not subject to demurrer for nonjoinder of parties plaintiff.

A declaration disclosing such facts is not subject to successful challenge by demurrer on the ground of nonjoinder of parties plaintiff.

Error to Circuit Court, Monongalia County.

Action by the State, on the relation of the A. L. Black Coal Company, against the United States Fidelity & Guaranty Company. Judgment for defendant on demurrer, and plaintiff brings error. Reversed, demurrer overruled, and case remanded.

Moreland & Guy, of Morgantown, for plaintiff in error.

Glasscock & Glasscock, of Morgantown, for defendant in error.

LYNCH, J. In a suit begun in the circuit court of Monongalia county George E. Warren Company obtained an injunction mandatory in form and effect against A. L. Black Coal Company and Serepi Coal Company, whereby the court required defendants to furnish plaintiff monthly 4,550 tons of coal mined from Serepi mine No. 1, and the appointment of a receiver with authority to take into custody their property and fully execute its order. Plaintiff secured but did not join in the execution of the necessary bond required by the order before it should become effective, though in every other particular it conformed with the terms and conditions prescribed by statute. The United States Fidelity & Guaranty Company was the

sole obligor. This order this court reversed upon appeal by A. L. Black Coal Company, the Serepi Coal Company not joining in the petition for the writ, dissolved the injunction, remanded the cause, and directed a settlement of the accounts of the receiver. 85 W. Va. 684, 102 S. E. 672.

The A. L. Black Coal Company then instituted this action to recover, under the provisions of the bond so executed, the costs incurred by it in defending its interests in the chancery cause and the damages suffered by it in consequence of the injunction order while in force and effect. This restraint it endeavored to remove more than once during the pendency of the suit. The declaration and each of its two counts the circuit court held insufficient on demurrer, both as originally presented and filed and as amended. This the court did chiefly on the ground of the nonjoinder of Serepi Coal Company as coplaintiff. As these were the two principal defendants in the Warren Company's suit and the object of the bond was to indemnify both, they should have united in the action, is the argument of the surety company.

Although not material or decisive, it is interesting and instructive to note that prior to the date of the Warren Company suit there was a reorganization of the Serepi Coal Company, by virtue of which the A. L. Black Coal Company, by purchase at a judicial sale, took over the property and the control and management of the reorganized corporation, as it theretofore had demonstrated its incapacity to operate the property so as to maintain its credit and meet its obligations. If Serepi Coal Company did not in this manner lose its corporate identity, it did divest itself of all its assets, and therefore ceased to be susceptible of injury growing out of anything done in the Warren suit. Its status at that time and now is of no consequence in so far as the merits of the present case are concerned.

[1-3] But wholly apart from this consideration and independent of it, the misconception of the legal necessity for the joinder as plaintiffs in one action of all persons who are within the terms of the indemnity, whatever their capacity to sue may be, is reasonably apparent, considering the nature and characteristics of the instrument. It purports to be a bond, payable to the state of West Virginia, to indemnify the defendants in the preceding suit against loss or damages sustained by them or either of them as a result of the restraint imposed by the court's order, and each of them may sue thereon for the injury sustained without joining the other as plaintiff; the only limitation of the recovery, or recoveries being that fixed by section 2, c. 10, Code (sec. 252), which provides that no amount in excess of the penalty of the bond is recoverable, except for the neces-

sary costs and expenses of the several actions on the instrument. Besides, in statutory bonds, that is, those specifically required by law, and an injunction bond is so required, there is generally but one obligee and therefore there cannot be more than one plaintiff, however many may be the persons who are entitled to invoke the remedy so provided for the redress of grievances occasioned by the abuse of the rights of the persons concerned. A person to be affected may, according to section 5, c. 10, Code (sec. 255), accept an injunction bond payable to him or to him and others to suit the emergencies of the case. That, however, is unusual, and was not the mode adopted in this instance. The bond sued on is payable to the state, and that is the ordinary practice.

The declaration, read as a whole, seems plainly to indicate a defense based upon the activity of A. L. Black Coal Company from the beginning to the end of the suit brought against it and Serepi Coal Company, and the latter, though a necessary party, remained practically inactive in the meantime and was not an appellant in this court. The former alone employed counsel who prepared the argument and otherwise assisted in the defense of its rights.

Had the bond specifically named as formal

obligees the two companies who were the real beneficiaries of the bond, as section 5, c. 10, Code, permitted, doubtless, according to general rules applicable to joint parties to a contract, one could not have maintained a suit without joining the other. But here the state of West Virginia is the only formal obligee, and section 2 expressly authorizes it to prosecute a suit "for the benefit of * * * any * * * person injured by a breach of the condition of any such bond." As already noted, the only limit placed upon such suits is that damages are recoverable upon the instrument only until in the aggregate they equal the penalty thereof. Hence, in view of the express statutory authority to sue, considered in connection with the mere formal status of the Serepi Coal Company, we are of opinion that the circuit court erred in sustaining the demurrer to the declaration and dismissing it upon plaintiff's failure to amend. *Harrington v. Gordon*, 42 Wash. 692, 80 Pac. 187; *Kitsap County Bank v. United States Fidelity & Guaranty Co.*, 90 Wash. 12, 20, 155 Pac. 411.

From what has been said, it necessarily follows that the judgment complained of must be reversed, the demurrer overruled, and the case remanded for further proceedings therein.

(151 Ga. 795)

(108 S.E.)

GEORGIA SOUTHERN & F. RY. CO. v. SMILEY. (No. 2302.)

(Supreme Court of Georgia. Aug. 11, 1921.)

*(Syllabus by the Court.)***1. Provisions of statute of limitations.**

Under Civ. Code 1910, § 4497, all actions to recover damages for personal injuries must be brought within two years after the right of action accrues.

2. Act of Congress authorizes actions against carriers under federal control.

Under Federal Control Act, § 10 (Fed. Stat. Ann. Supp. 1918, p. 757 [U. S. Comp. St. 1918, U. S. Comp. St. Ann. Supp. 1919, § 3115½]), all actions at law or suits in equity can be brought against common carriers under federal control as theretofore provided by law, and no defense can be made thereto on the ground that the carrier was an instrumentality or agency of the federal government.

3. Evidence — 22(1)—Railroads — 5½, New, vol. 6A Key—No. Series—Federal act suspending limitations inapplicable to state courts; service of process during federal control permissible; judicial notice taken that corporation is domestic one.

Section 206 (f) of the act of Congress passed February 28, 1920 (Fed. Stat. Ann. Supp. 1920, p. 79), which provides that "the period of federal control shall not be computed as a part of the periods of limitations in actions against carriers or in claims for reparation to the Commission for causes of action arising prior to federal control," applies only to federal courts.

4. Demurrer erroneously overruled.

The court erred in overruling the demurrer to the petition.

Error from City Court of Valdosta; J. G. Cranford, Judge.

Action by Cora Smiley against the Georgia Southern & Florida Railway Company. A demurrer to the petition was overruled, and defendant brings error. Reversed.

J. E. Hall and C. J. Bloch, both of Macon, and Patterson, Copeland & Slater, of Valdosta, for plaintiff in error.

F. S. Harrell, of Valdosta, for defendant in error.

HILL, J. Cora Smiley brought suit against the Georgia Southern & Florida Railway Company, in the city court of Valdosta, to recover damages in the sum of \$5,000, on account of alleged personal injuries sustained by the plaintiff. The material portions of the petition were in substance as follows:

On December 11, 1917, plaintiff purchased from the agent of the defendant at Valdosta a ticket to Lake City, Fla., and was wrongfully directed to a train of the defendant

going to Jacksonville, instead of to Lake City. By reason of being directed to the wrong train the plaintiff was ejected by the conductor, and in alighting from the train she sustained certain personal injuries. The petition was filed on June 23, 1920, more than two years after the alleged tort. On the date of the injuries complained of, and until November 11, 1918, the United States of America was actively engaged in war with Germany; and on account of the war the physical properties of the defendant were, on January 1, 1918, taken possession of by the United States government, and were operated by the government through its Director General of Railroads from that date until March 1, 1920, and the agents of the defendant became the agents of the United States government, and no service could be perfected upon the defendant during that period. It was further alleged that under and by virtue of an act of Congress approved February 28, 1920 (41 Stat. 456), the statute of limitations was suspended as to the cause of action herein alleged, for and during the period of federal control of the defendant's properties. Certain acts of negligence which contributed to the injury were alleged; and judgment was prayed against the defendant for the amount of damages set out above.

The defendant filed its demurrer to the petition, setting out, among other grounds, that the petition showed on its face that the claim set up by the plaintiff is barred by the statute of limitations of the state of Georgia. The defendant demurred specially to paragraph 12 of the petition, on the ground that the Congress of the United States did not have, at the time of the passage of the Transportation Act, which was approved February 28, 1920, and has not now, the constitutional authority to toll or change the statute of limitations of the state of Georgia, as related to the cause of action attempted to be set up in the petition. The demurrer was overruled by the trial court upon each and every ground, both general and special, and the defendant excepted.

[1-3] The petition alleged that the cause of action arose on December 11, 1917. The petition was filed on June 22, 1920, more than two years after the date of the alleged injury. Civil Code (1910) § 4497, declares that actions for injuries done to the person shall be brought within two years after the right of action accrues. The suit is therefore barred, unless the above statute is tolled by the Transportation Act of Congress passed in 1920. That act provides that—

"The period of federal control shall not be computed as a part of the periods of limitation in actions against carriers, or in claims for reparation to the Commission for causes of action arising prior to federal control." Fed. Stat. Ann. 1920 Supp. p. 79 (f).

The question arises, therefore, whether the above act of Congress, declaring the suspension of the statute of limitations, is binding on the state courts. On March 21, 1918, Congress passed an act (Fed. Stat. Ann. 1918 Supp. p. 757) known as the federal Control Act (U. S. Comp. St. 1918, U. S. Comp. St. Ann. Supp. 1919, §§ 3115½a-3115½p). In section 10 (section 3115½j) it is provided:

"That carriers while under federal control shall be subject to all laws and liabilities as common carriers, whether arising under state or federal laws or at common law, except in so far as may be inconsistent with the provisions of this act or any other act applicable to such federal control or with any order of the President. Actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law; and in any action at law or suit in equity against the carrier, no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the federal government. Nor shall any such carrier be entitled to have transferred to a federal court any action heretofore or hereafter instituted by or against it, which action was not so transferable prior to the federal control of such carrier; and any action which has heretofore been so transferred because of such federal control or of any act of Congress or official order or proclamation relating thereto shall, upon motion of either party, be transferred to the court in which it was originally instituted. But no process, mesne or final, shall be levied against any property under such federal control."

From reading the above section of the act of Congress of 1918 it will be seen that actions at law or suits in equity might be brought by and against common carriers, and judgments rendered, as then provided by law; and it was also provided that no defense should be made to such suits upon the ground that the carrier was an instrumentality or agency of the federal government. It seems, therefore, that the plaintiff in the present case could have brought and maintained her suit in the state courts, even under the federal statute, at any time within the period fixed by the state statute. Not having brought the suit within the period fixed by the state statute, can the state statute be tolled by the federal statute of 1920? There is nothing in the federal act of 1920 which expressly, or by necessary implication, repeals the authority conferred by the act of 1918 to bring the suit in the state courts according to law. The federal Control Act specifically preserves the right of parties who had causes of action to bring them against the carriers during the period of federal control and to prosecute such suits to judgment. The act also provides that executions based on judgments so obtained should not be levied upon the property of the carriers in the hands of the federal govern-

ment. See section 10 of the Federal Control Act, *supra*. But the act expressly conferred the right to sue and to prosecute the suit to judgment. And see *McGregor v. Great Northern* (N. D.) 172 N. W. 841, 845 (4 A. L. R. 1635), where it was said that—

"Both the President in his original proclamation and Congress in the act of March 21, 1918, clearly contemplated that the liability of the carrier should continue. * * * Since the liability continued, it is competent for the suitor to resort to the ordinary legal remedies to establish it," etc.

It is argued here that suit could not have been brought, because service could not be perfected on the defendant during the period of federal control. As has been pointed out, the plaintiff had the right to sue within the period fixed by the statute, and also under the Federal Control Act; and if she had the right to sue, she would have the right to perfect service on the defendant if a resident of the state of Georgia, and it had its principal office located within the state where service could have been perfected. This court will take judicial cognizance of the fact that the Georgia Southern & Florida Railway Company is a corporation existing under the laws of this state. See *A. & W. P. R. Co. v. A. B. & A. R. Co.*, 124 Ga. 125, 52 S. E. 320.

In *Small v. Slocumb*, 112 Ga. 279, 281, 37 S. E. 481, 53 L. R. A. 180, 81 Am. St. Rep. 50, this court held:

"Congress has power to levy and collect taxes by requiring revenue stamps to be placed upon certain written instruments, and has power to prescribe a punishment for the failure or refusal to comply with that requirement, and to provide that such instruments shall not, unless stamped, be admissible * * * in the federal courts. It has, however, no power to prescribe rules of evidence for a state court, and therefore the act of Congress, which declares that certain written instruments shall not be received in evidence in any court until stamped as required by the act, is to be understood as applicable to the federal courts only."

In delivering the opinion of the court Chief Justice Simmons said:

"Under our system of government, the states retain all powers of sovereignty which were not granted to the general government by the Constitution. They had the power to create and establish their own courts, and to regulate the practice and procedure, and to prescribe rules of evidence therein. There is nothing in the Constitution of the United States which expressly or by implication gives to Congress the power to prescribe rules of evidence for the courts of the states. Of course Congress, having the power to impose stamp duties, has the power to provide for the enforcement of their

payment by any necessary and proper means. But while to make unstamped instruments inadmissible in evidence in state courts would doubtless aid in compelling the payment of the tax, we think that such a method of collection is neither necessary nor proper, and is therefore not within the power of Congress. The act of 1898 subjects to a penalty any one who fails or refuses to comply with the provisions as to stamping written instruments, and the federal courts have ample machinery for the enforcement of this penalty. No other method of enforcement would seem to be necessary; but, even if it were, Congress has power to provide that no unstamped instruments shall be received in evidence in any of the federal courts. Any attempt to extend this provision, so as to make it applicable to the courts of the several states cannot, therefore, be defended upon the ground that it is necessary. Nor do we think it a proper means of enforcing the stamp act to interfere with the courts peculiarly within the control of the several states, by declaring what shall or shall not be used as evidence in them, or to seek to make the state courts punish a failure to comply with the federal stamp act by refusing to allow unstamped documents to be used as evidence in them. This, however, is no new question. It has been dealt with by the courts of many of the states. We have searched diligently in the reports of the decisions of the various state courts, and have found but one state court of last resort which has made and adhered to a decision that Congress had the right to prescribe that an unstamped instrument should not be received in evidence in a state court."

The Chief Justice (after citing and discussing the case just referred to—*Chartiers, etc., Co. v. McNamara*, 72 Pa. St. 278, 13 Am. Rep. 673) further said:

"In the cases of *Clemens v. Conrad*, 19 Mich. 170, and *Sammons v. Halloway*, 21 Mich. 162, Judge Cooley, the great expounder of constitutional law in this country, shows by his reasoning that Congress has no power to prescribe a rule of evidence for state courts, and that the act should therefore be construed as intended to apply to federal courts only. In the former case he said, in part: 'To make an instrument inadmissible in evidence because not sufficiently stamped is, however, quite a different thing from imposing penalties for a breach of the revenue laws. The latter punishes the guilty party or compels him to perform his duty to the government; the former imposes what may sometimes be equivalent to a forfeiture of rights upon any party, guilty or innocent, who chances to be so circumstanced that he cannot make a showing of his rights in court without the production of the unstamped instrument. * * * A law so highly penal, it is to be presumed, has been so framed as clearly to point out all the cases to which it was designed to apply, so as to leave nothing to inference. In attempting properly to construe it, it is proper to bear in mind the position of the body which enacted it, relatively to the different legal tribunals of the country. Congress creates the courts which operate

within the sphere of federal sovereignty and administer the judicial power conferred by the Constitution of the United States. For them it prescribes rules of evidence and may establish a course of practice. It has no such general power as regards the state courts. Those courts have another origin, and their rules of evidence and courses of proceeding are prescribed by a different legislative body. Waiving, in the present case, any discussion of the question whether the state courts are not agencies of state government, which are beyond the sphere of the taxing power of the nation and fully at liberty to investigate in their own modes, under the laws of the state, the questions of fact which are put in issue before them, we think it a just and reasonable interpretation of the law of Congress that the courts which are precluded from receiving unstamped instruments in evidence are only the federal courts. * * * We think that a rule of evidence laid down in general terms is to be understood as applicable to those courts only for which the Legislature prescribing it has general power to make rules, and not to other courts, not expressly named, over which it has no such general power and with whose proceedings it could interfere, if at all, only in exceptional cases.' See also *Cooley, Const. Llm.* (6th Ed.) 592 and note."

And see other authorities cited in the *Small Case, supra*.

We think that the reasoning in that case, and the other authorities cited in support of it, as to the want of authority of Congress under the Constitution of the United States to prescribe rules of evidence and a course of practice in state courts, is applicable to the facts of the instant case. But the act of Congress of 1920, cited *supra*, is general in its terms, and does not attempt, expressly or by implication, to make it apply to the state courts; and we must conclude, therefore, that Congress in passing that act had no intention to toll the statute of the states with reference to the time in which damage suits for personal injuries should be brought. And even if Congress had attempted to do so, we do not think that it was within its power, under the Constitution of the United States, to so toll the statute of this state as to authorize the plaintiff in the present case to bring her suit after it was barred by the state statute quoted in the beginning of this opinion. We think the act of Congress of 1920, being general in its terms, applies to federal courts only, for which Congress alone can prescribe rules for their guidance.

[4] This ruling being controlling of the right of the plaintiff to bring her action at all, it appearing upon the face of the petition that the plaintiff's cause of action, which is a suit for personal injuries, is barred by the statute of this state, it is unnecessary to decide the other question raised, as to whether the petition sets forth a cause of action. From what has been said above, it follows

that the court erred in overruling the demurrer to the petition.

Judgment reversed. All the Justices concur.

BECK, P. J., concurs in the judgment.

ATKINSON and GILBERT, JJ., concur specially.

(88 W. Va. 650)

LOWTHER v. OHIO VALLEY OIL & GAS CO. (No. 4018.)

(Supreme Court of Appeals of West Virginia.
April 19, 1921. Rehearing Denied
September 7, 1921.)

(Syllabus by the Court.)

1. Appeal and error §176—Judgment on instruction stating agreed facts binding though one was mistaken as to verity of facts.

An instruction given to the jury and stating facts agreed upon by the parties is binding and conclusive upon the parties so agreeing, and a verdict and judgment based thereon will not be disturbed by the appellate court although the evidence tends to show that one of the parties to the agreed instruction was mistaken as to the verity of the facts agreed upon, where such instruction is given at the conclusion of the evidence without objection or exception, and no motion for continuance is made, nor evidence that the party was misled or taken by surprise submitted to the court upon a motion to set aside the verdict.

2. Detinue §7, 22—Formal demand not necessary except to convert lawful possession into unlawful detention; whether demand made held for jury.

It is not necessary in an action of detinue to make a formal demand for the delivery of property; but in order to convert a lawful possession into an unlawful detention a demand must be made, and from the date of the demand damages for the detention will begin to accrue. Whether such demand was made is a question of fact for the jury.

3. Stipulations §14(4)—Question as to unlawful detention of property may be eliminated by agreement.

Where the parties in a suit in detinue have agreed in open court in writing that the defendant unlawfully detains the property which is the subject of the litigation, and by such agreement limits the issue to the time when such unlawful detention began, the question as to whether or not the detention was lawful is eliminated, and the verdict will not be disturbed because unlawful detention by the defendant was not clearly proven.

4. Detinue §19—Measure of damages for unlawful detention is value of use of property during detention.

The measure of damages for unlawful detention of property is ordinarily the value of the use of the property during the detention, and an instruction to this effect in a detinue suit is proper where there are no special cir-

cumstances or damages to change the ordinary rule.

5. New trial §143(1)—Verdict cannot be impeached by testimony of jurors.

The testimony of jurors will not be received to impeach their verdict.

6. Detinue §24—Verdict for detention of property held sufficient in form.

A verdict in an action of detinue which finds for the plaintiff, gives the items, and values of the items, of the property unlawfully detained by the defendant, and further finds as follows: "And we assess two thousand two hundred and eighty-eight \$2,288.00 dollars for the detention of said property"—is good, and is sufficient to show that the said sum of \$2,288 is the amount assessed as damages for the unlawful detention.

7. Trial §340(5)—Judge may write down amount found by jury in words and may correct clerical errors in so doing.

It is not error for the judge, upon receiving a verdict, to write therein the amount of damages in words, which the jury have found in figures, in the presence of the jury, and if in so doing he has made a clerical error, so that the words do not correspond with the figures and state the true amount, to then correct the clerical error in the presence of the jury, and with their assent, before they are discharged.

Error to Circuit Court, Ritchie County.

Detinue by C. F. Lowther against the Ohio Valley Oil & Gas Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Thos. J. Davis, of Harrisville, for plaintiff in error.

Adams & Cooper, of Harrisville, for defendant in error.

LIVELY, J. This writ of error brings for review a judgment of the circuit court of Ritchie county in which C. F. Lowther, in an action of detinue against the Ohio Valley Oil & Gas Company, was adjudged the possession of a No. 24 Star drilling machine and certain other personal property, or if the specific property could not be had, the alternative value thereof as ascertained by a jury, and \$2,288 damages for the detention thereof.

[1] An agreed instruction was given the jury which is as follows:

"The jury are instructed that by agreement between the plaintiff and the defendant, entered into at the bar of the court at the beginning of the trial of this case, it is admitted that the plaintiff was and is the owner of the property sued for and mentioned in the declaration and is entitled to a verdict therefor, or for the value thereof in case the same cannot be had, and the issues are confined to the question when the unlawful detention from the plaintiff of the property mentioned in the declaration or any part thereof began, the value of the property detained and the damages, if any, sustained by the plaintiff on account of such unlawful

detention; and all questions as to the rent, if anything, to which the plaintiff may be entitled for the use of said property by the defendant prior to the beginning of the unlawful detention and the question of compensation to which the defendant may be entitled for repairs on said property are reserved for future adjudication in the action of assumpsit of the plaintiff against the defendant, now pending in this court.

"You are further instructed that the values to be found by you of the several articles detained, for the purpose of this case, are as set forth in the prepared form of verdict agreed upon by the plaintiff and defendant, and submitted to you, but such values are not to be binding upon the parties or to affect their rights in said action of assumpsit."

In the progress of the trial it appeared from the testimony of the plaintiff that the drilling machine and other equipment was on certain leases which had been transferred to the defendant by plaintiff, and the defendant then claimed that all of the property on the leases at the time of the transfer was sold to it by the plaintiff, and attempted to substantiate this claim by the testimony of its president, Mr. Banta, that its contract of purchase included all of the property of every kind on the leases at the time of the purchase and transfer, but not having the contract and not then being able to produce it, the testimony concerning the contents of the contract was not permitted to go to any further length. The defendant claimed that it did not know that the property sued for was on the leases at the time of the transfer, nor until the plaintiff had so stated in the trial, and until that moment was not advised that it had any interest in or claim to the property in litigation. However, it made no effort to obtain a continuance on account of surprise, proceeded with the trial of the case, and made no exception or objection to giving to the jury the agreed instruction, which admitted that the plaintiff was then the owner of the property sued for and entitled to a verdict therefor. Generally a litigant who is surprised in a trial must then protect his interests by non-suit or continuance, or some other appropriate motion or proceeding. He cannot take the chance of an adverse verdict, and, when such a verdict is rendered, ask to have it set aside in order to correct his mistake. *Frymier v. Railroad Co.*, 76 W. Va. 96, 85 S. E. 26. Moreover, the motion to set aside the verdict was not predicated on surprise or newly discovered evidence of defendant's ownership of the property. Presumptively it had abandoned this claim of ownership in the court below. Defendant's third assignment of error, to the effect that the trial court should have set aside the verdict and granted a new trial because of its possible and undeveloped claim of ownership, is not well taken. It is asserted for the first time in this court. *Henderson v. Hazlett*, 75 W. Va. 255, 83 S. E. 907.

[2] The agreed instruction confined the issues to the date when the unlawful detention of the property by the defendant began, the value of the property (which was also agreed upon and given to the jury as agreed values), and the damages, if any, sustained by the plaintiff on account of such unlawful detention. It would serve no purpose to consider the assignments of error upon matters which have been eliminated by this agreed instruction. Facts agreed upon by the parties in open court are binding, and a decree or judgment based thereon will not be reversed. *McCoy v. McCoy*, 74 W. Va. 64, 81 S. E. 562, Ann. Cas. 1916C, 387. When did the unlawful detention begin? After considerable negotiations for the delivery of the property to plaintiff it was agreed by the president of the defendant company with plaintiff, on February 19, 1918, that the property would be delivered forthwith to plaintiff, and that the adjustment of rent therefor and of the bill for repairs made on the machine would be made later. Before this agreement was carried out defendant learned that the Bruce heirs claimed the ownership of the property, and learning that the plaintiff was not financially responsible, as it claimed, or fearing that he was not financially responsible, refused to carry out the agreement for delivery of the property made by its president, but stated in a letter to the plaintiff dated February 23, 1918, that as soon as he sent the company satisfactory evidence of his title, and would arrange for a settlement of the moneys expended by it in rebuilding the machine, it would then deliver the property. On March 4, 1918, the Bruce heirs wrote to defendant, formally relinquishing all claim to the property, which letter defendant admitted it received on the 6th or 7th of March, 1918. The amount of expenditures in rebuilding the machine claimed by the defendant was not furnished the plaintiff, although urged by him, and at one time, in order to get it out of the way he proposed to "guess it off." A bailee's lien may be waived by agreement, or by implication arising from the bailee's acts. Under the agreement of February 19, 1918, this item was to be left open for adjustment together with the rent for the machine then owing to the plaintiff; and by the agreed instruction these two items are eliminated from this case and reserved for settlement in an assumpsit suit pending for that purpose. The plaintiff testified that after the Bruce heirs had relinquished all claim to the property, the defendant refused to deliver it to him or permit him to take any part of it. There is no substantial controversy about these facts. On this evidence the jury found that the unlawful detention began on April 1, 1918. We think this evidence warranted the jury in fixing this date, and that a sufficient demand had been made for delivery of the property before that time,

After the defendant notified plaintiff that it had no further use for the property, all of which it had been using in its business, and that it would pay no further rental thereon, all of the efforts of the plaintiff to get possession were implied demands, finally terminating in an agreement to deliver, which was afterwards repudiated. Under such circumstances no formal specific demand was necessary. Refusal had been sufficiently made to obviate the necessity thereof.

After April 1, 1918, there were frequent letters and telegrams between the parties in an effort to effect an adjustment out of court, and evidencing an intention on the part of the plaintiff to resort to the courts if the property was not promptly delivered.

[3] There were two interrogatories propounded to the jury on motion of the plaintiff and objected to by defendant:

First. "Did the defendant unlawfully detain from the plaintiff the property in controversy prior to the date of the institution of this suit?"

Second. "If so, when did the unlawful detention begin?"

The submission of these interrogatories is assigned as error. It will be again observed that one of the issues submitted by the agreed instruction was as to when the unlawful detention began. The fact that the detention was unlawful seems to have been agreed upon, and therefore it was unnecessary and improper; but we can see no harm in thus bringing that question to the special attention and finding of the jury. It was harmless error. The plaintiff claimed the detention was unlawful and began on the 19th day of February, 1918, and the defendant claimed it to have begun on May 9, 1918. It was very material for the jury to determine when the unlawful detention began in order to ascertain from what date the damages should accrue. Where interrogatories tend to ascertain and separate one or more facts controlling the judgment, such interrogatories should be encouraged and promoted. *Peninsular v. Franklin Ins. Co.*, 85 W. Va. 666, 14 S. E. 237.

[4] The following instruction given for the plaintiff is claimed as erroneous:

"The jury are further instructed that the measure of damages if any sustained by the plaintiff is the value of the use or hire of the property detained from the time the unlawful detention began to the date of the verdict."

This instruction correctly propounds the true measure of damages in an ordinary case of detention, and there are no special items of damages claimed here. *Wayne v. Cyphers*, 80 W. Va. 336, 92 S. E. 590; 18 O. J. P. 1024; 4 *Sutherland on Damages* (4th Ed.) 4317. But it is insisted that the instruction assumes, or would lead the jury to believe, that the de-

tention of the property was unlawful, thus invading the province of the jury upon the determination of a material fact at issue. As heretofore shown, the parties had agreed that the detention was unlawful, and limited the issue to when the unlawful detention began.

[5] The only other question left open by the agreed instruction was the amount of damages to be assessed. Complaint is made that the jury ascertained and fixed the damages at \$4 per day from April 1, 1918, to the date of the verdict. The complaint is not based on the amount of the damages, but on the method by which the basis of \$4 per day was fixed, as disclosed by the affidavits of two jurors. There was evidence on behalf of the plaintiff, which does not appear to have been controverted, that the use of the machine and equipment sued for was worth \$12 per day, and hence the damages assessed, by whatever calculation or method arrived at by the jury, are much less than they might have been under the evidence. Had the sum been greater, we do not perceive how the verdict could have been disturbed under this evidence. After judgment on the verdict had been entered and the court had adjourned, but before completion of the bills of exception, two jurors made affidavits to the effect that some members of the jury were in favor of assessing \$12 per day as damages, and others at less sums, while possibly four were not in favor of allowing any damages, but that in order to arrive at a verdict it was agreed that each juror should state the amount of damages per day he would assess, and the total divided by 11 (one of the jurors having been excused for cause) should be the verdict, which method was adopted, resulting in a composition verdict of \$4 per day, and that Sundays and holidays were excluded from the number of days between April 1, 1918 (which date they had agreed upon as the day when the unlawful detention began), and the day of the verdict. The judge of the lower court, being of the opinion that he had no authority to consider the affidavits or then grant the defendant a new trial, gave the defendant the benefit of exceptions to his ruling in that regard and signed bill of exception No. 4, which incorporated the two affidavits. The refusal of the court to set aside the verdict and judgment because of the facts disclosed by these two affidavits is assigned as error. The judgment had been entered on the verdict, and the term of court had ended, and the defendant had given bond for suspension of the judgment while perfecting an appeal to this court. The court very properly refused to consider these affidavits at the time presented; and even if they had been presented before judgment and before the end of the term, they could not have been considered. A juror cannot impeach the verdict. *Pickens v. Boom*

Co., 58 W. Va. 11, 50 S. E. 872, 6 Ann. Cas. 285; Probst v. Braeunlich, 24 W. Va. 356; Reynolds v. Tompkins, 23 W. Va. 229.

[7] Bill of exceptions No. 3 complains of the action of the court in writing in the verdict when returned, in words, the amount of damages fixed by the verdict in figures. The jury had fixed the damages at \$2,288 (in figures), and the court in writing the amount in words made a mistake and wrote "two thousand two hundred and eight"; but when his clerical mistake was discovered it was immediately corrected so as to correspond with the figures, before the jury left the court room, and to which correction the jury assented. We perceive no error in this action of the judge in correcting his clerical error. How has the defendant been prejudiced? The exception is extremely technical and without merit.

[8] Exception is made to the form of the verdict because it does not state that the sum of \$2,288 was given as damages for the detention of the property. The verdict reads:

"We the jury find for the plaintiff, and fix the value of the property sued for in this action as follows (then each item of property and value is given). And we assess two thousand two hundred and eighty-eight, \$2,288.00, dollars for the detention of said property."

It is clear and conclusive that the sum named for the detention was assessed as damages. It could have been given for no other purpose and under no other hypothesis and is responsive to the evidence and instructions. *Peters v. Johnson*, 50 W. Va. 644, 41 S. E. 190, 57 L. R. A. 428, 88 Am. St. Rep. 909; *Lewis v. Childers*, 13 W. Va. 1.

Exception is made to the judgment entered as enlarging the verdict and not responsive thereto. The judgment is for the possession of the property described in the verdict, and if any article cannot be had, then the value of such item of property as fixed and ascertained by the jury; and if none of the property can be had, then the aggregate value of the various items as so fixed, amounting to \$5,973. The fact that a correct addition is made of the value of the various items, thus arriving at the total value, is not enlarging the judgment to the detriment of the defendant. The judgment is entirely consistent with the verdict.

It is claimed that the court improperly overruled a demurrer to the declaration. We cannot find from the record that a demurrer thereto was interposed.

There are many assignments of error which we do not consider as important and others which are rendered unimportant by the agreed instruction.

We can find no error, and the judgment is affirmed.

Affirmed.

STATE v. LONG. (No. 4022.)

(Supreme Court of Appeals of West Virginia.
May 10, 1921. Rehearing Denied
September 7, 1921.)

(Syllabus by the Court.)

1. Criminal law §789(4)—Instruction to acquit if reasonable doubt raised by evidence itself or by ingenuity of counsel erroneous.

An instruction in a trial for felony, which tells the jury that if a reasonable doubt of the guilt of the accused is raised in their minds by the evidence itself, or by the ingenuity of counsel, they should find the accused not guilty, is erroneous, and should be refused.

2. Arrest §63(3)—Police officer may arrest without warrant one committing breach of peace in his presence.

A police officer, within his jurisdiction, may lawfully arrest, without warrant, one who commits a breach of the peace in his presence or view.

3. Homicide §300(3)—Instruction as to right of person arrested without warrant to kill policeman erroneous.

Where a police officer, in attempting to arrest without warrant a person who is intoxicated, disorderly, loudly swearing and disturbing the peace, is shot and killed by that person, who, to excuse his act, relies on the defense of accidental discharge of the revolver in his hand caused by muscular reflex action superinduced by a blow on his cheek bone from the policeman's mace, and not upon self-defense or the unlawfulness of the attempted arrest, an instruction, which tells the jury that, if they believe the attempted arrest was unlawful, then the defendant was justified in repelling it with force, and to kill the policeman if such was necessary to protect himself from death or great bodily harm, is not properly drawn, and should be refused.

4. Criminal law §813, 1172(6)—Instructions propounding abstract propositions of law improper, but not reversible error, unless misleading.

Instructions, propounding abstract propositions of law, should not be given; but, if given, and there be evidence to which they are applicable, the appellate court will not reverse for that cause, unless it is clear that the jury has been misled or confused thereby.

5. Criminal law §806(2), 822(1)—Instructions for prosecution need not embody theory of defense if given in defendant's instructions; instructions must be considered as whole.

If the law applicable to and governing the theory of the defense is fully and fairly propounded in the instructions given for the defense, it is not necessary that those given for the prosecution should contain propositions of law relied upon by the defense, or that there should be incorporated therein the theory of the defense. Instructions must be considered together as a whole; an instruction based on

one theory, unless binding, does not ignore another theory on which other instructions are given.

6. Criminal law §1172(1)—If context shows that word mistakenly used was not misleading it is not prejudicial.

Instructions must be considered in the light of the evidence; and if the context of an instruction and the evidence clearly show that one word therein was used for another, and that the jury could not have been misled by a mistake so clear and palpable, the error will not be considered as prejudicial.

7. Breach of the peace §1—"Breach of peace" defined.

A "breach of the peace" includes all violations of the public peace, order, or decorum, such as to make an affray; threaten to beat, wound, or kill another, or commit violence against his person or property; contend with angry words to the disturbance of the peace; appear in a state of gross intoxication in a public place; recklessly flourish a loaded pistol in a public place while intoxicated; and the like.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Breach of the Peace.]

8. Case approved.

Fourth point of the syllabus in *State v. Weisengoff*, 85 W. Va. 271, 101 S. E. 450, is approved and applied.

9. Criminal law §785(3)—Instruction as to extent to which jury are judges of evidence held erroneous.

An instruction which tells the jury that they are the sole judges of the evidence, and of the weight to be given thereto, and that they may believe or refuse to believe the testimony of any witness or any part of his evidence, is erroneous, prejudicial, and reversible error.

10. Criminal law §1153(3)—Order and time of introduction of evidence in discretion of trial court.

The order and time in which evidence shall be introduced is largely in the discretion of the trial court, and a verdict will rarely be reversed for that reason, unless clearly prejudicial.

11. Arrest §68—Known peace officer arresting without warrant need not disclose authority until request made therefor.

In making an arrest without a warrant, a known peace officer is not bound to disclose his character or authority, or give notice of his intention, until the party has submitted, or has demanded by what authority the arrest is made, as his known official character is sufficient in the first instance to require submission, unless a demand for disclosure of his authority is first made.

12. Criminal law §485(1) — Hypothetical question as to muscular reflex action causing discharge of pistol need not give remote details.

Where a violent blow on the cheek bone is struck with a policeman's mace, and it is de-

signed to prove by expert testimony that the blow would cause muscular reflex action sufficient to immediately cause the discharge of an automatic pistol, then in the hand of the recipient of the blow, it is not necessary to incorporate in the hypothetical question, propounded to the expert witness, all the details of the evidence in the case, remote from the time when the blow was given; they could shed no light upon whether the blow given, as fully described and set out in the question propounded, would cause muscular reflex action.

13. Homicide §20—De facto officer entitled to same protection as if title undisputed and in prosecution for murder of de facto officer appointment and qualification need not be shown.

A de facto officer while engaged in the execution of his duties is entitled to the same protection from assault, obstruction, or interference, as if his title was undisputed, and in a prosecution for the murder of an officer de facto it is not necessary to prove that he was duly appointed or elected, or had duly qualified.

14. Homicide §165—Evidence of friendly relations between defendant and victim admissible to rebut element of malice.

Evidence tending to show friendly relations existing between one charged with homicide and his victim is admissible to rebut the element of malice, and it is error to refuse to allow it to go to the jury.

15. Witnesses §388(2)—Impeaching evidence inadmissible in absence of proper foundation.

Evidence of a witness, called solely for the purpose of impeaching another witness by contradicting his testimony on some particular point, but showing he had on other occasions made conflicting statements, should be refused, where no proper basis has been laid for the contradiction.

Error to Circuit Court, Wetzel County.

Charles Amos Long was convicted of murder in the second degree, and he brings error. Reversed and remanded.

T. M. McIntire, of New Martinsville, T. A. Brown, of Parkersburg, and Wm. T. George and J. Blackburn Ware, both of Philippi, for plaintiff in error.

E. T. England, Atty. Gen., Charles Ritchie, Asst. Atty. Gen., and G. W. Coffield, Pros. Atty., of New Martinsville, for the State.

LIVELY, J. Charles Amos Long was convicted of murder in the second degree in the circuit court of Wetzel county and sentenced to confinement in the penitentiary for a term of 12 years, and prosecutes this writ.

The defendant was a merchant and real estate dealer residing in the town of Pine Grove in Wetzel county and the evidence tended to show that in the late afternoon and evening of April 16, 1918, he became intoxicated, and was recklessly operating his automobile over the streets of that town,

and was told that he must be arrested by Clem Long, a policeman of the town, for that offense. But while walking along the street, apparently in charge of the policeman, he drew his revolver and presented it at the policeman, with the statement that he would not be arrested, accompanying the act with words indicative of an intention of inflicting upon the policeman serious bodily harm. The arrest was thus successfully resisted, and the policeman afterwards went to the mayor's office and reported that the defendant had "bluffed" him, but did not ask for nor secure a warrant with which to apprehend him. The mayor advised the policeman not to attempt to arrest the defendant while intoxicated, but to wait until he was sober. A short time afterwards, and about an hour or three-quarters before the fatal shooting, the defendant again began speeding his car and acting generally in such a bolsterous and reckless way as to attract the attention of a considerable crowd of the citizens who gathered together evidently to observe his acts. He went into a store on the main street of the town, where a shoe drummer was exhibiting to the merchant a line of sample shoes, and threw one or more of the shoes and some other articles of merchandise out of the store onto the sidewalk, one of the shoes striking a pedestrian. He then came out of the store and offered an apology to the person hit by the shoe, which apology not being accepted very readily, he became incensed, and wanted to have a fight with the supposed offender. At another store he became dissatisfied with some cigars which he had purchased from the merchant, and tore them up and threw them on the floor until he obtained one which was satisfactory, and then threw the money to pay for the same on the floor. At another time he approached the same policeman near defendant's store, and began quarreling with him and again threatened to shoot him with the same revolver, and called him a vile name in the presence of defendant's wife and various other persons. Shortly before the fatal shooting he got out of his car in front of his office, which was a short distance from his store, and attempted to unlock the office and enter, but, being unable to find the proper key or possibly to fit it in the lock, he again drew his pistol and asked a boy, of about 14 years of age, to take the pistol and shoot the lock off. By this time quite a crowd of the citizens had gathered on the street near by, evidently with the purpose of observing what would happen, and the defendant, perceiving Clem Long, the policeman, standing near the office and in the crowd, immediately approached him and began an altercation with him, swearing and abusing the policeman and making assertions that he could not and would not be arrested, and contending with the policeman with loud words and in a

threatening manner. At this time defendant had placed his pistol in his right-hand coat pocket and was grasping it with his right hand. As a result of the altercation the policeman struck defendant a violent blow on the cheek bone with his mace, and about the time of the blow the pistol was discharged, the bullet entering the abdomen of the policeman above the hip bone, and passing through the body and out on the opposite side about four inches lower than the point of entrance, causing the death of the policeman some hours afterwards. The evidence is conflicting as to whether the shot was fired before the blow was struck, some of the witnesses so testifying, or whether the blow was struck first and the pistol fired afterwards. A large crowd had gathered and witnessed the difficulty, variously estimated at from 35 to 75 persons. All of the numerous witness agreed that there was not much difference in time between the firing of the shot and the blow. They were almost simultaneous. Defendant was either knocked down by the blow from the mace, or some other person hit him from behind, thus causing his fall. He was then disarmed with considerable difficulty and force by some of the bystanders, and immediately taken to jail.

This statement of the evidence is taken largely from the testimony of the witnesses for the state, and may be inaccurate in unimportant details, but it is sufficient to give the main facts out of which the difficulty arose.

Numerous alleged errors occurring in the trial are insisted upon by the defendant as cause for reversal of the judgment.

It is unnecessary to consider the first six assignments of error, in view of the disposition we have concluded to make of the case. They relate: (1) To refusal to continue the trial on the showing made, (a) because of absence and illness of counsel, (b) prejudice and ill feeling against the defendant in the county, and (c) absence of alleged material witnesses; (2) refusal to furnish defendant with a list of the jurors promptly upon request made by him; (3) entering of an order, in the absence of the defendant, refusing the request of the prosecuting attorney for a list of the jurors; (4) refusal to quash the entire panel of jurors because of the failure of the court to appoint jury commissioners under chapter 124, Acts 1919; (5) failure of the record to show that the sheriff was instructed to keep the jury together without communication with any one; and (6) failure of the record to show that the jury returned into court on October 9, a day of the trial, in custody of the sheriff. A cursory examination of these assignments leaves us under the impression that they are without merit; but it would serve no useful purpose to consider them critically, as none of them will likely arise upon a new trial.

[1] Instruction No. 6, offered by the defendant, was refused. It relates to reasonable doubt of the guilt of the accused. It tells the jury if a reasonable doubt is raised by the evidence itself, or by the ingenuity of counsel, upon any hypothesis reasonably consistent with the evidence, that doubt is decisive of the defendant's innocence. It is argued that the ingenuity of counsel means argument of counsel. The right of a prisoner to be heard at the bar through counsel is firmly established everywhere. It is conserved in our Bill of Rights, where it is expressly provided that the accused "shall have the assistance of counsel." Wide latitude is given to counsel in making their arguments to the jury, and it is their privilege to make such deductions as the evidence will justify. It has been held to be error to instruct the jury entirely to disregard argument of counsel. *Garrison v. Wilcoxson*, 11 Ga. 154; *People v. Ambach*, 247 Ill. 451, 93 N. E. 310. But instructions cautioning the jury not to regard statements of counsel in argument as evidence, and to disregard counsel's expressed belief that his client was innocent, have been held proper, as not destroying the effect of the argument. *Smith v. State*, 95 Ga. 472, 20 S. E. 291; *State v. Heath*, 237 Mo. 255, 141 S. W. 26. But the instruction here is not confined to argument of counsel, and can only be considered as relating to the argument by implication. The instruction relates to the ingenuity of counsel. Counsel in conducting trials often ingenuously propound questions and present improper evidence, and, although ruled out, it leaves its impression, which is sometimes difficult for a jury to discard. Counsel in argument will often ingenuously and disingenuously make statements of fact not warranted by the testimony. It would be traveling afar from the beaten paths to instruct jurors that they may base a reasonable doubt upon ingenuity of counsel in the conduct of the trial. There were other instructions for the defendant, notably Nos. 4, 5, 7, and 8, which fully covered the doctrine of reasonable doubt.

[2] Defendant's instruction No. 14, refused, told the jury that if they believed the deceased was a police officer, and, acting as such, without a warrant commanding the arrest of the defendant made an attack upon the defendant while on the streets of Pine Grove, and struck him a severe blow on the cheek bone with his mace, and thereby caused the pistol in the defendant's hand to be discharged from reflex muscular action, causing the death of the deceased, then they should find for the defendant, was properly refused. It is predicated on the assumption that a police officer cannot make an arrest without a warrant, which is not the law. A police officer may make arrests without warrant for offenses committed in his presence, and which amount to a breach of the peace. The defense relies on the decision in *State v. Lutz*,

101 S. E. 434, but that decision does not hold that an arrest by a policeman cannot be made without warrant. It expressly says that such an arrest may not be made, unless an offense, which is being committed in the presence of the officer, amounts to a breach of the peace. Besides the instruction leaves out the important element as to whether or not the policeman was acting unlawfully or without just cause. An arrest without a warrant is not per se unlawful. The instruction was an incomplete statement of the law, and would tend to mislead the jury.

Defendant's instructions Nos. 15, 25, and 25a, refused, are not insisted upon as error here, and will not be considered.

Defendant's instruction No. 30, refused, told the jury that the policeman's mace, introduced in evidence, was a dangerous and deadly weapon. The mace was inspected and handled by the jury, they could ascertain its weight, length, and diameter, and its deadly and dangerous character was a question of fact which they had the right to determine. We do not find in the record such a description of the mace as would justify a court in pronouncing it a dangerous and deadly weapon as a conclusion of law. The instruction was properly refused.

[3] Defendant's instruction No. 33, refused, in effect told the jury that the policeman had no authority to make the arrest of the defendant for an offense less than a felony not committed in his presence, without a warrant, and if they believed from the evidence that the policeman was at the time of the shooting attempting to arrest the defendant for an offense committed earlier in the evening, and for which he had no warrant, and for which he had had ample time to obtain a warrant, then the attempt to arrest was unlawful, and the defendant was justified in the use of such force as was reasonably necessary to preserve his liberty and to repel force with force, and to kill the policeman if such killing was reasonably necessary to protect himself from death or great bodily harm at the hands of the policeman, and under such facts the killing would be justified, and they should find the defendant not guilty. There are several reasons which would justify the refusal of this instruction, the most cogent of which is that the instruction tells the jury that if they believed the arrest unlawful because for an offense not committed in the presence of the officer, then the defendant could repel force with force, and kill the policeman if such killing was necessary, etc. In resisting an unlawful arrest one cannot go to the extent of killing the officer in order to preserve his liberty only. The only justification for killing in such instance would be where self-defense is relied upon, or where self-defense enters, and then the defendant must believe, and have reasonable grounds to believe, that it is necessary for him to do so to save his

own life or to protect himself from great bodily harm. *State v. Lutz*, 85 W. Va. 330, 101 S. E. 434. The instruction is misleading. Moreover, the theory of the state was, and there is much evidence to support it, that defendant was intoxicated and disorderly, operating his automobile over the streets of the town at a dangerous speed, and generally creating a disturbance of the peace of the town, and having successfully resisted arrest by the deceased a short time before the fatal shooting, by threatening to shoot him with a pistol then in his hand, and, perceiving the officer in the street near the office of defendant, approached him for the purpose of provoking a quarrel, and again "bluffing" him. The fatal shooting resulted. On the other hand, the defendant does not claim nor rely upon self-defense. His version of the shooting is that he was going from his office or from his car to his storeroom for the purpose of removing money left in the cash register by his wife, and perceived and approached the deceased, and said to him, "You ain't going to arrest me, are you?" The policeman replied, "No, I am not going to arrest you to-night, Amos. I told you that." "I said, 'I didn't think you was going to arrest me, and I know you hadn't ought to,' or words to that effect. He said, 'No, sir; I am not going to do it to-night, but I am to-morrow,' or 'I will,' something to that effect. That is as near as I can remember the conversation, every word of it."

He then testified that he did not know that deceased was going to arrest him, or that deceased was going to strike him with the mace, but suddenly the policeman struck him with the mace so quickly that he scarcely knew what it meant, and involuntarily threw up his right hand, which was in his coat pocket, grasping a revolver, to ward off the blow from his head, and without taking his hand out of his coat pocket. He did not know whether the blow knocked him down, or whether he was hit from behind. He was asked the question:

"Tell the jury what you remember, if anything, about how you came to fire the shot that struck the deceased, Clem Long? A. I don't know. Somebody told me, after I had been taken to jail some time, that I had shot a man—that is the first I knew, the first that I really knew that the gun had went off."

What application or relevancy does an instruction on self-defense for the defendant have under this evidence? Or what application has the law of repelling an unlawful arrest? The instruction is inconsistent with the defense. However, there was some appreciable evidence coupled with the blow of the mace, and the uncertainty of whether the shot preceded the blow, which would give color to the claim of self-defense, and the jury would have the right to say whether self-defense prompted the firing of the shot,

and that the defendant had reason to believe, and did believe, he was in imminent danger of his life or great bodily harm. But, as above suggested, the instruction is not so framed, and is faulty.

Instructions 34 and 36, offered by defendant, were properly refused for the same reason.

Defendant's instruction No. 35, refused, but modified and given as No. 35a, sets out the defense relied upon, that is, that the firing of the fatal shot was caused by reflex action of the muscles of the defendant, induced by the blow from the policeman's mace, and without any intent on the part of the defendant to fire the shot; and it told the jury that, if such was their belief from all the evidence, then they must find the defendant not guilty. The modification made by the court is so slight and inconsequential that it is difficult to understand why it was made. The only change is the substitution of the word "then" for the word "yet," and the difference in the meaning of the two words in that connection and with the context of the instruction is so little that there is no substantial ground for objection to the change.

[4] We now come to consideration of the instructions given for the state over the objection of the defendant. Instructions 1 to 15, inclusive (excepting Nos. 7, 9, 10, 11, which were refused), all correctly propound propositions of law applicable to the case, but are objected to because they are in the abstract. It is well settled that abstract propositions of law should not be given when there is no evidence on which they can be predicated; but where they are given, and there is evidence in the case to which they are applicable, but no particular reference is made to the evidence in such instructions, it will be presumed that the jury made the proper application. *Blashfield's Inst. to Juries*, § 432, p. 973.

"That an instruction presents merely an abstract proposition is certainly a very sufficient reason why a court may refuse to give it; but, if given, and it state the law correctly, I am not aware that it has ever been held a sufficient cause for reversing a judgment." *Koerner v. Rankin's Heirs*, 11 Grat. (Va.) 420.

Unless the appellate court can see that the jury might have been misled, or confused, by an instruction in the abstract, it will not reverse. *Sheppard v. Ins. Co.*, 21 W. Va. 370.

Instruction No. 1, which defines murder, and which says that murder perpetrated by poison, lying in wait, or any other willful, deliberate, or premeditated killing, is murder in the first degree, seems to have been approved in *State v. Abbott*, 64 W. Va. 411, 62 S. E. 693, which was a case of murder arising out of a sudden brawl. There was no evidence of poisoning or lying in wait in the case under consideration, but it may have

been proper for the purpose of showing the deliberation and premeditation necessary as an element of murder in the first degree. It could not have misled the jury in this case. The verdict is not for first degree murder. Was not this instruction rather for the benefit of the prisoner? How has he been prejudiced?

Instruction No. 2 was given and approved in the celebrated case of *State v. Cain*, 20 W. Va. 679.

[5] Instructions 3, 5, 12, 15, and 17 are claimed to be erroneous, because the theory of the discharge of the pistol by involuntary reflex muscular action of defendant was not incorporated therein; because they ignore that defense. The law applicable to the facts, as deduced from the evidence and interpreted by the prosecution, is usually embodied in the state's instruction, and it is not necessary, and it would be impracticable, to incorporate in each instruction the theories, limitations, and conditions which go to make up the instructions as a whole. *State v. Dodds*, 54 W. Va. 289, 46 S. E. 228. The court gave 27 instructions at the instance of the defense, fully covering its theories and its conclusions of fact from the evidence, and we find that its claim of accidental and unintentional shooting caused by reflex muscular action was included therein, and the jury directed to find the defendant not guilty if they believed the fatal shot was fired as claimed by the defendant. The instructions must be considered as a whole. *State v. Cottrill*, 52 W. Va. 363, 43 S. E. 244; *Gray's Case*, 92 Va. 772, 22 S. E. 858. An instruction based on one theory, unless binding, is not to ignore another theory on which another instruction is given, even though the theories be totally inconsistent. Even where an instruction is incomplete, but states the law correctly so far as it goes, and another or other instructions remedy the incompleteness, the error is cured. *State v. Prafer*, 52 W. Va. 132, 43 S. E. 230.

[6] State's instruction No. 17 is also claimed as erroneous because it uses the word "blow" instead of "shot." That instruction reads:

"The court instructs the jury that voluntary manslaughter is where the act causing death is committed in the heat of sudden passion caused by provocation; and they are further instructed that if they believe beyond a reasonable doubt, from the evidence in this case, that the defendant, Charles Amos Long, in the heat of sudden passion, caused by provocation, killed Clement Jefferson Long at the time and place alleged in the indictment, they should find the defendant, Charles Amos Long, guilty of voluntary manslaughter, unless they further believe from the evidence that the defendant believed, and had reason to believe, that the shot which resulted in Clement Jefferson Long's death was necessary to protect his own life, or protect himself from great bodily harm, and

that the necessity of inflicting said blow was not brought about by the defendant, Charles Amos Long's own conduct."

There was no evidence whatever of the deceased being killed by a blow. It is conclusive that he was killed by the pistol shot wound inflicted by defendant, and the context of the instruction is so clear and convincing that "shot" was meant instead of "blow," and the evidence is so clear on that point, that the jury could not have been misled. Instructions must be interpreted in the light of the evidence, and not in the abstract. *State v. Dodds*, 54 W. Va. 289, 46 S. E. 228. The instruction is further criticized because it tells the jury that the defendant cannot justify himself on the plea of self-defense, if the necessity of inflicting said blow (shot) was brought about by his own conduct. Counsel insists that the word "conduct" is misleading; that it should have been "misconduct" or "bad conduct" or "wrongful act." While this instruction is loosely drawn and justly subject to criticism, we do not think the jury could have been misled either by the use of the phrase "said blow" or the word "conduct," in the light of the other instructions and the evidence and the evident meaning of the instruction itself. *Kimball v. Borden*, 97 Va. 477, 34 S. E. 45.

The state's instruction No. 19 is confidently claimed as erroneous. It reads:

"The court instructs the jury that if they believe from the evidence in the case beyond a reasonable doubt that, at the time of the shooting of Clement Jefferson Long by the prisoner, Charles Amos Long, the said Clement Jefferson Long was then and there a policeman of the town of Pine Grove, Wetzel county, W. Va., and shortly before or at the time of said shooting the accused, Charles Amos Long, was in the presence of said Clement Jefferson Long in the street of said town drunk, and guilty of contending with angry words and swearing to the disturbance of the peace of said town, that such acts and conduct was an offense under the laws of this state, which, if committed in the presence of such policeman, was just legal cause for the arrest of the accused by said policeman without a warrant, and in such a case the accused had no right to resist."

[7] The objection to this instruction is that it does not correctly state the law. It is contended that a policeman does not have authority to arrest, without warrant, a person drunk or guilty of contending with angry words and swearing to the disturbance of the peace of the town in the presence of the officer; that such authority could only be given a policeman by town ordinance, duly passed by the proper municipal authorities and recorded in the manner prescribed by law; and that no such ordinance of the town of Pine Grove was properly introduced in evidence. Without considering at this time whether the ordinance of the town giving the right of its police officers to make arrests

without warrant in certain cases, and which went to the jury, was properly admitted, we hold that a police officer, irrespective of town ordinance, has the authority under the common law to make arrests, without warrant, for misdemeanors committed in his presence, which are a breach of the peace. *State v. Lutz*, 101 S. E. 434. What is a breach of the peace?

"The term 'breach of the peace' is generic, and includes all violations of the public peace or order, or decorum; in other words, it signifies the offense of disturbing the public peace or tranquillity enjoyed by the citizens of a community; a disturbance of the public tranquillity by an act or conduct inciting to violence or tending to provoke or excite others to break the peace; a disturbance of the public order by an act of violence, or by any act likely to produce violence, or which, by causing consternation and alarm, disturbs the peace and quiet of the community. By 'peace' as used in this connection is meant the tranquillity enjoyed by the citizens of a municipality or a community where good order reigns among its members. Breach of the peace is a common-law offense." 9 C. J. p. 386.

There was abundant evidence to show that for some time prior to, and up to the time of the shooting, the defendant had been intoxicated, and that he had been driving his car recklessly through the streets, had drawn his pistol on the police officer and threatened to shoot him, and had entered a store and thrown out sample shoes on display, and immediately before the shooting cursed the policeman and called him vile names in a loud and angry voice. It is true that all this was denied by the defendant, but the evidence was quite sufficient on which to base the instruction. If the jury believed that such acts were thus committed by the defendant, then they were justified in finding that the defendant was committing a breach of the peace, and the attempted arrest was lawful. We find no reversible error in this instruction.

Instruction No. 22 for the state was to the effect that if they believed the defendant beyond a reasonable doubt, being armed, approached the policeman in such a manner as to give him reasonable cause to apprehend a design on the part of defendant to do him great bodily harm or take his life, and that he, the policeman, had reasonable cause to believe, and did believe, that such design was about to be accomplished, and that the danger was imminent, he, the policeman, had a right to strike the defendant with his mace. The objection to this instruction is that there was no evidence on which to base it. An inspection of the evidence for the state shows that when the defendant saw the policeman standing near the sidewalk he immediately approached him and began an altercation. His right hand was in his coat pocket, in which he had just placed his

pistol, which he had exhibited a few moments before, when he asked the boy to shoot the lock off of his office door. That afternoon he had threatened to shoot the policeman rather than be arrested for recklessly speeding his automobile on the streets, and had then drawn his pistol; he admits having the pistol in his grasp in his coat pocket when he approached the officer. Undoubtedly the policeman was apprehensive of danger. The evidence was sufficient for the giving of this instruction; in fact it was strong enough to sustain a verdict of murder in the first degree.

The state's instruction No. 24 reads:

"The court instructs the jury that if they believe from the evidence beyond a reasonable doubt that the prisoner, Charles Amos Long, armed with a revolver, sought the deceased, Clement Jefferson Long, with a view of provoking a difficulty with him, or with intent of having an affray with him, for the purpose of killing him, and a difficulty ensued, he cannot, without some proof of a voluntary change of conduct or action on his part, excuse the killing of the deceased, Clement Jefferson Long, upon the ground that the deceased, Clement Jefferson Long, struck him first with his mace, and that the revolver in the hands of the said Charles Amos Long was accidentally discharged; for the law will not hold him guiltless, who by seeking a combat and continuing therein, brings upon himself the very thing out of which the accident grew; accidental killing wholly to be excused from all guilt must be caused in the doing by some lawful act."

[8] The objection is that, even if the jury believed that the defendant sought out the policeman with the intent of provoking an affray, or with the intent to kill, if, while engaged in the affray, he accidentally fired the fatal shot as the result of reflex muscular action superinduced by the blow of the mace, then he would be innocent. Such is not the law. Malice is an essential element of first or second degree murder, but if the jury believed that defendant brought about the affray by an unlawful act, and as a result thereof the accidental shooting occurred, resulting in the homicide, it would be manslaughter only. The instruction tells the jury that under such circumstances the defendant would not be guiltless, and would not be wholly excused. This question arose in the case of *State v. Weisengoff*, 85 W. Va. 271, 101 S. E. 450, where it was one of the main contentions, and is fully discussed there with citation to many authorities. *Weisengoff* was unlawfully resisting an arrest for a misdemeanor, and while doing so and attempting to escape from the sheriff who had boarded *Weisengoff's* automobile recklessly or unintentionally drove the car against an iron bridge which he was attempting to cross, injuring the sheriff so badly that he died in about two hours thereafter. This in-

struction is fully justified under the principles announced in that case.

[9] Instruction 25 for the state is as follows:

"The court instructs the jury that they are the sole judges of the evidence and of the weight to be given thereto, and that they may believe, or refuse to believe, any witness or any part of his evidence, and that when passing upon the credibility of any witness they may take into consideration his interest in the matter in controversy, the reasonableness or unreasonableness of his statements, his bias or prejudice in the matter, if any appear, and his demeanor upon the witness stand."

This instruction was given in *State v. Dickey*, 48 W. Va. 326, 37 S. E. 695, and also in *State v. Bickel*, 53 W. Va. 597, 45 S. E. 917. However, the recent case of *State v. McCausland*, 82 W. Va. 525, 96 S. E. 938, disapproved it, holding that the instruction would permit the jury to reject the testimony of a witness arbitrarily. A somewhat similar instruction was given in *Siever v. Coffman*, 80 W. Va. 425, 92 S. E. 671, and disapproved, Judge Miller saying therein:

"The jury being the sole judges of the credibility and weight to be given to the testimony of witnesses, the court cannot by an instruction directly or impliedly tell them they should disregard any evidence."

In the more recent case of *State v. Ringer*, 100 S. E. 413, this same instruction was held to be erroneous, and was one of the reasons for reversing the conviction in that case. But the Attorney General insists that the addition of the words, "and of the weight to be given thereto" (after the words "sole judges of the evidence"), and the addition of the words "or any part of his evidence" (after the words in the instruction "refuse to believe any witness"), would cure the instruction. We cannot see that these words add to or take from the meaning of the instruction. The viciousness of the instruction remains, in that it tells the jury they are at liberty to arbitrarily believe or disbelieve any witness or any part of his testimony. We hold that the giving of this instruction is reversible error. Whether or not it was aimed at the testimony of the defendant, which was contradicted in many instances by other witnesses, we need not say.

Various bills of exception were taken by the defendant to the introduction and refusal of evidence. Many are without merit, and relate to matters immaterial, and will not be reviewed.

Perry Edgar was introduced as a witness for the defense, and permitted to state that he had heard Harry Roome, a witness for the state, tell the policeman, Clem Long, while standing in front of Stone's store a short time before the shooting:

"If I was in your place I would go over and knock his head off with that mace, or words to that effect."

The state objected to the question, but the court permitted the witness to answer, stating that it could go in for the purpose of showing the feeling of witness Roome toward the defendant, but not for impeachment. This is the ground of the exception. Upon examination of the evidence of Roome we do not find that a proper foundation for impeachment was laid, but the witness was permitted to answer, and the defendant got the full benefit of the evidence, even if the foundation for impeachment was not properly laid.

[10, 13] Dr. Fulton, a witness for the state, who did not see the shooting, was asked on examination if a shot fired from the coat pocket of the defendant, who was practically the same height as the deceased, would have taken the downward course in the body of the deceased, as described by the doctor, unless the deceased was leaning forward at the time, or unless he was on a lower level, and the court refused to permit an answer. All of the witnesses for the state who saw the shooting, and the defendant himself, testified that the defendant threw his hand up, and the shot was fired through the pocket of the coat while above its ordinary position. The doctor's answer to the question as propounded would have shed no light on the relative position of the defendant and his victim. He was also asked on cross-examination to describe the condition of the defendant's wound received from the policeman's mace. The court held that this was not proper cross-examination, but that the defense could recall the doctor and make him their witness for that purpose when the defense put in its testimony. The order and time in which evidence shall be introduced is largely in the discretion of the trial court, and a verdict will rarely be disturbed for that reason. *Goodwin v. Tony Pocahontas Coal Co.*, 106 S. E. 76. The witness could have been summoned by the defense, and this evidence offered at the proper time. However, the evidence was for the purpose of showing the force and seriousness of the blow, which was fully described by other witnesses and admitted by the state. Its probative force would have been largely cumulative. Many of the errors assigned relate to the evidence and instructions on the question of the right of the policeman to arrest the defendant; whether or not he should have had a warrant; whether the attempted arrest was lawful or unlawful. *H. C. Young*, the town recorder, was introduced, and the municipal minutes and records were introduced and admitted over defendant's objection, showing ordinances making it an offense to operate automobiles over the streets at a

rate exceeding 12 miles per hour, making it an offense for any one to engage in riotous tumults, profanity, obscene language, etc.; and an order, tending to show the employment of Clem Long (the deceased) as night policeman at \$1 per day. In our view we do not consider the introduction or rejection of these ordinances and minutes as very material.

"If one kills an officer *de facto*, while resisting or obstructing him in the discharge of his official duties, he is guilty of murder. Hence upon an indictment of this nature it is not necessary for the prosecution to prove that the officer killed was duly appointed or elected, or had duly qualified. It is sufficient to prove that he was an officer *de facto*." *Constantineau De Facto Doctrine*, § 215.

[11] Clem Long was a *de facto* officer. He was recognized as a policeman by the municipal authorities and the citizens generally, had been sworn in as such, wore the badge of a policeman, and carried a mace. He was known and recognized as such by the defendant. Nor do we think that because he had no warrant it would materially affect his status as an officer, or his right and duty to make the arrest. It was not because he did not have a warrant that the homicide occurred. He was not asked by the defendant to exhibit a warrant. It would have been of no assistance or protection to him. His authority was not questioned. The defendant, according to the state's witnesses, stated that no one could arrest him, accompanying the assertion by profanity and by calling the policeman a vile name. From the defendant's testimony of the shooting above set out in detail it will be seen that he had no idea that an arrest would be made, or that the deceased was attempting to make an arrest. He was not resisting arrest. He did not attempt to justify the homicide on the theory of an unlawful arrest, and for that reason that he had a right to resist. His defense is accidental shooting pure and simple. The law of resistance to an unlawful arrest has no application here under the theory of the defense. What relevancy then can there be in the lack of a warrant? Moreover, if the defendant at the time of the attempted arrest or immediately before, and in the view and presence of the officer, was committing a breach or a disturbance of the peace (and there was ample evidence to that effect), no warrant was necessary in order to justify the attempted arrest.

"In making an arrest a sworn peace officer, commonly known as such and acting within the limits of his jurisdiction, is not bound to show his warrant, even though it is demanded of him, as every one is bound to know the character of such an officer when acting within his proper jurisdiction, and is bound to submit peacefully to the arrest before he can demand that the cause thereof be made known to him." 5 C. J. p. 392, § 16.

"In making an arrest without a warrant it is usually held that a known peace officer is not bound to disclose his character or authority, or give notice of his intention, until the party has submitted, as his known official character is sufficient in the first instance to require submission until formal notice of authority and intention to make an arrest, and the cause for it, can be given." *Id.* p. 419.

M. L. Long, the father of the deceased, was introduced by the state to prove a dying declaration made by the deceased, and his examination for laying the foundation was conducted in the presence of the jury. He was permitted to testify that the deceased told him that "Amos shot him, and he struck him," and thereupon the defense moved to strike out the question and answer, and the court then on his own motion excluded all the testimony of the witness, and instructed the jury not to consider any of it. Both the state and the defense excepted to the court's action, and the defendant insists here that the court erred in permitting any of the witness' testimony to be introduced and then striking it out, because of the impression it would make on the minds of the jury, and which they could not eradicate by being told to do so. The claim is that the court should have known, before admitting the evidence to the jury, whether or not it was properly admissible. The general rule is that preliminary questions to determine the admissibility of such evidence may be conducted in the presence and hearing of the jury, or otherwise at the discretion of the trial court; but if had in the absence of the jury and the evidence is decided to be admissible, then all of the preliminary evidence must be again given to the jury, because ultimately it is for the jury to determine, in weighing the declaration, whether or not it was made when the deceased was in extremis and conscious of his condition; it is error to remove these questions from their consideration. 21 Cyc. p. 985. No motion was made by the defense to have the preliminary examination made out of the hearing of the jury. The evidence of the declaration was excluded on motion of the defendant, and we fail to see wherein complaint can be made because the motion was sustained. Error will often creep into jury trials, and it is usual and proper for the court, upon perceiving it, to instruct the jury to disregard the error. Often it is accomplished by written instruction. A verbal instruction at the time of the happening is more effective. The judge should not have permitted the dying declaration to go to the jury until he concluded that the proper foundation had been laid. If it was error, the error has been cured by the instruction to disregard it.

[12] Error is predicated on the refusal of the court to permit the medical expert, Dr. C. A. Wingerter, to answer some of the hy-

pothetical questions propounded to him by the defense on the theory that the shot was fired by the defendant as a result of reflex muscular action, caused by the blow from the policeman's mace. The claim is made that the full probative value of the evidence was destroyed because the court did not permit the questions to contain a full statement of all the facts and circumstances, as interpreted by the defense, which led up to what occurred when the fatal shot was fired, and the blow from the mace given. An inspection of the record discloses that the various questions which the witness was allowed to answer, considered together, detailed all of the essentials necessary for a full presentation of the theory of the defense. The questions took a wider range than necessary. It was not necessary to state in detail in the hypothetical questions all of the evidence leading up to the time when the blow was struck in order for the witness to determine whether reflex action of the muscles caused the firing of the pistol when the blow was struck. These details could shed no light upon whether the blow would produce that physical result. It was in the discretion of the court to require irrelevant facts to be omitted. That irrelevant facts should be excluded from such questions is an obvious, not to say instinctive, exercise of administrative power. *Ruschenberg v. Railway Co.*, 161 Mo. 70, 61 S. W. 626.

[14] The defendant was asked if he and the deceased did not take a drink of liquor together the day before the shooting in defendant's office, and the court refused to permit the witness to answer. We can see no reason why this question should not have been answered. It was admissible to show a friendly feeling between them. The question of enmity or friendship existing between the parties prior to a homicide is admissible to show the mental attitude of each toward the other. The element of malice in this, as in all other cases of like character, is one of the essential matters of inquiry, and evidence tending to show a friendly relation between the slayer and his victim is relevant to rebut any presumption of malice. *O'Boyle v. Com.*, 100 Va. 785, 40 S. E. 121.

Another assignment of error is that the court would not permit the defendant to show that his intoxication was the result of

the use of liquor taken as a preventative of the influenza—a malady then prevalent in the community—an excuse for his intoxicated condition. Voluntary intoxication is no excuse for crime, a rule of law so well settled and approved by reason and experience that to permit one to give excuses for drinking to intoxication, and hence to excuse his acts while in that condition, would destroy its efficacy. Excuses for the use of liquor as a medicine for existing or contemplated sickness would then be the rule, without much exception, in cases of this character.

[15] We have examined defendant's assignment of error contained in bill of exceptions E. 46. Luther Connor was introduced to contradict the evidence of Pat Taylor, who had stated that he had accompanied the policeman to the scene of the shooting, and that he accompanied him there for the purpose of watching defendant, who was intoxicated, to see that he did no harm to any one, and for no other purpose. Connor, who was a stranger in the town, had heard some man who was accompanying the policeman that night, both going in the direction of the place where the affray occurred, say, "By God, I will help arrest him." When asked if he recognized Pat Taylor as the man who made the remark, he replied, "I couldn't swear he was, or who was who, that night. I was a perfect stranger in Pine Grove." He was then asked if Taylor had not told him he was with the policeman that night, and the court refused to permit the witness to answer. No foundation for a contradiction had been laid. The evidence was uncertain and remote. It was not error to refuse it.

There are other assignments of error to the action of the court in refusing to allow witnesses called for the purpose of contradiction to give evidence, because proper foundations for contradiction had not been laid, which we do not deem important to pass upon. If the points upon which they were called to contradict are material, proper foundations can be laid and the evidence permitted on a new trial.

The judgment of the circuit court of Wetzel county will be reversed, the verdict of the jury set aside, and the case remanded for a new trial.

Reversed and remanded.

(117 S. C. 90)

SEACOAST PACKING CO. v. SCHEIN.
(No. 10705.)

(Supreme Court of South Carolina. Aug. 1, 1921.)

1. Pleading \S 354(2)—Defense that stock subscription made on faith of representations full amount of stock subscribed properly stricken where based on mere rumor.

In an action for the unpaid balance of a stock subscription, there was no error in striking out a defense that such subscription was made on the faith of the representation that the full amount of the capital stock had been subscribed for by bona fide subscribers, where such defense was based on mere rumor, and not connected with plaintiff or its duly authorized agents.

2. Pleading \S 359—Defense that stock subscription became binding only after full amount of capital stock subscribed erroneously stricken.

In an action for the balance of a stock subscription, a defense that such subscription, by its terms, became binding only after the full amount of the capital stock had been subscribed was not subject to being stricken out as sham; it setting up a violation of the terms of the subscription.

3. Pleading \S 359—Defense subscription made on agent's assurance person objectionable to subscriber would not be made director erroneously stricken.

In an action for the balance of a stock subscription, a defense that such subscription was made on the assurance of the corporation's agent that a certain person objectionable to defendant would not be made a director cannot be stricken out as sham, being based on a violation of the conditions of the subscription.

Cothran, J., dissenting.

Appeal from Common Pleas Circuit Court, of Beaufort County; J. W. De Vore, Judge.

Action by the Seacoast Packing Company against D. Schein. Judgment for plaintiff, and defendant appeals. Modified.

Moffatt & Marion, of Columbia, and C. M. Aman, of Beaufort, for appellant.

W. J. Thomas, of Beaufort, for respondent.

FRASER, J. This is a case similar to the case of Seacoast Packing Co. v. Long, filed herewith, 108 S. E. 159.

The complaint alleges that the defendant subscribed in writing for 10 shares of the capital stock of the plaintiff corporation, and had failed to comply with the terms of his contract. An order was made on motion of the plaintiff striking out the second, third, and fourth defenses. From this order the defendant appealed.

[1] I. There was no error in striking out the second defense. This defense was based on mere rumor, not connected in any way

with the plaintiff or its duly authorized agents.

[2] II. The third defense sets up a violation of the terms of his subscription, and is not subject to being stricken out as sham.

[3] III. The fourth defense is based upon the violation of the conditions of defendant's subscription and cannot be stricken out as sham.

The judgment appealed from is modified.

GARY, C. J., and WATTS, J., concur.

COTHRAN, J. (dissenting). Action to recover a balance of \$800 upon a subscription of \$1,000 to the capital stock of a proposed corporation. The defendant admitted making the subscription, but alleged as defenses to the action: (1) A general denial; (2) that his subscription was made upon the faith of the representation that the full amount of the capital stock, \$150,000, had been subscribed for by bona fide subscribers; (3) that his subscription by its terms became binding only after the full amount of the capital stock had been subscribed; (4) that his subscription was made upon the assurance of the agent of the corporation that a certain person objectionable to him would not be made a director in the corporation; (5) that the whole amount of the capital stock had not been subscribed for; that the assurance as to the election of the undesirable citizen had not been kept; (6) other matters not material to the present inquiry; (7) that his subscription and the payment made thereon were made and obtained by false statements and representations of the plaintiff's representative, relied upon by the defendant; (8) counterclaim for the \$200 paid in.

Upon motion of plaintiff's attorney the circuit judge passed an order striking out as frivolous, sham, and irrelevant the second, third, and fourth defenses epitomized, "except any allegations of fraud that may be contained therein."

Should there be any merit in the defenses, the order should be reversed as utterly incapable of execution. To strike out all of the allegations of fact constituting the alleged fraud and leave only the bald allegations of fraud would render that which was left without supporting allegations. Should there be no merit in them, the whole of them, including the allegations of fraud, should have been stricken. The several defenses above outlined as (2), (3), and (4) will therefore be now considered.

The first defense is based upon the alleged false representation that the entire capital stock of \$150,000 had been subscribed for by bona fide subscribers. This, if made, was the representation of a fact, material to the defendant, upon which he relied, and, if false and fraudulent, avoided his subscription.

"Any false statement by the authorized agents of a corporation, in regard to the past or present status of the corporate enterprise, or material matters connected therewith, whereby subscriptions are obtained, is a fraudulent representation. Thus a false statement that a certain amount of stock had been subscribed for * * * has been held to constitute a fraudulent representation, entitling the subscriber induced thereby to subscribe, to the remedies provided for him by law in such cases. In all these cases, however, the distinction between statements relative to the prospects and capabilities of the enterprise and statements specifically specifying what does or does not exist must be carefully borne in mind. The former are matters of opinion; the latter are material representations, and are fraudulent if false." 1 Cook, Corp. (6th Ed.) § 145.

Such representations by promoters or solicitors of stock are binding upon the corporation when it adopts the subscription as shown by suit thereon. See opinion of the writer hereof in the case of Seacoast Co. v. Long, filed herewith, 108 S. E. 159.

The third defense is based upon the allegation that the defendant's subscription by its terms became binding only after the full amount of the capital stock had been subscribed. It must be assumed from the allegations of the answer that this condition was contained in the contract of subscription, as a part of it. If so, the defendant has the right to stand upon the condition which was entirely reasonable. Whether or not he may be able to establish it upon the trial is another question.

The fourth defense is based upon the breach of the assurance that a certain person would not be elected a director. This is not the representation of a fact, but an assurance or promise, of which the defendant is not entitled to avail himself, unless it is shown to have been a part of his contract of subscription, as indicated in the Long Case.

The judgment of this court should be that the order appealed from be reversed.

(117 S. C. 76)

STATE v. GOSSETT. (No. 10707.)

(Supreme Court of South Carolina. Aug. 25, 1921.)

1. Courts \S 64(2)—Power to call special term of court of general sessions sustainable under Constitution.

The power to call a special term of the court of common pleas and general sessions, conferred on the Chief Justice of the Supreme Court or the presiding Associate Justice by Code Civ. Proc. 1912, § 33, and Civ. Code 1912, § 3840, is sustainable under the provisions of Const. art. 5, § 6, directing the General Assembly to provide by law for the temporary appointment of any person learned in the law to hold either special or regular terms of the circuit courts.

2. Constitutional law \S 26 — Legislative powers ample, except where limited.

The general legislative powers of the General Assembly are ample, except where limited by the Constitution.

3. Courts \S 64(2)—Power to call special term not absolute.

The power to order a special term of court, conferred on the Chief Justice of the Supreme Court or the presiding Associate Justice by Code Civ. Proc. 1912, § 33, and Civ. Code 1912, § 3840, is not an absolute power, but controlled by considerations safeguarding the rights and interests of those whose rights and interests will be determined by the special tribunal.

4. Constitutional law \S 259 — Courts \S 64 (3)—Act providing for calling of special term of general sessions at instance of solicitor a denial of "due process of law."

Civ. Code 1912, § 3841, providing that, on application to the Governor by the solicitor of any circuit, stating that public interest demands an extra term of the court of general sessions in any county, etc., it shall be the duty of the Governor to appoint some man learned in the law to hold an extra term of the court, etc., held violative of Const. U. S. Amend. 14, and Const. S. C. art. 1, § 5, in their guaranties of due process of law.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Due Process of Law.]

Appeal from General Sessions Circuit Court of Abbeville County; Thos. S. Sease, Judge.

Kenneth Gossett was convicted of rape, and he appeals. Judgment reversed, and case remanded.

Bonham & Price, of Greenville, and M. L. Bonham, of Anderson, for appellant.

H. S. Blackwell, Sol., of Laurens, George Bell Timmerman, of Lexington, and J. Howard Moore, of Abbeville, for the State.

COTHRAN, J. The defendant, Kenneth Gossett, was indicted, with his cousin, John Gossett, at a special term of the court of general sessions for Abbeville county, upon the charge of rape. The crime was alleged to have been committed upon the person of a young woman of that county, near Abbeville, on March 14, 1920. A true bill was rendered on April 5, 1920. The trial was entered upon, after the usual three days allowed, on April 8th. After the testimony was concluded the presiding judge directed a verdict of not guilty in favor of defendant John Gossett, and he was discharged. The jury rendered a verdict of guilty, with recommendation to mercy, as to the defendant Kenneth Gossett, and, after the refusal of a motion for a new trial, he was sentenced to imprisonment for 40 years. He has appealed to this court from said judgment.

Upon the threshold of this appeal we are

confronted with the objection of the appellant to the legality of the court which condemned him. It is contended that section 3841, vol. 1, Code of Laws A. D. 1912, under which the special court was ordered and held, is violative of the Fourteenth Amendment to the Constitution of the United States, which provides:

"Nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws"

—and of article 1, section 5, of the Constitution of South Carolina, which provides:

"Nor shall any person be deprived of life, liberty or property without due process of law, nor shall any person be denied the equal protection of the laws."

A determination of the issue thus raised requires a statement of the proceedings leading up to the ordering of the special term and the appointment of the presiding judge, and a consideration of the constitutional and statute law which controls the matter.

On March 18, 1920, four days after the commission of the alleged crime, the solicitor of the circuit made application in writing to the Governor of the state, stating that the public interest demanded that a special term of the court of general sessions for Abbeville county be held, and petitioning that it be called to be held at Abbeville on April 5th. Acting upon that application and petition, the Governor issued an order, dated March 18th, which, after reciting the fact of said application and petition, directed that such special term be held as requested.

Thereupon the Chief Justice of this court issued an order, which, after reciting the fact that the Governor had ordered the special term as stated, assigned the Honorable Thomas S. Sease, judge of the Seventh circuit, as a disengaged circuit judge, to hold the court. Accordingly Judge Sease appeared at the appointed time, opened the court, organized and charged the grand jury, and submitted to them the indictment against the defendants. The grand jury promptly returned a true bill against both of the defendants, and the other proceedings above narrated followed in due course.

Section 3841, vol. 1, Code of Laws A. D. 1912, reads thus:

"Upon the application to the Governor by the solicitor of any circuit, stating that the public interest demands an extra term of the court of general sessions in any county of the state, or upon the application of the majority of the members of the bar of any county, stating that the civil business demands an extra term of the court of common pleas, it shall be the duty of the Governor to appoint some man, learned in the law, and to be suggested by the Chief Justice of the Supreme Court of the state, to hold

an extra term of said court or courts in said county, and notify the clerk of said court of said appointment."

Prior to the enactment of this statute the process for ordering special terms of court was as follows:

Section 33 of the Code of Civil Procedure provided (and still provides):

"Special sessions of the courts of common pleas or general sessions may be held whenever so ordered, either by the Chief Justice or by the circuit judge at the time holding the circuit court of the county for which the extra term may be ordered, of which extra term such notice shall be given as the Chief Justice or the circuit judge so ordering the same may direct. If such extra term of either or both the courts aforesaid be ordered by the Chief Justice, he may order any one of the circuit judges to hold the same; but if such extra term be ordered by a circuit judge, as hereinbefore provided, then such extra term shall be held only by the circuit judge so ordering the same."

Section 3840 of volume 1 is as follows:

"Whenever any circuit judge, pending his assignment to hold the courts of any circuit, shall die, resign, be disabled by illness, or be absent from the state, or in any case of a vacancy in the office of circuit judge of any circuit, or in case the Chief Justice or presiding Associate Justice of the Supreme Court shall order a special court of common pleas and general sessions, or common pleas or general sessions, in any county in this state, upon a satisfactory showing that such special court is needed, the Chief Justice or presiding Associate Justice may assign any other circuit judge disengaged to hold the courts of such circuits, or to fill any appointment made necessary by such vacancy, or to hold such special court; and in the event that there be no other circuit judge disengaged, then the Governor, upon the recommendation of the Supreme Court, or the Chief Justice thereof if the Supreme Court be not in session, shall immediately commission as special judge such person learned in the law as shall be recommended to hold courts of such circuit or to hold such special court for that term only."

The Constitution (article 5, § 6) provides:

"The General Assembly shall provide by law for the temporary appointment of men learned in the law to hold either special or regular terms of the circuit courts, whenever there may be necessity for such appointment."

From these provisions, it is apparent that at the time of the passage of the act of 1900 (section 3841) the following processes were ordained (and are still of force) with reference to the ordering of special terms:

(1) A special term might be ordered by the Chief Justice or presiding Associate Justice of the Supreme Court, upon a satisfactory showing that such court was needed.

(2) A special term might be ordered by the circuit judge at the time holding the

circuit court of the county for which the special term was to be ordered.

(3) When the special term should be ordered by the Chief Justice or by the presiding Associate Justice, he was authorized to assign any disengaged circuit judge to hold the court, or if there be none so disengaged, the Supreme Court, if in session, or the Chief Justice, if not, should recommend for appointment as special judge to hold the court some person learned in the law, whom the Governor should immediately commission as special judge for the purpose.

(4) When the special term should be ordered by the circuit judge at the time holding court, it could be held only by the circuit judge who may have ordered it.

Thus, under the legislation as it stood then, the power to order a special term was vested exclusively in the Chief Justice, the presiding Associate Justice, and the circuit judge holding court at the time for the county in which the special term was to be ordered. The persons authorized to preside as judge of such special court were limited to (1) a disengaged circuit judge, to be assigned by the Chief Justice or the presiding Associate Justice; (2) a person learned in the law, in the event that there should be no circuit judge disengaged, to be commissioned by the Governor as special judge, upon the recommendation of the Supreme Court, if in session, or of the Chief Justice, if not; (3) the circuit judge who may have ordered the court.

[1, 2] The power thus conferred by section 33 of the Civil Code and 3840 of the Code of Laws, is easily sustainable under the provisions of the Constitution (article 5, section 6) quoted above, as necessarily implied therein, or referable to the general legislative powers of the General Assembly, which are ample, except where limited by the Constitution.

[3] It is not an absolute power, but is controlled by considerations which safeguard the rights and interests of those whose rights and interests will be determined by such tribunal. In the first place, the discretion to be exercised in ordering the special term is vested in the Chief Justice, the supreme custodian of the judicial interests of the state absolutely impartial, non-partisan, unmoved by the clamor of the mob. "Far from the madding crowd's ignoble strife," equally solicitous that harm may not come from the "law's delays" or from impetuous haste; a calm discretion to be exercised. In the next place, it is a discretion to be exercised as a judicial function: "Upon a satisfactory showing that such special court is needed." The Chief Justice hears and determines.

There cannot be a question but that the power thus conferred is directed to be exer-

cised in a fair, just, and reasonable manner, affording, in the judicial exercise of discretion by a supreme, impartial, judicial officer, a sure guaranty of due process of law and the equal protection of the laws. The law has been broken and demands prompt punishment of the offender; the law guarantees to the accused a fair trial; the public interest is as much involved in the sanctity of this guaranty as in the swift retribution which should follow crime. A fair trial means a trial before an impartial judge, an honest jury, and in an atmosphere of judicial calm. It requires a wise, fearless, and impartial mind to harmonize these elements of the public interest, lest in its haste to deal a blow the law may perpetrate a judicial wrong. Happily the law had provided for the just resolution of this difficulty.

[4] Then followed the act of 1900 (section 3841), which has thrown to the winds the sensible and just guaranties afforded by the then existing law. It makes no provision for a showing, a hearing, or a determination of the fact that the public interest, which, as we have seen, includes the guaranty of a fair trial to the accused, demands a special court. It makes no provision for the determination of this question, so vital to the rights of the accused, by an impartial authority. Unlimited, except by his conception of what the public interest demands, which is no limitation at all, the absolute power to set in motion the machinery which inevitably must result in the ordering of a special court is vested in the solicitor of the circuit, the paid prosecutor, representing an adverse interest, necessarily a partisan, a political and not a judicial officer. Upon his application to the Governor, stating, without showing, that the public interest demands an extra term, the Governor has no discretion:

"It shall be the duty of the Governor to appoint some man learned in the law and to be suggested by the Chief Justice * * * to hold an extra term. * * *"

The Chief Justice has no discretion in the matter, except the naming of the special judge. The momentum of the solicitor's ipse dixit is irresistible. A startling difference between the two procedures—the one, providing for due application, a presentation of reasons, and a judicial determination by a judicial officer; the other, a statement by a partisan official, without showing or determination of facts, and without the exercise of discretion by any one. It enables him, without the slightest consideration for the rights of the accused, to select his own time for the sacrifice, close on the heels of the crime, when righteous indignation has degenerated into a rabble cry of "Crucify him!" Into that atmosphere he invites

the accused to a "fair trial"; it would be indeed "committere agnum lupo."

The defendant, however guilty in point of fact he may be, is entitled to be tried in an orderly manner; not only by an impartial judge and a jury representative of the law-abiding intelligence of the county, but in a calm judicial atmosphere where the serene deliberations of those arbiters of the law and the facts may not be affected by that subtle psychological influence of the mob, which, though silent and unseen, is sometimes tremendously felt. It was the influence of the mob that provoked the unrighteous and cowardly judgment of Pilate, who sought to wash his hands of his own blood-guiltiness, and yet delivered the Nazarene for crucifixion. The time of the trial, the circumstances surrounding the court, the inflamed condition of the public mind, the nature of the crime, are matters of the gravest concern to the defendant and bear heavily upon the opportunity for a fair trial guaranteed to him by the Constitution. Should the public prosecutor, the active, interested adversary of the defendant, be clothed with the absolute authority to prepare the altar for the sacrifice at a time and under circumstances which practically guarantee a sacrifice? Is that due process of law, and affording to the defendant the equal protection of the laws?

Under the section being discussed, the solicitor is not required to give the grounds of his opinion that the public interest demands a special court; he is not even required to have such an opinion, except what might be implied from the simple statement to that effect; he has shown no grounds suggesting that the public interest demanded such impetuous haste. The public interest is greater in securing the constitutional rights of the accused than in responding to public clamor for a victim. What was the reason, therefore, for ordering a special court? It could not have been the crowded condition of the docket, for the Gossett case was the only one contemplated to be tried, and when that trial was over the court was functus officio. It could not have been that the business of the court could not wait the regular term, soon to be held, for the reason that no other case was called. We are constrained to believe that it was called at the initiation of the able and zealous solicitor, for the purpose of securing the prompt punishment of the perpetrators of an abominable crime, under circumstances which would warrant that expectation, without consideration for the constitutional rights of the accused.

We do not intend the slightest criticism of his conduct in the matter; he had the right under that statute, if it was a valid stat-

ute, to do exactly as he did; the criticism is directed against the statute, which permits the occasion for and the selection of the time for holding the court to be fixed at the arbitrary suggestion of the state's prosecuting officer, without the slightest consideration for the interests of the accused, or of the necessarily prejudicial atmosphere which may, and in this case certainly did, surround the trial. This court has declared:

"It is greatly to be regretted that it should be necessary to hold a trial in any other than calm and judicial atmosphere." *State v. Bethune*, 93 S. C. 195, 200, 75 S. E. 281.

If that be true, it is a right of the accused, as near as may be, that he be tried in such an atmosphere. Should that right be annihilated at the arbitrary will of the prosecuting officer, the representative of the adversary interest? We use the word "arbitrary," not in an offensive sense, but in the sense of the uncontrolled exercise of will, responsible to no one, and operative without even the exercise of discretion. That such a procedure does not conform to the requirements of the Constitution is perfectly clear, from the following definitions of "due process of law":

"Due process of law requires judicial investigation and determination of the rights." *Ex parte Tillman*, 84 S. C. 552, 562, 66 S. E. 1049, 26 L. R. A. (N. S.) 781.

"In the due course of legal proceedings, according to those rules and forms which have been established for the protection of private rights." *Kennard v. Louisiana*, 92 U. S. 480, 23 L. Ed. 478.

"They then mean a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights. To give such proceedings any validity, there must be a tribunal competent by its Constitution—that is, by the law of its creation—to pass upon the subject-matter of the suit." *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565.

"In all cases, that kind of procedure is due process of law which is suitable and proper to the nature of the case, and sanctioned by the established customs and usages of the courts." *Ex parte Wall*, 107 U. S. 265, 2 Sup. Ct. 569, 27 L. Ed. 552.

"The clause in question means, therefore, that there can be no proceeding against life, liberty, or property, which may result in the deprivation of either, without the observance of these general rules established in our system of jurisprudence for the security of private rights." *Hagar v. Reclamation Dist.*, 111 U. S. 701, 4 Sup. Ct. 663, 28 L. Ed. 569.

"Law, in its regular course of administration through courts of justice, is due process, and, when secured by the law of the state, the constitutional requisition is satisfied." *Caldwell v. Texas*, 137 U. S. 692, 11 Sup. Ct. 224, 34 L. Ed. 816.

And due process is so secured by laws operating on all alike, and not subjecting "the in-

dividual to the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice." *Bank v. Okely*, 4 Wheat. 235, 4 L. Ed. 559.

"It follows that any legal proceeding enforced by public authority, whether sanctioned by age and custom, or newly devised in the discretion of the legislative power, in furtherance of the general public good, which regards and preserves these principles of liberty and justice, must be held to be due process of law." *Reetz v. Michigan*, 188 U. S. 505, 23 Sup. Ct. 390, 47 L. Ed. 563.

The circumstances of this trial demonstrate beyond a doubt that the defendant, under the operations of this section which we are considering, was not convicted by due process of law and was denied the equal protection of the laws. We refer to them, not so much for the purpose of granting the defendant a new trial upon that ground, but for the purpose of demonstrating the operation of the procedure under section 3841, and to sustain our conclusion that, at least so far as the criminal court is concerned, it is violative of the constitutional provisions that have been quoted.

The crime is alleged to have been committed on March 14th; on March 16th, two other young men, not the defendants, were arrested at Greenwood, charged with the crime; they were not carried to the Abbeville jail, but were rushed to the state penitentiary in Columbia for safe-keeping; on March 16th, the young women involved went to Columbia to identify the prisoners; they stated that the young men arrested were not the guilty parties; on March 17th the defendants were arrested, one at his home in Honea Path, Anderson county, and the other in Greenville; they were taken to Anderson, not Abbeville, and were identified by the young women; thence they were taken, not to Abbeville, but by way of Greenville and Spartanburg, to the state penitentiary; on March 18th the solicitor made application for a special court, himself fixing the date, and on the same day the Governor ordered a special court to be held at Abbeville on April 5th; on March 20th the Chief Justice designated Judge Sease to hold the court. The defendants were detained in the penitentiary for about a week, and were then transferred, not to Abbeville, but to Greenville jail, for convenient access by their counsel, attorneys of Greenville; there they were kept until the morning of the opening of the special court at Abbeville, when they were transferred to the Abbeville jail. The foreman of the grand jury of Abbeville county made affidavit to the effect that the defendants could not safely be brought to Abbeville county on account of prevailing hot sentiment; the sheriff of the county recommended to the Governor military protection during the trial that was approaching; more than 100 affidavits were submitted by

the defendants upon their motion for a change of venue on the ground that a fair trial could not be had; the motion was refused. The defendants moved for a continuance of the case upon the ground that defendants had not had sufficient time to prepare their defense, their counsel residing in another county, and the defendants being a part of the time in the state penitentiary, and that every member of the bar of Abbeville had been approached for the purpose of assistance, but without avail; the motion was refused. The failure to employ local assistance in the defense among the members of the bar at Abbeville is a striking index of the condition of public sentiment.

Notwithstanding the fact that section 4020 of the Code of Laws requires that ten days' notice of the drawing of the jury shall be given, only five days had been given. A motion to quash the venue was made upon this ground and refused. If the statutory notice had been given, the court could not have been held at the appointed time. But it had to be held, and the slight matter of a statutory regulation must not stand in the way. If the special court had been legally ordered, of course every other case upon the calendar could have been tried. The trial of no other case than the Gossett case was suggested. The court was ordered to try the Gossetts. A side light on the drawing of the jury clearly shows this. The names of two jurors drawn were discarded—the one upon the ground that he was related to the prosecutrix in the Gossett case; the other upon the ground that he was related to the young woman who was a companion of the prosecutrix upon the occasion of the alleged crime. This may have presented a ground for objection to the competency of these jurors upon the trial of the case, but it presented no ground for excluding them from the panel, which in contemplation of law was drawn to try every case then on the docket. Their exclusion is conclusive of the purpose which was in the minds of all concerned, of the ordering of the special court—to try the Gossetts.

A striking circumstance occurred during the trial which reflects the fully appreciated temper of the spectators and their sullen determination that justice as they conceive it should not be balked. At the close of the testimony the circuit judge directed a verdict in favor of one of the defendants, John Gossett; the record contains this statement:

"As soon as this motion was granted, under arrangement of the court and court officials, John Gossett was handcuffed as though he were being carried back to jail and quietly slipped out the rear entrance of the courthouse and placed in an automobile and sent out of the county with all possible speed."

We are convinced that the procedure provided in this section is a bald concession to the spirit of mob law, and presents the spec-

tacle of the law, strong and mighty, bowing to the despotism of the mob, which has been declared to be greater than the tyranny of a despot. It provides a miserable compromise with lynch law, enabling the law to bargain with the mob to stay its hand, and allow the court, under the forms of law, to accomplish what is equally as reprehensible, a judicial lynching. It is notorious that such bargains have been made; the angry mob has been appeased by the promise of a quick special court to try the offender, under circumstances that render his conviction inevitable.

There can be no compromise with the spirit of lynching for any crime. Those who compose such a mob are themselves without the pale of law, and commit a crime, not only against the victim of their vengeance, but against the majesty of the law. They are not entitled to recognition as legitimate parties to a compact. They trample under their dusty feet the pandects of our civilization and spit upon the sacred rights of the individual. The law ought to be, and is, strong enough to treat them as criminals. It seems hardly necessary to say that, in the discussion and decision of this question, the court is entirely impersonal, without the slightest purpose to reflect upon the character or conduct of the solicitor of the Eighth circuit, whose ability and character render such reflection impossible.

The court deems it unnecessary to consider the other questions raised by the exceptions.

The judgment of this court is that the judgment appealed from be reversed, and that the case be remanded to the court of general sessions for Abbeville county for proceedings conformable to law.

GARY, C. J., and WATTS and FRASER, JJ., concur.

(117 S. C. 60)

BLACKWELL v. FAUCETT. (No. 10708.)

(Supreme Court of South Carolina. Aug. 26, 1921.)

1. Judgment \S 250—No recovery on cause of action not pleaded.

Where plaintiff's cause of action for conversion of certain shingles and cement was based on a contract for the purchase of the land on which the shingles and cement were placed, plaintiff cannot recover for the conversion on any theory of annexation of the material to the land.

2. Justices of the peace \S 141(2)—Equitable relief improperly granted in circuit court on appeal from magistrate.

Where the case was before the circuit court on appeal from a magistrate, it should have been decided on the jurisdictional facts as they existed in the magistrate's court, and an equitable remedy, not enforceable in the magistrate's court, was improperly granted.

3. Justices of the peace \S 47—Where reformation of contract for sale of land essential to recovery, magistrate was without jurisdiction.

Where plaintiff sued for conversion of shingles and cement, claiming title because they were sold to him with the tract of land on which they were placed, and were included in the trade evidenced by the written contract for the sale of the land, which contract did not in fact refer to them, reformation of such contract to include them was essential to plaintiff's recovery, and therefore a magistrate was without jurisdiction.

4. Evidence \S 397(1)—Court can look only to terms of written contract.

When the parties have reduced their contract to writing, the court can look only to the terms in which the parties have expressed their intention in such writing.

Gary, C. J., dissenting.

Appeal from Common Pleas Circuit Court of Cherokee County; Ernest Moore, Judge.

Action by Joe Blackwell against W. T. Faucett. From a judgment for plaintiff, defendant appeals. Judgment reversed.

Dobson & Vassy, of Gaffney, for appellant.
G. W. Speer, of Gaffney, for respondent.

COTHRAN, J. Action in magistrate court for \$100, the value of certain shingles and cement alleged to be the property of the plaintiff, and wrongfully converted to his own use by the defendant. Judgment for the plaintiff; appeal to circuit court; judgment of magistrate affirmed; defendant appeals.

These are the facts of this controversy, as we gather them from the record:

In the fall of 1919, the plaintiff, Blackwell, bargained with the defendant, Faucett, for a tract of land at the price of \$3,500, payable \$100 cash, the assumption of an outstanding mortgage of \$600, and \$2,800 on January 2, 1920; they entered into a written contract expressing these terms; on January 2, 1920, Blackwell complied with the terms of the sale, received from Faucett a deed conveying the premises, and on January 5th moved in and took possession. It appears that there was a lot of cement and shingles upon the premises when Blackwell bargained for the place, worth \$89, which Faucett carried away with him when he moved out. Blackwell, upon finding that out, demanded the cement and shingles from Faucett, claiming that they were specifically included in the trade for the land, all covered by the agreed price. Faucett refused to deliver them, and this suit, in magistrate's court, resulted. The cement and shingles are not mentioned either in the written contract or in the deed.

Upon the trial in magistrate's court the plaintiff was allowed over the defendant's objection to testify that he had bought the

land, cement, and shingles, for \$3,500; two witnesses for him were allowed to state the terms of the trade to have been as plaintiff testified. The ground of the defendant's objection to all of this testimony was that it tended to vary and add to the terms of the written contract referred to, and of the deed. The objection was overruled by the magistrate, who, after taking the defendant's testimony, denying that the cement and shingles were included, rendered judgment in favor of Blackwell for their value, \$39. On appeal to the circuit court the presiding judge affirmed the judgment of the magistrate, intimating, without expressly deciding, that the parol testimony may have been admissible upon the theory that the material was placed upon the premises for annexation, and therefore passed with the land, but really basing his decision upon the fact of mistake in the written contract not expressing the oral agreement. He realized the difficulty of giving effect to this conclusion without a reformation of the contract, which, being an equitable remedy, could not be enforced in the magistrate's court; he evaded the difficulty by holding that, as the case was then in the court of common pleas, which did have equitable jurisdiction, the plaintiff might invoke its unlimited power to accomplish the reformation.

[1] It is a sufficient answer to the suggestion relating to the annexation of the material to say that no such claim was made by the plaintiff, whose cause of action was distinctly upon the contract.

[2] As to the other position taken by the circuit judge, it cannot be sustained, for the reason that the case was before him on appeal, not originally, and of course should have been decided upon the jurisdictional facts as they existed in the magistrate's court. It might with equal propriety be contended that, if the action had been for the recovery of real estate in the magistrate's court, on appeal the court of common pleas would have had the power to "give judgment according to the justice of the case."

[3] The real question for determination by this court is whether, under the circumstances, a reformation of the written contract was essential to the plaintiff's recovery. If it was, the magistrate's court was clearly without jurisdiction. That it was essential appears too apparent for argument. The plaintiff's cause of action was upon the contract; he claimed title to the cement and shingles by reason of the fact that they were sold to him with the tract of land—that they were included in the trade evidenced by the written contract. As a matter of fact, no reference is made to them in the written contract, and if they can be said to have been included in the written contract that result can only be accomplished by showing that they were included in the oral agreement

which preceded the written contract, and by mistake were omitted. This would present a clear case for reformation of the written contract, and for recovery upon it when so reformed. Until it has been reformed the plaintiff suing upon it is met with the rule forbidding parol evidence under the circumstances.

[4] There is no more wholesome rule of law, in my opinion, than that announced in *Lagrone v. Timmerman*, 46 S. C. 411:

"When the parties have reduced their contract to writing, the court can only look to the terms in which the parties have expressed their intention in such writing."

And quoting from 1 Greenl. Ev. § 275:

"When parties have deliberately put their engagements into writing, in such terms as import a legal obligation, without any uncertainty as to the object or extent of such engagement, it is conclusively presumed that the whole engagement of the parties, and the extent and manner of their undertaking, was reduced to writing; and all oral testimony of a previous colloquium between the parties, or a conversation or declaration at the time when it was completed or afterwards, as it would tend in many instances to substitute a new and different contract for the one which was really agreed upon, to the prejudice, possibly, of one of the parties, is rejected."

"When a writing, upon its face, imports to be a complete expression of the whole agreement, and contains thereon all that is necessary to constitute a contract, it is presumed that the parties have introduced into it every material item and term, and parol evidence is not admissible to add another term to the agreement, although the writing contains nothing on the particular item to which the parol evidence is directed." 10 R. C. L. 1030.

The "primary right," as Mr. Pomeroy terms it (volume 2, § 911), of the plaintiff is legal, the right to recover the value of the cement and shingles which, under the contract, belonged to him, and which has been unlawfully converted to his own use by the defendant; the plaintiff's remedy is not upon the written contract for it makes no mention of these commodities, but it is a reformation of the written contract that it may correctly express the agreement of the parties by including these commodities which were through mistake omitted from the contract. His primary right being legal, and his remedy purely equitable, the jurisdiction of the court of equity is exclusive.

The magistrate's court, under the Constitution, having no equitable jurisdiction, it was impossible for the plaintiff to obtain in that court the essential relief to recovery. He was inexorably confined to his legal action upon the contract, which by its failure to establish the right to the commodities for which he sued rendered parol testimony of that element inadmissible. If the plaintiff in a law case upon a written contract can, without notice to the defendant, recover up-

on an element in the preceding parol agreement which, by mistake, was omitted from the written contract, there is no necessity in any case for the reformation of the contract.

It is declared in *Moore v. Edwards' Ex'rs*, 1 Bail. 23, that while "mistake" is a branch of equity jurisdiction, it is not exclusively so, except where a discovery is indispensable, or "the nature of the relief is such as to require the extraordinary aid of a court of equity." Without a reformation of the written contract the plaintiff cannot prove the omitted element upon which he relies, for he would thereby violate the rule against parol evidence; the law court could not reform a contract so as to render this testimony admissible; the equity court could; the plaintiff's ability, therefore, to introduce such testimony depended upon the relief which required, and could only be obtained by, "the extraordinary aid of a court of equity"; which demonstrates that the plaintiff's relief upon the ground of mistake could only be obtained in a court of equity. That case involved the simple correction of an error, a "mistake," in the application of a certain credit upon an execution, just as a law court could correct a similar error in a credit upon a note; it involved no feature of equitable cognizance; no reformation of the instrument, or other relief which required "the extraordinary aid of a court of equity"; and very properly the court held that the error could be corrected in a court of law. But here the plaintiff, in order to recover upon the omitted element, is obliged to invoke the extraordinary aid. So in the case of *Griffin v. Ry. Co.*, 66 S. C. 77, 44 S. E. 562, it was held that in a law case the question of fraud in the execution of a release, signed by the plaintiff, could be determined by the law court. It was simply the establishment of a fact which nullified the release, and no aid of the equity court was required. Other cases might be cited illustrative of the distinction between cases where a fact is allowed to be proved in a law case which defeats the adversary's contention, although it may be a matter of equitable jurisdiction, and cases where the extraordinary aid of a court of equity is invoked to afford certain relief upon the proof of such fact.

The very recent case of *Gill v. Ruggles*, 104 S. C. 461, 89 S. E. 503, is instructive. There parol evidence was held inadmissible to establish an agreement which was not included in the subsequent written agreement. No effort was made to reform the written agreement, and until it was reformed the evidence was not admissible.

The judgment should be reversed and the case remanded to the magistrate for a new trial. That being the opinion of a majority of the court, it is so ordered.

Judgment reversed.

WATTS and FRASER, JJ., concur.

Statement of Facts.

GARY, C. J. (dissenting). The facts as found by his honor the circuit judge are as follows:

"This cause came on to be heard upon appeal by the defendant from the judgment of the court of Magistrate J. B. Bell, in favor of plaintiff and against the defendant for the sum of \$89, the value of certain shingles and cement belonging to the plaintiff and wrongfully taken and converted to his own use by the defendant. The facts established by the evidence are as follows:

"Plaintiff and defendant were negotiating for the sale by the latter and the purchase by the former of a certain tract of land and certain cement and shingles then upon the lands and intended by the owner for use in the repair of buildings thereon. The final conclusion reached by the parties was that the defendant would sell and the plaintiff would buy the lands in question, including the shingles and cement, at and for the price of \$3,500, whereupon \$100 of the purchase price was paid by the plaintiff and a contract in writing was signed by the defendant for the execution by him of a deed of conveyance of the premises to the plaintiff upon the payment by the latter of the remaining purchase money upon a then future day therein specified. By a mutual mistake of the parties, there was no mention of the shingles and cement in this contract; but the fact that these chattels were intended by the parties to be conveyed along with the land is established by the evidence, although controverted by the defendant.

"The plaintiff having subsequently paid the credit portion of the purchase money, in pursuance of the contract, a deed of conveyance to him of the lands in fee simple was duly executed and delivered by the defendant; but, by reason of a continuance of the mutual mistake, this deed contained no direct reference to the shingles and cement now in controversy. It is established by the evidence, however, that it was the purpose and intention of the parties at the time that the title to the shingles and cement should pass by this conveyance.

"Upon taking possession of the land, in pursuance of this deed, the plaintiff discovered that the shingles and cement had been removed from the premises and converted to his own use by the defendant, and, thereupon, this action was brought in the court of magistrate for the recovery of the property so converted or the value thereof. The evidence has been taken, and there is no suggestion that any other testimony is available.

"There is very respectable authority for the proposition that chattels placed upon the premises by the owner, with the intention of annexing the same to the realty, thereby become a part of the freehold, and will pass by a deed of the premises as fixtures under the doctrine of constructive annexation. See 19 Cyc. 1042-1044. Certainly, this should be the effect of such a deed when such was the intention of the parties, as was the fact in the case at bar. The proof of such an intention by parol does not vary or contradict the writing in the contract or deed, as it merely serves to establish the status of the chattel as being a fixture, and passing by the deed.

"Even, however, if the shingles and cement here in controversy did not become fixtures by constructive annexation to the realty, under the contract between the parties plaintiff and defendant for the sale by the latter and the purchase by the former of the lands, including the shingles and cement, and the deed made in pursuance thereof, so as to pass the legal title to these chattels as fixtures, it still does not follow that the complaint in this case should be dismissed merely on account of the fact that the action was originally commenced in the court of magistrate."

The exceptions are as follows:

(1) "That his honor erred in finding and holding that the cement and shingles were intended by the owner for use in the repair of buildings on the premises. It is respectfully submitted that there is no testimony in the case to support such finding."

(2) "That his honor erred in finding as follows: 'The final conclusion reached by the parties was that the defendant would sell and the plaintiff would buy the land in question, including the shingles and cement, at and for the price of \$3,500.'"

(3) "That his honor erred in finding as follows: 'By a mutual mistake of the parties, there was no mention of the shingles and cement in this (written) contract, and that, by reason of a continuance of the mutual mistake, this deed contained no direct reference to the shingles and cement now in controversy.' It is submitted that there is no testimony, nor even a suggestion in the case, that the cement and shingles were omitted from the written contract and the deed, by mutual mistake, or by mistake of either of the parties."

(4) "That his honor erred in finding as follows: 'It is established by the evidence, however, that it was the purpose and intention of the parties, at the time, that the title to the shingles and cement should pass by this conveyance.' The contract for the purchase of the premises by the plaintiff and the deed of conveyance by the defendant to the plaintiff both being in writing and being conclusively presumed to contain the whole contract, it is respectfully submitted that there is no competent testimony to support the said finding."

(5) "That his honor erred in holding that title to the shingles and cement would pass with a conveyance of the real estate by reason of their being placed upon the premises with the purpose and intention of repairing buildings thereon, in that: First, there is no testimony that the cement and shingles were placed upon the premises for that purpose; and, second, that the cement and shingles, not being attached or annexed to the realty, became no part thereof, and will not pass with the land."

(6) "That his honor erred as a matter of law in holding that the circuit court should grant equitable relief in this case under section 407 of the Code of Civil Procedure or any other provision of law. That the case having been commenced in the magistrate's court, and there being no proper allegations for the granting of equitable relief, and the defendant having been put on no notice that such relief would be sought, his honor erred in granting conceived equitable relief."

(7) "That even if the court had authority and

power to grant equitable relief in this case, there is no testimony in the case entitling the plaintiff to equitable relief, for the reason that there is no testimony that the shingles and cement were omitted from the written contracts by fraud, duress, undue influence, or mutual mistake of the parties, and his honor erred in holding that the contract should be reformed, and in not reversing the judgment of the magistrate's court."

(8) "That his honor erred in affirming the judgment of the magistrate's court, and in not reversing said judgment upon each of the several and separate grounds contained in the defendant's appeal to the circuit court, each of which grounds is hereby made the basis of this exception."

Opinion.

The exceptions will be considered in their regular order.

First Exception.—This exception cannot be sustained, for the reason, that there was testimony tending to sustain the finding of fact by his honor the circuit judge; therefore such finding is not subject to review by this court. *Gossett v. Gladden*, 112 S. C. 144, 99 S. E. 752.

Second Exception.—For the reason just mentioned, and for the additional reason that this exception fails to specify the ground of error, it is also overruled.

Third Exception.—What was said in considering the first exception is conclusive of the question presented by this exception.

Fourth Exception.—The appellant's attorneys rely upon the rule thus announced in 1 Greenleaf on Ev. § 275:

"When parties have deliberately put their engagements into writing, in such terms as impart a legal obligation, without any uncertainty as to the object or extent of such engagement, it is conclusively presumed, that the whole engagement of the parties, and the extent and manner of their undertaking, was reduced to writing; and all oral testimony of a previous colloquium between the parties, or of conversation or declaration at the time when it was completed or afterwards, as it would tend, in many instances, to substitute a new and different contract for the one which was really agreed upon, to the prejudice, possibly, of one of the parties, is rejected."

The court after quoting the foregoing with approval, in the case of *Lagrone v. Timmerman*, 46 S. C. 372, 24 S. E. 290, says:

"In other words—as the rule is now more briefly expressed—parol contemporaneous evidence is inadmissible to contradict or vary the terms of a valid written instrument."

This case is cited by the appellant's attorneys, together with numerous other authorities sustaining this doctrine. There are, however, two exceptions to this general rule, as distinct and well recognized as the rule itself, to wit, fraud and mistake. In *Lee v. Lee*, 11 Rich. Eq. (S. C.) 574, it is said:

"If an instrument * * * absolute on its face can be converted by parol into a defeasible—

ble instrument, except where the omission to reduce the defeasance to writing was occasioned by fraud or mistake, the evidence must be very clear and convincing. * * * But if there be fraud, whether it consist in not executing a defeasance, or in misrepresenting the character of the instrument, or in any other way, it would be a reproach to the administration of justice if the perpetrator of the fraud could shield himself from detection and exposure by the abuse of rules instituted to prevent fraud. * * * In the language of the Supreme Court, 'the oral evidence is admissible in such cases upon the general principles of equity jurisprudence,' and to prevent the successful practice of such frauds under the shelter of any written papers, however precise and formal. The defendant's principal ground of appeal is because his agreement to reconvey the lands was a parol trust, and void under statute of frauds. But *Massey v. McIlwain*, 2 Hill Eq. 421, and *Kinard v. Heirs*, 3 Rich. Eq. 423, 55 Am. Dec. 643, establish that the statute cannot be used as an instrument of fraud."

The case of *Lee v. Lee*, 11 Rich. Eq. 574, is cited with approval in *Welborn v. Dixon*, 70 S. C. 108, 49 S. E. 232, 3 Ann. Cas. 407. The jurisdiction of the court in the exercise of its chancery powers is not exclusive in cases of fraud or mistake.

"Accidents and mistakes certainly constitute one branch of equity jurisprudence; but it is not peculiar, except when a discovery is indispensable, or the nature of the relief such as to require the extraordinary aid of chancery. Actions at law to recover back money paid by mistake constitute, in all the books of practice, a conspicuous class of causes, for which the action of assumpsit may be maintained at law; and there is no question that, in general, when the facts can be proved according to the rules of the common law, and the remedy is such as a court of law can administer, consistently, with the prescribed modes of proceeding, mistakes may be inquired into in a court of law. In the case under consideration, the plaintiff sued out a sci. fa. to revive a judgment against the defendant, and as evidence of payment, the defendant produces an execution, on which is indorsed the word 'satisfied;' the plaintiff replies it was so indorsed by mistake. There is nothing magical in the term itself. The evidence offered was admissible according to the rules of the common law, the relief such as a court of common law was competent to give, and the court, therefore, clearly had jurisdiction." *Moore v. Edwards' Ex'rs*, 1 Bail. 28.

This language is quoted with approval in the following cases: *Griffin v. Ry.*, 66 S. C. 77, 44 S. E. 562; *Hodges v. Kohn*, 67 S. C. 69, 45 S. E. 102; *Harris v. Harris*, 104 S. C. 33, 88 S. E. 276; and *Military Co. v. Fayonsky*, 113 S. C. 470, 101 S. E. 818. See, also, *Fass v. Ina Co.*, 105 S. C. 364, 89 S. E. 1040.

Nor is it necessary, under certain circumstances, for the facts upon which a party relies to show fraud or mistake to be stated in the pleadings.

"Under the practice prevailing in this state, before the adoption of the Code of Procedure, even in a law case, the court had the right, when an instrument of writing was introduced in evidence, although it was not mentioned in the pleadings, to declare it null and void, in so far as that action was concerned. In the case of *Maddox v. Williamson*, 1 Strob. L. 23, the court says: 'An assignment, no more than a deed, can, in a court of law, be set aside and canceled; but when either deed or assignment comes in question in an issue here, it will, if fraudulent and void, be, for the purposes of that issue, regarded as a nullity. Section 3, art. 5, of the Constitution of South Carolina, provides: 'That justice may be administered in a uniform mode of pleading, without distinction between law and equity, they (the General Assembly) shall provide for abolishing the distinct forms of action, and for that purpose shall appoint some suitable person or persons, whose duty it shall be to revise, modify, and abridge the rules, practice, pleadings, and forms of the courts now in use in this state.' In pursuance of this constitutional requirement, the Legislature adopted the Code of Procedure, under whose liberal provisions both legal and equitable issues may be decided in one action. We do not see, therefore, why the court below did not have the right to declare the indenture null and void." *McKenzie v. Sifford*, 45 S. C. 496, 23 S. E. 622; *Griffin v. Southern Ry.*, 66 S. C. 85, 44 S. E. 562; *Hodges v. Kohn*, 67 S. C. 69, 45 S. E. 102; *Railway v. Devlin*, 85 S. C. 128, 67 S. E. 149; *Stack v. Haigler*, 90 S. C. 319, 73 S. E. 354.

It must be remembered that it was the defendant, and not the plaintiff, that set up the deed in his answer, and introduced it in evidence. It would therefore be a fraud on the rights of the plaintiff, and would allow the defendant to take advantage of his own wrong, if the plaintiff was denied the right to show the mistake in question. This exception is overruled.

Fifth Exception.—In the first place, there was testimony tending to sustain the finding of his honor the circuit judge; and, in the second place, it does not necessarily follow that the cement and shingles were not to be regarded as fixtures, by reason of the fact that they may not have been physically attached to the freehold. The rule in such cases is thus stated in *Hurst v. Furniture Co.*, 95 S. C. 221, 78 S. E. 960:

"The great confusion in regard to the law of fixtures, has arisen from the effort to construe that as a fixture in one case, because it was so regarded in other cases. A fixture involves a mixed question of law and fact. It is incumbent on the court to define a fixture, but whether it is such in a particular instance, depends upon the facts of that case, unless the facts are susceptible of but one inference. In modern times, the question whether the article is to be regarded as a fixture depends generally upon the intention of the parties in the particular case."

This exception cannot be sustained.

Sixth Exception.—This exception is taken under a misapprehension. It is true his

honor the circuit judge discussed the question mentioned in the exception, but he did not rest his conclusion thereon. After discussing such question, he thus states the ground upon which he rested his decision: "For the reason hereinabove stated, however, it is conceived that the plaintiff is entitled to such recovery even at law." The reasons hereinbefore set out are those to which he had reference. Furthermore, as said by Mr. Justice Watts, in *Rowell v. Hines*, 114 S. C. 339, 103 S. E. 545: "This court will sustain an order of the circuit court, if its conclusions are right and its reasons wrong." This exception is overruled.

Seventh Exception.—What has already been said is conclusive of the question presented by this exception.

Eighth Exception.—Rule 5, § 6, of this court (90 S. E. vii) provides, that each exception must contain a concise statement of one proposition of law, and that each exception must contain within itself a complete assignment of error, and a mere reference therein to any other exception then or previously taken, or request to charge, will not be considered. This exception violates the said rule. *Hayes v. McGill*, 108 S. E. 150.

For these reasons I dissent.

(182 N. C. 758)

CAPPS v. ATLANTIC COAST LINE R. CO. et al. (No. 65.)

(Supreme Court of North Carolina. Sept. 14, 1921.)

Appeal and error \Leftrightarrow 105—No appeal from refusal to dismiss.

No appeal lies from a refusal to dismiss.

Appeal from Superior Court, Wilson County; Calvert, Judge.

Action by E. B. Capps, administrator of I. M. Williamson, against Walker D. Hines, Director General of Railroads, and the Atlantic Coast Line Railroad Company. Motion to dismiss overruled, and defendants appeal. Appeal dismissed.

F. S. Spruill, of Rocky Mount, and Carl H. Davis, of Wilmington, for appellants.

O. P. Dickinson, of Wilson, for appellee.

PER CURIAM. The judgment appealed from is as follows:

"The motion to dismiss made by the defendant in his answer is hereby overruled; and the other matters and things set up in the pleadings are hereby continued for further consideration by the court."

The uniform decisions of this court have always been that "no appeal lies from a refusal to dismiss." *McBryde v. Patterson*, 78 N. C. 412, down to date, see cases cited under C. S. § 638, at page 273 of volume 1. If

it were otherwise, the defendant, in every case could always get from 6 to 12 months' delay by simply moving to dismiss and appealing from a refusal to do so.

It is useless to cite cases, for they are very numerous and without any exception. As this court has said (as to another point):

"There are some matters at least, which should be deemed settled and this is one of them." *Burrell v. Hughes*, 120 N. C. 279, 26 S. E. 782.

Appeal dismissed.

(182 N. C. 1)

ARMSTRONG v. SPRUILL et ux. (No. 10.)

(Supreme Court of North Carolina. Sept. 14, 1921.)

Waters and water courses \Leftrightarrow 126(3)—Whether 'lower proprietor damaged by upper proprietors' enlargement of drainage canal held for jury.

In an action for the overflowing of the lands of a lower proprietor, alleged to have been caused by the enlargement of a drainage canal by the upper proprietors, without pursuing their remedy under C. S. § 5260 et seq., and section 5274, where the evidence was conflicting as to whether such enlargement caused damage to plaintiff, the question should have been submitted to the jury.

Appeal from Superior Court, Tyrrell County; Allen, Judge.

Action by Jesse Armstrong against C. T. Spruill and wife. Judgment of nonsuit, and plaintiff appeals. Reversed.

W. L. Whitley, of Plymouth, and Meekins & McMullan, of Elizabeth City, for appellant.

T. H. Woodley, of Columbia, and Aydtlett & Simpson, of Elizabeth City, for appellees.

CLARK, C. J. It appears by the contradicted testimony that more than 60 years ago the canal was cut which drained the lands now owned by plaintiff and defendants and all other parties along its line; that they all drained into this canal and helped maintain it until 1915. The plaintiff alleges that the defendants, finding the old canal, to use which they have shown a prescriptive right, had become insufficient, enlarged the same and placed water upon plaintiff, to his damage. If the defendants, upper proprietors, desired to enlarge the canal, their remedy was under C. S. § 5260 et seq. Under C. S. § 5274, they could in a proper proceeding have had said canal enlarged or deepened, with a just apportionment of the costs. Instead of pursuing this remedy, there is evidence that the defendants enlarged the canal according to their own views, and increased the flow of water upon the land of plaintiff; he being the lower proprietor.

There is a clear conflict of evidence as to whether as a matter of fact the enlargement of the canal by the defendant has caused damage to the plaintiff. The case, therefore, should have been submitted to the jury upon the evidence, and the judgment of nonsuit is reversed.

(182 N. C. 80)

JENETTE et al. v. HOVEY & CO. et al.
(No. 21.)

(Supreme Court of North Carolina. Sept. 14, 1921.)

1. Appeal and error \Leftrightarrow 91(5)—Appeal may be taken from overruling of motion to dismiss attachment.

On the overruling of defendant's motion to dismiss an attachment for lack of sufficient publication of notice, a substantial right is affected, and a present appeal will lie.

2. Attachment \Leftrightarrow 206—Summons unnecessary in attachment suit.

In proper instances, where civil actions are commenced, and service is obtained by attachment on defendant's property, and publication of a notice based on the jurisdiction thus acquired, the issuance of a summons is unnecessary.

3. Attachment \Leftrightarrow 209(4) — Court may in its discretion permit publication to continue after a delay.

Under C. S. § 802, providing that in attachment suits, where plaintiff relies on service by publication, publication must be commenced within 30 days after granting the attachment, and section 803, providing that publication must be for 4 successive weeks, the court may in its discretion permit the publication to continue, on an affidavit filed nearly a year after the institution of the action, and after defendant has appeared specially and moved to dismiss for want of publication.

Appeal from Superior Court, Pasquotank County; Allen, Judge.

Action by W. H. Jenette and others against Hovey & Co. and the First & Citizens' National Bank of Elizabeth City, N. C. The Mars Hill Trust Company intervened. From an order of the court overruling the motion to dismiss the action and vacate the attachment, defendant Hovey & Co. appeals. Affirmed.

Plaintiffs, citizens of this state, having a cause of action against Hovey & Co., a foreign resident corporation, for an alleged breach of contract, instituted this suit in the superior court of Pasquotank county and sought to obtain service upon the defendant by attaching the proceeds of a certain draft in the hands of the First & Citizens' National Bank, of Elizabeth City, N. C.; said funds presumably belonging to the defendant. Summons was issued January 28, 1920, and duly served on the garnishee bank, but returned, on the day of its issuance, as to

Hovey & Co., "Not to be found in North Carolina." On the same day, plaintiffs secured from the clerk of the superior court a warrant of attachment, after filing proper affidavit and giving bond as required by statute, and the sheriff duly levied upon the above-mentioned funds, said to be the property of the defendant. The warrant of attachment was served immediately, and made returnable on the 17th day of February, 1920.

Thereafter, on October 30, 1920, the Mars Hill Trust Company, a Maine corporation, was allowed to intervene and set up its claim of title to the proceeds of said draft. The funds were turned over to the intervener by order of court, upon the execution and filing of a good and sufficient bond "for the protection of all parties to this cause." The plaintiffs' complaint and answer of the intervener, Mars Hill Trust Company, were filed on December 27, 1920. The defendant Hovey & Co. has not answered.

At the January term, 1921, this cause being on the docket for trial, Hovey & Co., through its attorney, entered a special appearance and moved to dismiss the action and to vacate the attachment, alleging that no valid service of the summons or warrant of attachment had been made, by publication or otherwise, as required by law. While this motion was being heard before his honor in the superior court, plaintiffs filed with the clerk an affidavit and obtained from him an order of publication, to which reference is made in the judgment of the court, as follows:

"Pending the determination of the motion of Hovey & Co. on its special appearance, said motion not being determined the day it was made, an affidavit for publication was filed by plaintiffs, and an order of publication was signed by the clerk of the superior court—said affidavit being also filed before the clerk—which affidavit and order appear in the record, to which reference is made, and publication was commenced as set forth in copy of notice appearing in the record. The said affidavit and order of the clerk and publication were made without the knowledge or approval of any parties to the action, other than plaintiffs, and without the knowledge of the judge before whom the motion to dismiss was pending. It appearing to the court that at the time of the institution of the action an affidavit as set out in the record was filed in this cause, though no order of publication was actually signed, the court in its discretion orders and permits the plaintiffs to proceed with the publication pending the determination of this motion, in accordance with the order of the clerk made herein. It is further ordered that the motion of the defendant Hovey & Co., upon its special appearance, to dismiss the action and vacate the attachment, be and the same is hereby overruled."

The defendant Hovey & Co. noted an exception and appealed.

W. A. Worth, of Elizabeth City, for appellant.

Ehringhaus & Small, of Elizabeth City, for appellees.

STACY, J. (after stating the facts as above). This action was brought to recover damages for an alleged breach of contract growing out of an agreement on the part of the defendant Hovey & Co. to deliver a certain quantity of seed Irish potatoes to the plaintiffs at Elizabeth City, N. C., during the month of January, 1920. The defendant being a nonresident corporation and having no process agent in this state, could not be served personally with summons; hence service was sought to be obtained by issuing a warrant of attachment and levying upon the proceeds of a draft in the hands of the First & Citizens' National Bank, of Elizabeth City, N. C., it being alleged that said funds belonged to Hovey & Co. The defendant through its counsel, entered a special appearance, and upon the facts as above stated moved to dismiss the attachment for want of any service of process, alleging that none had been made, either personally or by publication.

[1] From an adverse ruling on this motion, the defendant Hovey & Co. excepted and immediately appealed, which it had a right to do under a number of decisions of this court. *Finch v. Slater*, 152 N. C. 155, 67 S. E. 264, and *Warlick v. Reynolds*, 151 N. C. 606, 66 S. E. 657. The motion to dismiss the attachment affects a substantial right, and from the court's refusal to grant the same a present appeal will lie. *Sheldon v. Kivett*, 110 N. C. 408, 14 S. E. 970; *Roulhac v. Brown*, 87 N. C. 1; *Judd v. Mining Co.*, 120 N. C. 397, 27 S. E. 81.

[2] The appellant rests its case upon the ground that plaintiffs have failed to meet the requirements of the statute with respect to service of process as asked for and issued in this case. In the first place, it should be noted that, in proper instances, where civil actions are commenced and service is obtained by attachment of defendant's property and publication of a notice based upon the jurisdiction thus acquired, the issuance of a summons is unnecessary. *Mills v. Hansel*, 168 N. C. 651, 85 S. E. 17; *Armstrong v. Kinsell*, 164 N. C. 125, 80 S. E. 235; *Currie v. Mining Co.*, 157 N. C. 217, 72 S. E. 980; *Grocery Co. v. Bag Co.*, 142 N. C. 174, 55 S. E. 90; *Best v. Mortgage Co.*, 128 N. C. 351, 38 S. E. 923.

But it is urged that the law in this respect was declared to be otherwise in *Ditmore v. Goins*, 128 N. C. 325, 39 S. E. 61, and *McClure v. Fellows*, 131 N. C. 509, 42 S. E. 951, and so it was. It may be observed, however, that these cases were in direct conflict with the decision of the court in *Best v. Mortgage Co.*, 128 N. C. 351, 38 S. E. 923, and, besides, *McClure's Case* was expressly overruled in *Grocery Co. v. Bag Co.*, 142 N. C.

174, 55 S. E. 90, which of necessity overruled *Ditmore's Case*, though not specifically mentioned therein. Therefore both of these cases must now be considered, or understood, as having been overruled and no longer as precedents. They have never been approved in any subsequent opinion; but, on the contrary, a different ruling has been announced and consistently followed.

[3] We then come to consider whether plaintiffs have brought themselves within the statute providing for service by attachment and publication. The affidavit filed at the institution of the action would have justified the clerk in signing an order of publication (*Luttrell v. Martin*, 112 N. C. 593, 17 S. E. 573, and *Branch v. Frank*, 81 N. C. 180), and his failure to do so, at the time, doubtless was due to an oversight or inadvertence on the part of plaintiffs. Nevertheless the necessary order was not made until an additional affidavit was filed, nearly a year later, and after the defendant had entered a special appearance and moved to dismiss for want of publication, etc. The defendant contends that under C. S. § 802, and the decision of this court in *Bowman v. Ward*, 152 N. C. 602, 68 S. E. 2, the warrant of attachment in the instant case should have been vacated. While it is true the delay in obtaining the order of publication might well be characterized as unusual, and his honor probably would have been justified in so holding, yet we think it was within his discretion to permit the publication to continue. The rights of all parties have been preserved, and none destroyed, by this ruling. A similar question was presented in the case of *Mills v. Hansel*, supra, where the present Chief Justice, speaking for a unanimous court, said:

"The court acquired jurisdiction of the action by the service of the attachment upon the property of the defendant. If the notice was not duly served by the publication, it was 'error to discharge an attachment granted as ancillary to an action because of the insufficiency of the affidavit to obtain service of the summons by publication, for it is possible that the defect may be cured by amendments.' *Branch v. Frank*, 81 N. C. 180. The remedy is not to dismiss the attachment, but by ordering a re-publication, for, as the defendant is a nonresident, to dismiss the attachment may deprive the plaintiff of all remedy by the removal of the property before a new proceeding and attachment can be had"—citing *Price v. Cox*, 83 N. C. 261; *Penniman v. Daniel*, 90 N. C. 159; *Id.*, 96 N. C. 332.

C. S. § 806, which bears more directly upon the question at issue, requires publication of the issuance of the attachment, unless the defendant can personally be served with process; and it has been held with us that a failure to make such service, either personally or by publication, entitles the defendant to have the attachment dismissed. But it has also been decided that the court, in its dis-

cretion, may extend the time for ordering publication and service of such process. *Finch v. Slater*, supra, *Mills v. Hansel*, supra, and *Price v. Cox*, 83 N. C. 261. Hence, upon authority, we think the ruling of his honor, made in the exercise of his discretion, must be upheld. It is so ordered.

Affirmed.

(182 N. C. 757)

LEROY v. SALIBA. (No. 22.)

(Supreme Court of North Carolina. Sept. 14. 1921.)

Appeal and error \S 107, 792—Appeal from order of reference before judgment on report held premature and subject to dismissal on court's own motion.

In an action to recover misappropriated partnership funds, where the jury found that the partnership existed, and the court ordered a reference to take an account of the partnership receipts and expenses, an appeal from such order before judgment on the report thereon is premature, and must be dismissed *ex mero motu*, the proper procedure being for defendant to note his exception, and, on the coming in of the report and exceptions thereto, appeal from the final judgment.

Appeal from Superior Court, Pasquotank County; Allen, Judge.

Action by J. H. Leroy against Dr. John Saliba. From an order of reference, defendant appeals. Appeal dismissed.

See, also, 180 N. C. 15, 103 S. E. 921.

Upon the issue whether the plaintiff and defendant entered into a contract of partnership, as alleged in the complaint, the jury answered "Yes"; and, it appearing to the court that the taking of an account of the partnership receipts and expenses was necessary for the information of the court, such reference is ordered, and the defendant appealed.

T. J. Markham and Aydlett & Simpson, all of Elizabeth City, for appellant.

Ehringhaus & Small, Thompson & Wilson and Meekins & McMullan, all of Elizabeth City, for appellee.

PER CURIAM. The jury having found that the partnership existed, an appeal from the order of reference before judgment upon the report thereon is premature and fragmentary, and must be dismissed by the court *ex mero motu*. The defendant should have noted his exception, and, upon the coming in of the report and exceptions thereto, should have brought up his appeal from the final judgment. No appeal lay at this stage. C. S. 573 (2), and cases there cited.

In *Blackwell v. McCaine*, 105 N. C. 460, 11 S. E. 360, the court said:

"Many cases decide that an appeal does not lie at once from an interlocutory judgment or

order, unless it puts an end to the action, or may destroy or impair a substantial right of the complaining party to delay his appeal until the final judgment. He must assign error, or except, and have the same noted in the record, and bring the whole up by an appeal from the final judgment."

See, also, citations to that case in the *Anno*. Ed., especially *Shankle v. Whitley*, 131 N. C. 168, 42 S. E. 574.

The practice is thus stated nowhere more clearly than by Hoke, J., in *Jones v. Wooten*, 137 N. C. 425, 49 S. E. 917:

"Where a plea in bar is overruled or sustained, as a matter of law, by the judge, it is optional with the party to take an appeal at once or preserve his right by having an exception noted. Where, however, the issues are tried by a jury, and the right to an account is established by a verdict, and an order of reference made, it is proper to proceed with the reference, and an appeal can be taken only from a final judgment after report."

Appeal dismissed.

(27 Ga. App. 364)

BAILEY v. AMERICAN RY. EXPRESS CO. (No. 11766.)

(Court of Appeals of Georgia, Division No. 2. Aug. 31, 1921.)

(Syllabus by the Court.)

1. Carriers \S 158(1)—Cannot limit liability by arbitrary agreement as to value.

While a common carrier may charge a rate for transporting a shipment of freight, to be determined according to the value of the article shipped, the carrier cannot, by an arbitrary agreement as to the value of the article, limit its liability for its loss or damage through the fault of the carrier.

2. Carriers \S 166—Arbitrary fixing of value held not bona fide as matter of law.

Where the agent of the shipper, when delivering to the carrier for transportation an article of freight, states to the agent of the carrier that he does not know the value of the contents of the shipment, but at the suggestion of the agent of the carrier receiving the shipment the value is arbitrarily fixed at a sum far below the true value of the shipment, and a rate is made on the basis of such fixed value, such an arrangement cannot as a matter of law be held to be a bona fide effort between the carrier and shipper to fix the value of the article for the purpose of determining the rate.

3. Direction of verdict held error.

In a suit by the shipper against the carrier to recover for the loss of the shipment at its true value, which, as appears from the evidence, amounted to several hundred dollars, it was error to hold that the plaintiff could not recover a sum in excess of \$50, the amount agreed upon, and the direction of a verdict for the plaintiff, upon motion of the defendant, for the sum of \$50, was error.

Error from City Court of Macon; Du Pont Guerry, Judge.

Action by J. H. Bailey against the American Railway Express Company. Judgment on directed verdict for defendant, and plaintiff brings error. Reversed.

Will Gunn and E. Clem Powers, both of Macon, for plaintiff in error.

C. Baxter Jones and Jones, Park & Johnston, all of Macon, and Robt. C. & Philip H. Alston, of Atlanta, for defendant in error.

STEPHENS, J. Judgment reversed.

JENKINS, P. J., and HILL, J., concur.

(27 Ga. App. 368)

HERRINGTON & BRASWELL v. GARLICK.
(No. 11986.)

(Court of Appeals of Georgia, Division No. 2.
Aug. 31, 1921.)

(Syllabus by the Court.)

1. Husband and wife \S 138(2) — Slight evidence of agency required, where wife receives and retains consideration of husband's contract.

Where the consideration of a contract made with a husband reaches the wife as an accession to her separate estate, and she retains and enjoys it, only slight evidence of the husband's agency in contracting the debt is required to charge her. *Pinkston v. Cedar Hill Nursery & Orchard Co.*, 123 Ga. 308, 51 S. E. 387; *Akers v. Kirke*, 91 Ga. 590, 598, 18 S. E. 366.

2. Husband and wife \S 235(2)—Directed verdict held erroneous, where there was some evidence of husband's agency for wife.

This being an action against a married woman to recover the cost of building materials placed upon property belonging to her and alleged to have been furnished to her through her husband as agent, and there being some evidence to authorize the inference that the husband in purchasing the materials acted as agent for his wife, the trial judge erred in directing a verdict for the defendant.

Error from City Court of Waynesboro; Wm. H. Davis, Judge.

Action by Herrington & Braswell against M. B. Garlick. Judgment for defendant, and plaintiffs bring error. Reversed.

E. V. Heath, of Waynesboro, for plaintiffs in error.

C. B. Garlick and F. S. Burney, both of Waynesboro, for defendant in error.

STEPHENS, J. Judgment reversed.

JENKINS, P. J., and HILL, J., concur.

(27 Ga. App. 369)

MADDOX v. MADDOX. (No. 12021.)

(Court of Appeals of Georgia, Division No. 2.
Aug. 31, 1921.)

(Syllabus by the Court.)

1. Executors and administrators \S 17(3) — Widow entitled to appointment when under no disability.

Upon the death of the husband intestate the widow shall, provided she be of sound mind and "laboring under no disability," be entitled, to the exclusion of all others, to appointment as administratrix of the estate. Civ. Code 1910, \S 8943.

2. Executors and administrators \S 18—Widow cannot be denied appointment because of speculation that she will mismanage estate or prove unfit.

While, as provided in Civil Code 1910, \S 8978, after the administrator has been appointed and has taken charge of the estate, upon proof that he "wastes or in any manner mismanages the estate * * * or * * * for any reason he is unfit for the trust reposed in him," the ordinary may in his discretion revoke the letters of administration, the widow, who is legally entitled to the administration, cannot, when she is of sound mind, be denied the appointment upon the mere speculation that she will, on account of lack of business experience and want of capacity to manage the particular estate, mismanage it and prove unfit for the trust reposed. *Causey v. Causey*, 22 Ga. App. 679, 97 S. E. 98.

3. Executors and administrators \S 20(8)—On caveat to petition for appointment, verdict properly directed in favor of widow.

Upon the trial of an issue formed in the superior court on a caveat filed by the widow to the application of one of the children of the intestate, who was selected by a majority of the heirs, to be appointed administrator, where the widow appeared to be of sound mind and laboring under no disability that would disqualify her from receiving the appointment as administratrix, the court properly directed a verdict finding in favor of the caveat and awarding the administration of the estate to the widow. *Causey v. Causey*, supra.

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Petition by J. W. Maddox for appointment as administrator, to which I. F. Maddox filed a caveat. Judgment in favor of the caveator, and the petitioner brings error. Affirmed.

Chambers, Richards & Dickey and Mitchell & Mitchell, all of Atlanta, for plaintiff in error.

Neufville & Neufville, of Atlanta, for defendant in error.

STEPHENS, J. Judgment affirmed.

JENKINS, P. J., and HILL, J., concur.

(151 Ga. 767)

**MITCHELL COUNTY et al. v. HUDSPETH.
HUDSPETH v. MITCHELL COUNTY et al.**
(Nos. 2366, 2367.)(Supreme Court of Georgia. Aug. 10, 1921.
Rehearing Denied Sept. 15, 1921.)*(Syllabus by the Court.)*

1. Eminent domain — 167(1), 246(4), 273, 308 — County authorities enjoined from condemning land for bridge and approaches without compliance with statute as to appointment of commissioners; in suit to enjoin condemnation proceedings, jurisdiction retained to determine damages; general Eminent Domain Act does not apply to condemnation of road and bridge sites; burden on county to have decree so molded as to permit abandonment; damages for trespass cannot be avoided by abandoning road.

Where an equitable petition alleged that the plaintiff was the owner of land on both sides of and abutting a navigable river, and that the county authorities on each side of the stream joined in proceedings to condemn a certain amount of plaintiff's land under Civil Code 1910, § 5206 et seq., for the purpose of building a public free bridge across the river and laying out public roads on each side thereof as approaches thereto, and where there was no compliance with section 640 et seq. of the Civil Code of 1910, and the plaintiff prayed for injunction, damages, etc., the court did not err in overruling a general demurrer to such petition.

(a) A court of equity, having jurisdiction of the case for the purposes of the injunction, will retain jurisdiction in order to ascertain whether damages, if any, have been sustained by the plaintiff, and that complete equity may be done, and in order to avoid a multiplicity of suits, etc.

2. Eminent domain — 134 — Where adjacent land used as ferry, prospective value for bridge and present value for ferry to be considered.

Where one had land abutting on both sides of a navigable river on which she maintains and operates a public toll ferry, and has other land adjacent thereto which is sought to be condemned by the county authorities of two counties, each of which lies upon opposite sides of the river, and the owner has filed an equitable petition against both the counties jointly, to enjoin them from proceeding to condemn her land under section 5206 et seq. of the Civil Code of 1910, and for the recovery of damages by reason of the taking of her land for the purposes of building roads thereon and building a public free bridge across such stream, and the approaches thereto, it is proper, in order to arrive at just and adequate compensation in determining the value of such adjacent land taken for the bridge and roads, that its prospective value as a bridge site and its present value as a ferry site may be taken into the calculation.

Error from Superior Court, Mitchell County; Jno. R. Wilson, Judge.

Suit by Sarah A. Hudspeth against Mitchell County, and others. A general demurrer and all grounds of the special demurrer but one were overruled, and defendants bring error, and plaintiff files a cross-bill of exceptions. Judgment affirmed on the main bill and reversed on the cross-bill.

Mrs. Sarah A. Hudspeth filed a petition against Mitchell county and Baker county, having for its purpose the recovery of damages, and for injunction. The petition alleged, in substance, as follows: The plaintiff is the owner of a tract of land on both sides of Flint river at Newton, Ga. The river is the dividing line between the counties of Mitchell and Baker. As the owner of the lands the plaintiff, and those under whom she claims title, have maintained and continuously operated a public toll ferry across the river at Newton in connection with the ferry road, which during said period of time connected with the public roads in Mitchell and Baker counties, which were worked and maintained by the counties for over 30 years. No bridge or other ferry has been operated over the river within three miles during any of said time, except that a ferry was established at a point about 200 yards down the stream from plaintiff's ferry about 20-odd years ago, and the same was operated from time to time for about 3 years, but has not been operated since that time. The ferry and franchise owned by plaintiff has a value of \$20,000, and yields to plaintiff an annual income of \$1,200 over and above the cost of operation.

In 1919 Mitchell county and Baker county, acting through their duly constituted authorities, having charge of the roads and revenues of those counties, respectively, agreed to establish and maintain over the Flint river at Newton a county-line bridge, including approaches thereto on each side of the river, the approaches to connect with the public roads of the counties on each side of the river. It was arranged between those counties and the State Highway Board of Georgia that state aid should be given to the counties in the construction of the bridge and its approaches, and that the same would then become a part of the system of state-aid roads of Georgia, with all the rights and liabilities of the counties and the State Highway Board as fixed by the laws of Georgia. On February —, 1920, each of the defendants issued and published in the official gazette of each county advertisements for bids for the building of the bridge and its approaches, as set out in the notice to bridge contractors, copy of which was attached to the petition. Pursuant to the foregoing it was arranged that the bridge and its approaches should be built by a bridge contractor, and the contract was duly entered into by the counties and the contractor acting for both of the counties.

Pursuant to the contract the defendants, on May 1, 1920, by and through the contractor (the St. Louis Structural Steel Company, Inc.) entered upon the lands of the plaintiff for the purpose of building thereon the bridge and its approaches, and took exclusive possession of certain described portions of the plaintiff's lands. The defendants, through the contractor, continued to hold exclusive possession of the lands described, and cleared from the same all trees and underbrush, and have been placing thereon the bridge and its approaches, a great part of the foundation of the bridge and its approaches having been completed. Plaintiff did not consent, but objected to the taking of her land without being compensated therefor; but she made no effort to prevent the taking of the lands by force or legal proceedings, because she knew that both of the defendants were solvent and liable to respond in damages to the plaintiff for the amount of damages done her by the taking of her lands. She has been injured and damaged in the amount of the value of the land taken, which, considering its value as a bridge site and ferry site and for other purposes, is and was at the time of the taking of the value of \$25,000; and, excluding from consideration its value as a bridge site and ferry site, it is and was at the time of the taking of the value of \$500. The establishment of the public bridge and approaches will entirely destroy the value of her ferry and its franchise; and she sues for the damage thereby inflicted on her, as well as for the value of the land taken from plaintiff. She therefore prays for judgment against the counties jointly for the sum of \$24,500, being the damage done to her by the taking of the land and the establishment and operation of the bridge, considering the value of the land as a bridge site and ferry site exclusive of its other value, and for the further sum of \$500 as the value of the land exclusive of its value as a bridge site and ferry site. On July 27, 1920, plaintiff was served with notice by the State Highway Board, pursuant to section 5206 et seq. of the Civil Code of 1910, of its determination to construct and maintain a state-aid road from Camilla in Mitchell county to Newton in Baker county, the road to extend over the lands owned by plaintiff, and that the State Highway Board proposed to acquire title by condemnation proceedings "in accordance with the laws of Georgia."

It is alleged that the attempted condemnation proceedings are illegal and improper for a number of reasons, one of which is that, the defendants having already taken possession of the land of plaintiff, sought to be condemned by the exercise of eminent domain, the power to proceed and have the damages assessed as provided in the laws of Georgia with reference to the exercise of the power of eminent domain has been waived and lost by

the counties, and therefore no longer exists in their agent, the State Highway Board. The law in reference to the exercise of the power of eminent domain provides apparently that the proceedings for the assessment of damages, including the appeals to the superior court, shall be, as to each piece of property sought to be condemned in different counties, had in the separate counties where the separate pieces of property are located; and this would result, if the condemnation proceedings were allowed to continue, in harassing the plaintiff with a multiplicity of suits, viz., a suit in Baker county for damages done by the taking of her property there, and a separate and independent suit in Mitchell county for the taking of her property in that county; whereas the two counties of Mitchell and Baker having joined in their act of appropriating the property of plaintiff as a whole in both counties, acting through a common agent, the plaintiff has the right to hold the two counties liable for the amount of damage done by the joint act as joint tortfeasors, and she has a right to sue them jointly in one suit, so as to have the whole matter of damages adjudicated in one action; and therefore the proceedings for separate condemnations of plaintiff's separate pieces of property should be enjoined because they are illegal, and in order to avoid a multiplicity of suits. The value of plaintiff's land taken by the defendants on each side of the river, and especially its value as a bridge site and as a ferry site, is an indivisible unit, the value of which cannot be ascertained by considering the land taken on either side of the river separately, nor is there any method or rule of law by which the two separate tribunals assessing damages separately in each county, under condemnation proceedings, could be required to consider the damage done plaintiff on the whole by taking the lands considered in connection with their value as a bridge site or a ferry site and by the destruction of plaintiff's ferry franchise, nor is there any method or rule of law by which the separate tribunals could be made to apportion properly the damages as between the two counties, so as to fix the amount thereof for which each county is liable to plaintiff; and for these reasons there could be in this case no proper application of any adequate and proper measure of damages for the injury done to plaintiff by the acts of the defendants, if the same are considered in two separate tribunals under the condemnation proceedings; and therefore, if the condemnation proceedings are allowed to proceed, plaintiff's remedy at law would be inadequate and incomplete. Unless equitable relief prayed for by her is granted, her damages will be irreparable. Her prayers are for damages, and for injunction against the condemnation proceedings.

The defendants demurred to the petition as

amended, both generally and specially. The court overruled the general demurrer and all the grounds of the special demurrer but one (paragraph 5), which was sustained. This paragraph appears in the opinion. To the judgment overruling the general demurrer the defendants excepted; and on the judgment sustaining paragraph 5 of the special demurrer the plaintiff in her cross-bill of exceptions assigns error.

Benton Odom, of Newton, and A. S. Johnson, of Camilla, for plaintiffs in error.

Pope & Bennet, of Albany, for defendant in error.

HILL, J. (after stating the facts as above).

[1] 1. In the main bill, exception is taken to the overruling of the general demurrer only. It is insisted that the plaintiff was afforded an adequate remedy at law for the enforcement of whatever rights she may have had under the Eminent Domain Act of 1894, as embraced in section 5206 et seq. of the Civil Code of 1910. It is further insisted that, inasmuch as the condemnation proceedings had already been instituted under the act of 1894 (Acts 1894, p. 95), they should continue, and therefore that the present petition should have been dismissed in the court below. Equitable relief in the nature of an injunction is prayed against the condemnation proceedings. There can be no question, under the allegations, that the defendants are endeavoring to take plaintiff's land without just and adequate compensation having first been paid; and, unless the plaintiff has an adequate remedy at law, then the general demurrer should have been overruled, so far at least as the petition set out a cause of action for injunction. We are of the opinion that the Eminent Domain Act of 1894, as embodied in the Civil Code, § 5206 et seq., does not apply to the condemnation of a road and bridge site on the lands of another. In the case of *Hutchinson v. Lowndes County*, 131 Ga. 637 (3), 62 S. E. 1048, it was held that—

"The provisions embraced in Political Code, §§ 520-525, inclusive [now section 640 et seq. of the Civil Code of 1910], were not repealed by the act of 1894, embodied in Civil Code, § 4657 et seq. [now section 5206 et seq.] or by the act of 1900 (Acts 1900, p. 86)."

It seems, therefore, that in condemning land for the establishment of a public road the counties have no right to proceed under section 5206 et seq., but must proceed under section 640 et seq. Section 640 provides that—

"On application for any new road, or alteration in an old road, the ordinary shall appoint three road commissioners, residing as near where such road is intended to pass as possible; and if they find it a public utility, they must proceed to mark it out, and make their report under oath to such ordinaries that it was laid out and marked conformably to law."

In the case of *Ainslee v. Morgan County*, 151 Ga. —, 105 S. E. 836, this court held, under the facts of that case, that—

"It was error for the court to refuse to enjoin the county authorities from proceeding to condemn the land; there having been no compliance with section 640 et seq., Civ. Code 1910. *Warren County v. Todd*, 150 Ga. 690, 104 S. E. 906."

In that case Morgan county, through its board of commissioners of roads and revenues served upon Mrs. Ainslee a notice of its purpose to condemn a certain strip of land across her property, to be used for the construction of a public road. Mrs. Ainslee filed a petition, seeking to enjoin the county and the individuals constituting the board of commissioners from proceeding with the condemnation, alleging that it was the intention to use the property (condemnation of which was sought) for the purpose of changing the location of an existing road; that the change was unnecessary; that it would result in the destruction of a number of valuable shade trees and injury to petitioner's property for residence purposes; that no offer of compensation had been made to petitioner, etc. The defendants denied all the material allegations of the petition, and averred that they had endeavored to reach an agreement with the plaintiff as to the price to be paid her for the land, but were always informed that she would not sell any land to the county, etc. After hearing the evidence both for the plaintiff and the defendant, and after it was agreed in open court that the commissioners had not complied with section 640 et seq. of the Civil Code, the court refused to grant an injunction, holding that the county authorities were authorized to proceed under section 5206 et seq. of the Civil Code. The plaintiff excepted to the judgment refusing an injunction, and this court reversed the judgment of the lower court, as set out in the headnote above quoted. We think the principle ruled in the *Ainslee Case* is controlling here, and that the defendants could be enjoined from proceeding to condemn plaintiff's land under section 5206 et seq. of the Civil Code. We think also that defendants have an available remedy to condemn land for road purposes, under section 640 et seq. of the Civil Code of 1910, if they see fit to avail themselves of it. But the court, clearly having jurisdiction of this case for the purpose of enjoining the illegal condemnation proceedings, can retain jurisdiction also for the purpose of determining the amount of damages sustained by the plaintiff, if any, and in order likewise to avoid a multiplicity of suits, etc.

While it is not alleged that the counties have actually opened up the road through the plaintiff's lands on both sides of the river, and have completed the bridge, and that the bridge and road are now in actual use by the

public, the petition does allege that the counties have actually taken the right of way and bridge site, and have partially completed the road and bridge. The counties, having actually taken plaintiff's land, are liable to plaintiff for the value thereof. The counties cannot retain plaintiff's land without paying her therefor; and while the counties, as ruled above, are not authorized to condemn land under Civil Code, § 5206 et seq., nevertheless the plaintiff may maintain the suit for the recovery of the value of the land, or easement therein actually taken and appropriated by the counties for the purposes and in the manner set out in the petition. We do not hold that the counties may not, under proper pleadings, reserve the right to decline payment of the damages finally fixed, and to abandon the road and bridge. In the circumstances of this case, the burden is upon the counties to have the decree so molded as to permit them to decline to open the road as a public road and to be relieved from the payment of damages for the value of the right of way and bridge site, in the event they shall determine that the damages "transcend the utility of such road." Compare Civil Code, § 687. The counties could not relieve themselves of the damages, if any, occasioned by the trespass, by abandoning the road; but nothing here ruled is to be construed as holding that the county authorities may not, by proper pleadings, be left by the decree free to abandon the road and to decline to pay the damages finally assessed for the value of the plaintiff's land.

[2] 2. The court sustained paragraph 5 of the defendants' special demurrer, which in part was as follows:

"In the fifteenth paragraph [of the petition] the words 'which, considering its value as a bridge site and a ferry site and for other purposes, is and was at the time of such taking of the value of \$25,000, and' on the ground that (a) said words and allegations are irrelevant, and constitute no element of any cause of action in favor of plaintiff against these defendants, and (b) they present a claim and measure of damages which is illegal and not allowable under the law, and which plaintiff is not entitled to, and which should not be considered in estimating plaintiff's damages."

The plaintiff in her cross-bill of exceptions excepted to this ruling of the court. We think that the court erred in sustaining this special demurrer. Section 781 of the Civil Code of 1910 provides that—

"In determining the value of land taken for a bridge, its prospective value as a bridge site and its present value as a ferry, if one is in use, may be taken into the calculation."

Under the allegations of the present petition the land taken by the defendants from

the plaintiff was for the avowed purpose of building a free bridge, and the approaches thereto, across the Flint river, and for this damage to her property she is entitled to just and adequate compensation; and in order to ascertain what this just and adequate compensation is, it seems to us, while the plaintiff has no exclusive right to establish and maintain a ferry on her land, as decided in *Hudspeth v. Hall*, 111 Ga. 510, 36 S. E. 770, yet the value of the land taken by the county as a ferry or bridge site, and the approaches thereto, together with all other facts and circumstances calculated to enhance or diminish the value of the property taken or damaged, may be inquired into. In the case of *Dougherty County v. Tift*, 75 Ga. 815, Blandford, Justice, delivering the opinion of the court, said:

"If Tift was the owner of the land through which this stream ran, on both sides, then, under the act of 1850, he had the right to erect a bridge over the same, and charge toll for crossing thereon; and, whether the bridge be public or private, it belonged to Tift, and, when the county of Dougherty takes his land and erects another bridge, which causes damage to Tift's property, he is entitled to just compensation therefor. Article 1, § 3, par. 1, Const. Georgia; Code, § 5024. Whether the same is a public or a private bridge, the question in such a case is, What damage has the party sustained? and to ascertain this, the cost of erection, the income derived from the bridge, may be looked to and considered by the jury, together with all other facts and circumstances calculated to enhance or diminish the value of the property taken or damaged."

Civil Code, § 688, provides:

"In estimating the value of land when taken for public uses, it is not restricted to its agricultural or productive qualities, but inquiry may be made as to all other legitimate purposes to which the property could be appropriated."

We are of the opinion that the plaintiff may show the value of her land for any legitimate purpose to which the land could be appropriated, including its value as a bridge site, and as a ferry, if any, and that the court therefore erred in sustaining the above portion of paragraph 5 of the defendants' special demurrer; but in so far as such demurrer above dealt with was directed at paragraph 16 and a part of paragraph 17 of the petition, the demurrer was properly sustained because in the two paragraphs last mentioned there are elements of damages set forth as a basis of plaintiff's claim which are not allowable under the law, as will be seen from what has been said above while dealing with the demurrer to paragraph 15.

Judgment affirmed on the main bill of exceptions, and reversed on the cross-bill.

All the Justices concur.

(27 Ga. App. 365)

NEWCOMB HOTEL CO. v. CORBETT.
(No. 11867.)(Court of Appeals of Georgia, Division No. 2.
Aug. 31, 1921.)*(Syllabus by the Court.)***1. Innkeepers ⇨10—Guest entitled to be unmolested by unjustified intrusion.**

A guest in a hotel is entitled to the privacy of the room to which he has been assigned, and to remain there unmolested from improper or unjustified and unreasonable intrusion from the hotel keeper or those acting under his authority. Whether a hotel keeper is under a duty to protect a guest against third persons, it is not necessary to be here decided. See *Newcomb Hotel Co. v. Corbett*, 24 Ga. App. 533, 101 S. E. 713; *Id.*, 25 Ga. App. 583, 103 S. E. 723.

2. Innkeepers ⇨10—Inference held authorized that intrusion on hotel guest was within scope of employment.

Where a "night watchman" or "houseman" of a hotel, whose duty is to "Keep order in general and to look after things generally," including "anything that comes up," and who carries a pass key to the rooms, and who is told by the clerk on duty that there is "something wrong" in a certain room in the hotel, and is requested by the clerk to go to that room, and where such watchman or "houseman," in response to the clerk's request, goes to the room and opens the door with his pass key for the purpose of ascertaining what is going on in the room, the inference is authorized, if not demanded, that the clerk and the watchman were acting within the scope of their employment, and that their acts were those of their employer, and for which he is responsible.

3. Innkeepers ⇨10—Entry of guest's room, to ascertain whether improper conduct was transpiring, held to violate guest's rights.

Where a guest of a hotel is occupying his room, and is neither engaged in nor permitting improper conduct therein, nor affording any just ground to suspect such, it is an unjustified intrusion upon the guest, and a trespass upon his rights incident to his occupancy of the room for the hotel keeper to effect an uninvited and unpermitted entry into the room for the purpose of ascertaining whether improper conduct on the part of the guest or any one is transpiring therein.

4. Innkeepers ⇨10—Bound to know assignment of guests to room, irrespective of register.

Since a hotel keeper has an opportunity of seeing his guests when he receives them, he is chargeable with knowledge as to what guests are assigned to particular rooms in the hotel, and therefore he has no right to assume that a guest who is occupying a room to which he has been assigned is any other than the guest properly entitled to occupy the room. While, in order to facilitate his business in handling his guests, a hotel keeper may require his guests, when applying for accommodations at his hotel, to register their names in a register, he is nevertheless not thereby relieved, by any

false inference he may draw from the register, from the duty resting upon him of knowing to what rooms the various guests are assigned. Thus, where a female guest has applied for lodging at a hotel and has signed her name upon the register, without any prefix to her signature or other indication that her signature is that of a female, and is assigned to a certain room in the hotel, the hotel keeper is charged with notice that the particular room is occupied by the female guest, and he has no right to assume, from any false inference which he may afterwards draw from the character and handwriting of her signature on the register, that the person entitled to occupy the room is a man, and that the female guest properly occupying the room is an intruder, and not entitled to it. That the hotel keeper, possessing actual knowledge of this fact, may, when acting through another and different clerk, have drawn such false inference from the character of the guest's signature, is not a defense to a suit against him by the guest for unlawfully entering her room for the purpose of ascertaining if immoral conduct is being practiced therein.

5. Innkeepers ⇨10—Trial ⇨29(2)—Guest need not indicate sex on register; remark of court held not an expression of opinion, and not prejudicial.

Even assuming that, under the record as here presented the circumstance that the hotel clerk was misled by the character and handwriting of the plaintiff's signature on the register of the hotel may go to mitigate the defendant's act and to show a lack of willful misconduct, wantonness, or conscious indifference to the plaintiff's rights, it is nevertheless true that, since a hotel keeper has an opportunity of seeing and inspecting his guests when they apply for accommodation, a guest is not under any duty to indicate his or her sex by the name on the register, and therefore a remark by the trial judge, directed to counsel in the presence of the jury at the time such evidence was offered, that "I do not think it makes any difference as to how a person writes his name," was not an expression of opinion upon any fact in issue, and this court cannot conclude that it in any way operated to prejudice the jury against the defendant's case, especially in view of the fact that the trial judge, in his fair and impartial charge to the jury, instructed them that in fixing the amount of any damages which they might assess they were to look to the evidence and the circumstances and conditions surrounding the occurrence, and it must therefore necessarily be inferred that in awarding damages the jury, following the instructions of the court, considered the nature and character of the signature on the register as a mitigating circumstance.

6. Case sustained by evidence, and charge not erroneous.

This being a suit by the female occupant of the room for damages for an unjust and unwarranted intrusion and trespass upon her by the hotel company, through its employees acting within the scope of their employment, while she was occupying her room, and applying the above rulings, the evidence sustains the

plaintiff's case as laid; and the charge of the court properly submitted all the issues to the jury, and certain requests to charge made by the defendant, when not covered by what was actually given in charge, were properly refused.

7. Amendment properly allowed.

Under the above rulings, there was no error in allowing the amendment to the petition, excepted to by the defendant.

8. New trial \S 76(4)—Denial for excessiveness of verdict of \$5,500 for wrongful intrusion into hotel room not abuse of discretion.

It appearing from the evidence that the plaintiff, who was a female guest alone in her room, to which she had been assigned in the hotel of the defendant, and had retired and gone to bed for the night, was aroused by the night watchman of the hotel, accompanied by a police officer, with the encouragement of the night clerk, after the plaintiff had telephoned to the clerk for protection from the threatened intrusion, which night watchman, without the plaintiff's permission and over her protest, accompanied with a charge, communicated to her, that she had a man in the room, unlocked her door and caused the room to be entered for the purpose of ascertaining if the charge were true, and her room was searched for that purpose, even though she consented to the search after her room had been forcibly entered without her consent, this court cannot hold, that the trial judge abused his discretion in not granting a new trial to the defendant upon the ground that the verdict in the sum of \$5,500 was excessive.

Error from City Court of Savannah; Davis Freeman, Judge.

Action by L. L. Corbett against the Newcomb Hotel Company. Judgment for plaintiff, and defendant brings error. Affirmed.

E. S. Elliott and O'Byrne, Hartridge & Wright, all of Savannah, for plaintiff in error.

Robt. L. Colding and Oliver & Oliver, all of Savannah, for defendant in error.

STEPHENS, J. Judgment affirmed.

JENKINS, P. J., and HILL, J., concur.

(27 Ga. App. 367)

VAN KEUREN v. TRAVELERS' INDEMNITY CO. (No. 11882.)

(Court of Appeals of Georgia, Division No. 2. Aug. 31, 1921.)

(Syllabus by the Court.)

1. Insurance \S 425—Against robbery held not to cover taking in clerk's presence, unless he had actual knowledge of taking; "felonious taking."

Where a contract of insurance insures the proprietor of a jewelry store against robbery committed on his premises, which robbery is defined in the policy as "an overt felonious act committed in the presence of a custodian and

of which he was actually cognizant," a felonious taking or conversion by a customer of a diamond ring on the premises of the insured, even though done in the presence of the clerk or custodian, as contemplated in the policy, is not such a felonious taking as is insured against by the policy, unless the clerk having the ring in custody had actual knowledge of its felonious taking or conversion.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Steal.]

2. Insurance \S 635—Petition in action on policy insuring against robbery construed as alleging clerk was cognizant of taking; "actually cognizant."

In a suit by the insured against the insurer to recover for a loss covered by the above-recited clause in the policy, an allegation in the petition that, after the clerk or custodian had placed a tray containing rings upon the counter, the customer extracted from the tray a diamond ring of a certain value and then hurriedly left the petitioner's store before he could be apprehended or detained by the petitioner's employees, and where the petition further alleges that such taking was "a robbery of jewelry from petitioner as covered and included in the terms of said policy," the petition will be construed as alleging that the clerk was "actually cognizant" of such felonious taking. The general demurrer to the petition was therefore improperly sustained.

Error from Superior Court, Chatham County; P. W. Meldrim, Judge.

Action by R. Van Keuren against the Travelers' Indemnity Company. Judgment for defendant, and plaintiff brings error. Reversed.

Oliver & Oliver, of Savannah, for plaintiff in error.

Lawrence & Abrahams, of Savannah, for defendant in error.

STEPHENS, J. Judgment reversed.

JENKINS, P. J., and HILL, J., concur.

(27 Ga. App. 365)

DIRECTOR GENERAL OF RAILROADS v. BEARD. (No. 11809.)

(Court of Appeals of Georgia, Division No. 2. Aug. 31, 1921.)

(Syllabus by the Court.)

1. Receivers \S 177—Suable in any county where railroad might be sued.

The receivers of a railroad corporation are subject to suit as such in any county in which the corporation may be sued for a like cause of action. *Ball v. Mabry*, 91 Ga. 781, 18 S. E. 64.

2. Carriers \S 180(2)—Initial carrier liable for loss on connecting lines notwithstanding limitation of liability.

Since the passage of the act of 1906 (Ga. L. 1906, p. 102), from which section 2777 of

the Civil Code of 1910 was codified, the initial carrier in an intrastate shipment "is liable for loss occasioned anywhere en route, whether on its own lines or not, where it voluntarily receives the shipment, notwithstanding an agreement or stipulation in a bill of lading limiting liability to loss, damage, or injury occurring on its own lines." *Heath v. Sandersville R. Co.*, 23 Ga. App. 255 (5), 98 S. E. 92.

3. Costs \S 260(1)—Statutory damages awarded, where bill of exceptions prosecuted for delay only.

It being clearly apparent that the bill of exceptions was prosecuted in this court for delay only, the statutory damages of 10 per cent. (Civ. Code 1910, \S 6213) are awarded to the defendant in error.

Error from Superior Court, Colquitt County; W. E. Thomas, Judge.

Action by T. V. Beard against the Director General of Railroads. Judgment for plaintiff, and defendant brings error. Affirmed.

P. Q. Bryan, of Moultrie, for plaintiff in error.

J. A. Dewberry and A. R. Kline, both of Moultrie, for defendant in error.

STEPHENS, J. Judgment affirmed, with damages.

JENKINS, P. J., and HILL, J., concur.

(27 Ga. App. 363)

STODDARD v. CAMPBELL. (No. 12111.)

(Court of Appeals of Georgia, Division No. 2.
Aug. 23, 1921.)

(Syllabus by the Court.)

1. Death \S 31(7)—Grandmother, given child by father, held entitled to recover value of services in action for death.

Although "until majority" a child "remains under the control of the father, who is entitled to his services and the proceeds of his labor," this parental power may be "lost," among other ways, "by voluntary contract releasing the right to a third person." Civ. Code 1910, \S 3021 (1); *Eaves v. Fears*, 131 Ga. 820 (2), 64 S. E. 269. Where the father of a minor unconditionally gives him to the child's grandmother, who accepts him, for several years raises him as her own child, and performs for him all parental duties, she thereafter stands in loco parentis, and, in an action for the tortious homicide of the child, where at the time of his death he was performing services of value to the grandmother (such as contributing his earnings to her support), she is entitled to recover the value of his services until majority. *Atkinson v. Yarbrough*, 13 Ga. App. 781, 80 S. E. 29.

2. Death \S 31(7)—Statute held not to authorize recovery by grandmother for child's death.

Section 4424 of the Civil Code of 1910, which gives to "a mother, or, if no mother, a

father," the right to recover "the full value of the life" in case of the "homicide of a child minor or sui juris, upon whom she or he is dependent, or who contributes to his or her support," being in derogation of the common law and subject to strict construction (*Robinson v. Ga. R. Co.*, 117 Ga. 168, 169, 43 S. E. 452, 60 L. R. A. 555, 97 Am. St. Rep. 156), must be held to exclude persons standing only in a quasi-parental relation to the child, and not to authorize a recovery for the full value of a child's life by a grandmother standing in loco parentis, although dependent upon the child's earnings for her support. *City of Albany v. Lindsey*, 11 Ga. App. 573 (3), 75 S. E. 911.

3. Pleading \S 34(3), 204(3)—Construed in absence of special demurrer as based on cause of action sufficiently alleged; petition in action for death, stating cause of action for recovery of value of services, not demurrable.

While, as a general rule, allegations of fact are to be construed most strongly against the pleader, yet, in the absence of special demurrer, where the facts alleged in a petition are such as would be proper and adequate to support one form of action, but inadequate, although appropriate, to another form of action, and where the petition is ambiguous to the extent that the pleader's intention is not clearly manifest as to which form of action is relied upon, the courts in such a case, in endeavoring to ascertain the plaintiff's intention, will prima facie presume that his purpose was to serve his best interest, and will construe the pleadings so as to uphold, and not defeat, the action. *Southern Express Co. v. Pope*, 5 Ga. App. 689, 690 (2), 697, 63 S. E. 809; *Bell v. State Life Ins. Co.*, 24 Ga. App. 497 (5), 101 S. E. 541; *Payton v. Gulf Line Ry. Co.*, 4 Ga. App. 762 (2), 763, 62 S. E. 469; *Wright v. Southern Ry. Co.*, 7 Ga. App. 542, 545, 67 S. E. 272; *Dawson Cotton Oil Co. v. Kenan*, 21 Ga. App. 688, 692, 94 S. E. 1037. Under such a rule of construction, while the petition here failed to set forth a cause of action under section 4424, it was good as against general demurrer, in that it might be construed as a suit for the recovery of the value of the child's services. *City of Albany v. Lindsey*, 11 Ga. App. 573 (3), 578, 75 S. E. 911; *Frazier v. Ga. R. Co.*, 101 Ga. 70 (1), 72, 28 S. E. 684; *Augusta Ry. Co. v. Glover*, 92 Ga. 132, 143, 18 S. E. 406.

Error from Superior Court, Fulton County; W. D. Ellis, Judge.

Action by M. A. Stoddard against Wright Campbell. Judgment for defendant, and plaintiff brings error. Reversed.

Moore & Pomeroy and Jos. H. Ross, all of Atlanta, for plaintiff in error.

Westmoreland & Smith, of Atlanta, for defendant in error.

JENKINS, P. J. Judgment reversed.

STEPHENS and HILL, JJ., concur.

(27 Ga. App. 370)

PAYNE, Agent, etc., v. YOUNG. (No. 12024.)(Court of Appeals of Georgia, Division No. 2.
Aug. 31, 1921.)*(Syllabus by the Court.)*

1. Master and servant \S 276(2) — Evidence held to warrant inference that railroad flagman was struck by train.

Evidence that a flagman of a railroad train, a few minutes after having attended to his duties, in going back along a track to flag a train, was seen sitting on the outside of the rails of an adjacent track on the projecting cross-ties, and that shortly after a train had passed over the latter track the flagman was found lying by the track unconscious, with such a wound in his head as could have been made by a passing train, warrants the inference that he was injured from being struck by a passing train.

2. Master and servant \S 278(18)—Evidence held to warrant inference that trainmen saw or negligently failed to see flagman struck by train.

Where the right of the injured person to recover against the railroad company is dependent upon the federal Employers' Liability Act, and his suit against the railroad company for such recovery is predicated upon the alleged negligence of the defendant in not keeping a lookout on the train which injured the plaintiff, so as to discover his helpless condition on the track after he had fainted and fallen over unconscious on the track, and in not stopping its train after the plaintiff's presence in such helpless and dangerous condition had become known to the defendant, evidence that the track was straight and unobstructed, in the direction from which the train approached, for three-quarters of a mile beyond where the injured person was found, that it was about 2 o'clock p. m. on a clear day, and that if the plaintiff's presence had been seen by the engineer keeping a lookout the train which injured him could have been stopped in time to prevent the injury, and that the train, according to the testimony of the engineer, was running a race with another train, and that this engineer kept a lookout, and that people had been in the habit of frequenting the place where the injured person was found, warrants the inference that the servants of the railroad in charge of an approaching train saw the plaintiff, or negligently failed to see him, and thereby negligently injured him.

3. Appeal and error \S 302(3)—Master and servant \S 270(18)—Exception in motion for new trial to refusal to strike evidence respecting matter is incomplete when evidence does not appear; evidence of habit of frequenting place of accident on right of way held admissible.

An exception in a motion for a new trial to the refusal of the court to strike from the record all of the evidence of a certain witness "with reference to outsiders walking on or along the tracks at or near the place where the plaintiff alleged he was injured," where it does not appear what the evidence was, is incomplete, and presents no question for this court

to pass upon. However, evidence that persons were in the habit of frequenting the right of way of the railroad company at the place where the plaintiff was injured was relevant to the issue, and was properly admitted.

4. Appeal and error \S 302(4)—Ground of motion for new trial complaining of correct charge because of failure to give additional instructions presents no error.

An exception to an admittedly correct extract from the charge of the court, upon the ground that the court erred in giving it in charge, because the court failed, in the extract quoted, or elsewhere in the charge, to give additional instructions, presents no ground of error, and is therefore without merit.

5. Damages \S 130(1)—Verdict for \$5,000 for injury on head and pain and suffering not excessive.

From the nature of the injury which the plaintiff received in his head, and the pain and suffering which it appears from the evidence he underwent, this court cannot hold that the trial judge abused his discretion in overruling the defendant's motion for a new trial upon the ground that the verdict in the sum of \$5,000 was excessive.

Error from Superior Court, Habersham County; J. B. Jones, Judge.

Action by Carl Young against J. B. Payne, Agent, etc. Judgment for plaintiff, and defendant brings error. Affirmed.

E. J. Kimsey, of Cornelia, I. H. Sutton, of Clarksville, and Edgar A. Neely, of Atlanta, for plaintiff in error.

H. H. Perry and W. A. Charters, both of Gainesville, and Geo. G. Allen, of Toccoa, for defendant in error.

STEPHENS, J. Judgment affirmed.

JENKINS, P. J., and HILL, J., concur.

(27 Ga. App. 368)

OWENS v. FULLER. (No. 12012.)(Court of Appeals of Georgia, Division No. 2.
Aug. 31, 1921.)*(Syllabus by the Court.)*

1. Sales \S 377, 384(1)—Measure of damages for purchaser's breach stated; count praying for wrong measure of damages properly stricken on demurrer.

The proper measure of damages for the purchaser's breach of a contract for the sale of personal property is the amount due on the purchase money contracted for. In a suit by the seller against the purchaser, where the second count of the petition alleged the contract of sale and the purchase price agreed upon between the parties, but prayed for damages at the market value of the commodity sold, which alleged market value was in excess of the purchase price agreed upon, the second count was properly, on this ground, stricken on demurrer.

2. Appeal and error \S 1064(1)—Charge referring to warranty as condition held not prejudicial; instruction defining "conditional contract" without distinguishing between conditions precedent and subsequent held not prejudicial.

Where in such a suit the issue was whether or not the alleged contract of sale had been entered upon, the plaintiff contending that the sale had been consummated and the property had been delivered to the defendant with a warranty by the plaintiff that a sawmill, which was the subject-matter of the sale, would saw merchantable timber, and the defendant contending that the property had been delivered to him by the plaintiff under an agreement between them that the defendant would enter into a contract to purchase the property, provided that the defendant found, upon testing the machinery, that it would saw a certain number of feet of lumber per day, it was not prejudicial error for the court, in the charge to the jury, to refer to the plaintiff's alleged warranty or guaranty as a condition, nor (since there was no contention by either party that there was a contract containing a condition subsequent) to define a conditional contract as a contract which the parties enter into upon certain conditions, and which, if the conditions are not complied with, does not become binding, without distinguishing between conditions precedent and conditions subsequent.

3. Trial \S 193(2)—Instruction that conditions of sale were for jury not expression of opinion, though issue was whether sale was on condition.

An expression of an opinion by the court that the alleged sale was a conditional one was not made by charging the jury "that the terms and conditions under which the sawmill was delivered to the defendant * * * is a question of fact for your consideration."

4. Appeal and error \S 1068(4)—Error in limiting damages harmless, where jury found against plaintiff.

Since the jury found against the plaintiff's right to recover in any amount in his suit for the breach of the alleged contract of sale, any alleged error in the charge, limiting the plaintiff's right to recover to an amount less than that sued for, is necessarily harmless.

5. New trial \S 70—Properly denied when evidence supported verdict.

The charge of the court fairly and without prejudice to the plaintiff submitted all the issues to the jury, and the evidence supports a verdict for the defendant in so far as it applies to the plaintiff's suit for an alleged breach of the alleged contract of sale. The trial court therefore did not err in overruling the plaintiff's motion for a new trial.

Error from Superior Court, Baldwin County; J. B. Park, Judge.

Action by S. R. Owens against Burton Fuller. Judgment for defendant, and plaintiff brings error. Affirmed.

Sibley & Sibley, of Milledgeville, for plaintiff in error.

Edward R. Hines and Geo. S. Carpenter, both of Milledgeville, for defendant in error.

STEPHENS, J. Judgment affirmed.

JENKINS, P. J., and HILL, J., concur.

(27 Ga. App. 350)

SAVANNAH ELECTRIC CO. v. LOWE.
(No. 11760.)

(Court of Appeals of Georgia, Division No. 2.
Aug. 23, 1921.)

(Syllabus by the Court.)

1. Carriers \S 266—False Imprisonment \S 7(1)—Street car conductor may make such reassignments of seats as exigencies of traffic require; passenger remaining in seat other than that assigned him may be arrested without warrant.

Under sections 2718 and 2719 of the Civil Code of 1910, it is not only the right, but the express duty, of street railroad conductors to assign all passengers to seats in the cars in which they are riding, "so as to separate the white and colored races as much as practicable." To effectuate these provisions of law designed for the benefit and protection of both races, so as to preclude the possibility of racial contact and friction, conductors are invested with ample police powers. Under section 2719 it is a misdemeanor for any passenger, white or colored, to remain in any seat "other than that to which he may have been assigned." A reasonable construction of this power of a conductor includes not only the right to thus assign a seat at the time a passenger enters the car, but the right to make such necessary reassignments as the exigencies of the traffic may require. For a violation by a passenger of the penal provisions of this statute, not only may he be ejected from the car, but he is subject to summary arrest by the conductor, without warrant. Civ. Code, 1910, \S 2719. Furthermore, under the general police powers vested in railroad and street railroad conductors by section 926 and 927 of the Penal Code 1910, any passenger may be ejected or summarily arrested by the conductor for the violation within his presence of the penal provisions of this statute, or of any other penal statute or valid municipal ordinance, or for words or acts amounting to a breach of the peace.

2. False Imprisonment \S 20—Plea of justification admits detention and imposes burden of showing ground for arrest without warrant.

In a suit for false imprisonment, a plea of justification, while not admitting all the facts as alleged by the petition, does admit the act of detention (Smith v. Savannah Electric Co.,

25 Ga. App. 59, 102 S. E. 549; *Rigden v. Jordan*, 81 Ga. 668, 7 S. E. 857; Civ. Code 1910, § 4488; and where the arrest is made without a warrant, in order for the defendant to overcome the prima facie case thus made to arise, it is incumbent upon him to plead and to prove that a criminal offense was committed by the plaintiff in the presence of the defendant or his agent. Civ. Code, § 4488; *Ratteree v. Chapman*, 79 Ga. 574, 579, 4 S. E. 684; *Kerwich v. Steelman*, 44 Ga. 198; *McPherson v. Chandler*, 137 Ga. 129, 130(3), 72 S. E. 948; *Ocean Steamship Co. v. Williams*, 69 Ga. 251, 258.

3. Pleading §409(1)—Informal plea of justification is sufficient after trial.

"However loose and informal the plea of justification may be, when it is not demurred to, but is considered by the parties and the court as a sufficient plea of that character, and a trial is had under it, defects in it are not to be scrutinized after the trial is over; indeed it has been held that, where the parties treat it as sufficient, the trial court should do so likewise." *Henderson v. Fox*, 83 Ga. 233(3), 242, 9 S. E. 839, 840, citing *Bryan v. Gurr*, 27 Ga. 378.

4. False imprisonment §7(1)—Passenger not subject to arrest for violating rule of Railroad Commission as to seating of white and colored passengers.

The infringement by a street railway passenger of the provisions of some special rule or regulation of the state Railroad Commission, providing specifically and in detail the manner and method whereby the separation of the races is to be effected, but which rule neither does nor can (see *Southern Ry. Co. v. Melton*, 133 Ga. 277, 291, 65 S. E. 665; *U. S. v. Kettel* [D. C.] 157 Fed. 396; *U. S. v. Sandefuhr* [D. C.] 145 Fed. 49, 51) impose a penalty upon the passenger for its violation, while authorizing expulsion, does not authorize his arrest, in the absence of disorderly conduct. Thus, the rule of the state Railroad Commission, introduced in evidence by the defendant, and given in charge by the court, providing "that the Savannah Electric Company, in seating passengers on all of its cars, shall seat white passengers from the front of the car towards the rear, and colored passengers from the rear of the car towards the front, and that conductors shall be required to enforce this rule strictly by requiring colored passengers, beginning with the first seat in the rear, to occupy such seat to its capacity before taking the next seat in front, and so on," while having the full effect of a valid and binding civil statute (*Union Dry Goods Co. v. Ga. Public Service Corp.*, 142 Ga. 841, 846, 83 S. E. 946, L. R. A. 1916E, 358; Civ. Code 1910, § 2663), and while under the statute law it might be held to have penal force as against the common carrier, its officers, agents, or employees (Civ. Code 1910, §§ 2666, 2687, 2668) does not nor does it purport to provide a penalty for its violation by a passenger; and consequently the infringement of such a rule by a passenger, unless, as here, it amounts also to a violation of the statute, would not, in the absence of disorderly conduct, authorize his arrest.

5. False imprisonment §40—Municipal corporations §121—Street Railroads §70—Trial §39—Reading pleaded ordinances to court without objection held equivalent to formal tender; validity of ordinance is question for court; separate coach ordinance held in conflict with order of Railroad Commission; instruction as to effect of ordinance on street car passenger's right to retain seat held confusing, notwithstanding another instruction.

The plaintiff, in her petition against the street railway company, set forth certain municipal ordinances of the city of Savannah which she alleged had been violated by the defendant, and which in effect provide for the furnishing of separate accommodations for white and colored street railway passengers, by providing either separate cars or dividing the same car into separate divisions, each marked and designated by a described sign or placard so as to indicate for which race such part of the car is maintained. These ordinances further provide that any conductor or other official operating a street car not so provided with indicating signs shall be guilty of a criminal offense, and that any person "willfully occupying as a passenger" any part of a car other than that so set apart and designated for persons of his or her color shall, on conviction, be punished as for disorderly conduct. On the trial the ordinances were not formally introduced in evidence, and the defendant company excepts to the charge of the court relative thereto, (1) because the ordinances, for the reason that they were not formally tendered in evidence, were not properly before the court at all; (2) because the court erred in instructing the jury that "if there is a conflict between the state law and the city ordinances, then the state law takes preference," the contention being that any question of such a conflict was purely a question of law for determination by the court; and (3) because the court charged in reference to the ordinances as follows: "I want you to bear in mind, however, that if you find in this case that this plaintiff was not occupying a seat reserved under the city ordinance for white passengers, and where under the law she had a right to be, then she had a right to decline to move therefrom, and there would be no right on the part of the conductor to arrest her or expel her from the car." Held:

(a) While, in the absence of proof, the court cannot ordinarily take judicial cognizance of municipal ordinances (*Collier v. Schoenberg*, 26 Ga. App. —, 106 S. E. 581), yet where, as here, the ordinances have been pleaded in the petition, and the trial court has certified that "while the ordinances pleaded were not formally tendered in evidence, they were read to the court in the presence of the jury," such treatment of them by counsel without objection will be taken as equivalent to a formal tender. *Ga. Excelsior Co. v. Hartfelder-Garbutt Co.*, 12 Ga. App. 797, 78 S. E. 611.

(b) Any question as to the validity of a municipal ordinance and whether or not it conflicts with a state statute is properly a question of law to be determined by the court. As we construe these ordinances, they do in a sense conflict with the plan and method of procedure

outlined by the rule of the Railroad Commission; and since the Commission has jurisdiction of the subject-matter, its order has superior and binding force and effect as a civil rule, to the exclusion of the municipal ordinance which attempts to legislate otherwise. Consequently, while it is true that the court charged the jury that even a violation by the defendant company of any obligation sought to be imposed upon it by the ordinances would not justify the plaintiff in transgressing the statute law, still it seems reasonably possible, if not probable, that the excerpts from the charge quoted relating to the ordinances might have been confusing to the jury, on the theory that, since the plaintiff was undoubtedly occupying the rear portion of the car (either the second or third seat from the rear), she was therefore within her legal rights under the ordinances in so remaining, despite the direction of the conductor acting under the duty and authority of the statute law that she exchange her seat so as to occupy one further back.

6. False imprisonment ¶25—Evidence of good character admissible on question of damages when good character alleged.

The character of the person seeking damages for false imprisonment is not ordinarily in issue, so far as the mere right to recover is concerned; but where the petition alleges good character, which allegation is denied by the answer, evidence in support of good character becomes relevant in the consideration of the amount of damages. *Fire Ass'n of Philadelphia v. Fleming*, 78 Ga. 733(2), 3 S. E. 420; 19 Cyc. 365.

7. False imprisonment ¶7(1) — Passenger properly arrested for refusing to obey conductor's direction to change seats.

Under the statute law (Civ. Code 1910, §§ 2718, 2719), set forth in the first division of the syllabus, and under the undisputed evidence in the case, the conductor was acting within the reasonable scope of his rights, duty, and authority, in directing the plaintiff to exchange her seat for another located behind her, the purpose being in this way to "separate the white and colored races as much as practicable;" and since, under such circumstances, the statute makes it a misdemeanor for any passenger, white or colored, to remain in any seat "other than that to which he may have been assigned," the undisputed refusal of the plaintiff to obey such direction authorized her arrest, and consequently she could not be entitled to damages therefor.

Error from City Court of Savannah; Davis Freeman, Judge.

Action by Genevive Lowe against the Savannah Electric Company. Judgment for plaintiff, and defendant brings error. Reversed.

Lawrence & Abrahams, of Savannah, for plaintiff in error.

Oliver & Oliver, of Savannah, for defendant in error.

JENKINS, J. P. [1-7] The plaintiff was a passenger of the defendant street railway

company. She brought suit for damages on account of her alleged unlawful arrest by the conductor of the defendant company. The company entered a plea of justification based on the ground that the plaintiff had violated the regulations pertaining to the separation of the races. No objection was made as to the sufficiency of the plea of justification, but the case was tried upon the theory set up by a defense of that character. The jury found a verdict in favor of the plaintiff in the sum of \$537, and the defendant company brought its exceptions to this court.

Section 2717 of the Civil Code (1910) provides that—

"All railroads doing business in this state shall furnish equal accommodations, in separate cars, or compartments of cars, for white and colored passengers; but this section shall not apply to sleeping cars."

This section manifestly does not apply, however, to street cars. These are dealt with in the next section (section 2718), which provides:

"All conductors or other employees in charge of such cars shall be required to assign all passengers to their respective cars, or compartments of cars, provided by the said companies under the provisions of the preceding section; and all conductors of dummy, electric, and street cars shall be required, and are hereby empowered, to assign all passengers to seats on the cars under their charge, so as to separate the white and colored races as much as practicable; and all conductors and other employees of railroads and all conductors of dummy, electric, and street cars shall have, and are hereby invested with, police powers to carry out said provisions."

For a failure to obey the requirements of this section passengers are penalized by section 2719, as follows:

"Any passenger remaining in any car, or compartment, or seat, other than that to which he may have been assigned, shall be guilty of a misdemeanor."

The court on the trial gave in charge to the jury these two latter sections of the Code, and also the rule of the railroad commission of Georgia quoted in the fourth headnote, to the effect that conductors of the Savannah Electric Company should require "colored passengers, beginning with the first seat in the rear, to occupy such seat to its capacity before taking the next seat in front, and so on." The plaintiff in her petition pleaded certain municipal ordinances of Savannah, the provisions of which she contended had been violated by the defendant company. These ordinances were read in the presence of the jury, without objection, and were treated in the charge of the court as indicated in the syllabus. They read as follows:

"All companies, persons, firms, and associations operating street cars in the city of Savannah are hereby required to furnish separate accommodations for white and colored passengers, and all white and colored passengers occupying seats in street cars in the city of Savannah are hereby required to occupy the respective cars or divisions of cars provided for them, so that the white passengers shall occupy only the cars or division of cars provided for white passengers, and the colored passengers shall occupy only the cars or divisions of cars provided for the accommodation of colored passengers. All companies, firms, persons, and associations operating street cars in the city of Savannah shall furnish such separate accommodations, at their option, by the operation together of two or more cars, providing separate cars for white passengers and separate cars for colored passengers, or by furnishing separate accommodations for white and colored passengers in the same car. When separate accommodation is furnished for white and colored passengers in the same car the front part of the car shall be designated for white passengers, and the rear part of the car for colored passengers. When two or more cars are operated together, thus providing separate car or cars for white passengers, and separate car or cars for colored passengers, the front car or cars shall be designated for white passengers and the rear car or cars for colored passengers. The cars, or parts of cars, furnished for white and colored passengers respectively shall have placed conspicuously at each end of the car, or part of car, signs in plain letters, not less than two inches high, indicating by the words 'white' or 'colored,' as the case may be, that such car, or part of car, is provided for the use of white passengers or colored passengers, as the case may be; and when open cars to be entered from the side of the cars are provided for the accommodation of both white and colored passengers, additional such signs shall be provided and placed conspicuously on the side of the cars so as to indicate thereby the portion of the car to be used by white and colored passengers respectively."

"Any officer, agent, or employee of any company, person, or firm, who shall as superintendent or other officer of such company, or as conductor, motorman, or other employee of such company, operate any car not so provided with signs on the streets of the city of Savannah for the transportation of passengers, shall upon conviction thereof be fined not more than one hundred (\$100) dollars, or by imprisonment not more than thirty (30) days for each such offense; and any white person willfully occupying as a passenger any car or part of car not so set apart and provided for white passengers, and any colored person willfully occupying as a passenger any car or part of car not so set apart and provided for colored passengers, shall be deemed guilty of disorderly conduct, and shall be punished by fine not exceeding one hundred (\$100) dollars, or by imprisonment not exceeding thirty (30) days."

It would seem from the record that the car was not divided into separate divisions or compartments, but that placards indicating the method of seating the races were placed

in the front and rear of the car. There is a conflict in the testimony as to which particular seat the plaintiff occupied as a passenger upon the occasion in question. According to the conductor's evidence it was the third seat from the rear. According to her own evidence (which, however, is not exactly clear on this point) it might seem that she occupied the second seat from the rear. Without going into the testimony of the conductor, but setting forth the transaction solely according to the version given by the plaintiff herself, the record shows that she testified as follows:

"The conductor came and touched me on the shoulder and asked me to move, that two white ladies were seated directly behind me. * * * Why didn't I move. Well, the ladies were pointed to two seats above. The two ladies were seated in the rear of me, and after they were seated I didn't see any reason to move. * * * I simply looked directly behind me to see the people who called my attention to it. I saw two white ladies directly behind me. * * * Why did I undertake to tell them where to be seated, where they wanted to be seated? They were seated in the colored portion of the car. * * * As to why I did not move back when my attention was called to it? Well, I would have moved back, but the ladies did not say anything, and they simply were able to move up."

Referring to a different and later incident, when all the seats in front of her were occupied, and she was again directed to change her seat, she testified:

"I said, 'Why should I move? You haven't given me any reason.' I didn't look back to see whether there were any other white folks on the car. He said, 'There is a white man and a white boy? I said, 'Is that so? I did not know that.' After speaking to me like that, I saw the man and boy sitting down. I did not think of color any more. I sat there, and didn't pay any more attention. * * * It is not true that the conductor told me three times to move to the rear seat and I refused: he told me twice."

"Q. But at this particular time he told you to move, and you saw the white man and white boy were forced to sit in the negro compartment, and the conductor asked you to move. Now I ask you to tell the jury why you didn't reply to the conductor. A. Well, this is the point that I looked at then. It was a man and boy. Had it been ladies I would have readily gotten up."

"Q. So that, if it had been ladies, you would have moved, but being a man and boy, you refused to move? A. Yes, sir."

Thus, from the testimony of the plaintiff herself, whatever question might suggest itself as to the reasonableness of the direction given her in the first instance by the conductor, it would seem clear and undisputed that on the second occasion the plaintiff refused to exchange her seat for another in her rear, although the car in front of her at that time was filled with white passengers, and white passengers were standing or sitting in

her rear, and that the reason given by her for her refusal on this occasion was that the persons in her rear were not ladies. There was other testimony given for the defendant which would afford plain and palpable justification for the arrest, but which, for the purposes of this decision, it is not thought necessary to incorporate.

As we understand the case, the question is solely whether the defendant was authorized in arresting the plaintiff on account of her violation of the statute law, as properly administered by the officers and servants of the defendant company. It is not whether she may have violated also the provisions of the valid civil rule of the Railroad Commission, or whether either she or the defendant violated or observed the provision of the municipal ordinances.

Judgment reversed.

STEPHENS and HILL, JJ., concur.

(182 N. C. 2)

ELIZABETH CITY MILLING CO. v. PHILLIPS & CO. (No. 15.)

(Supreme Court of North Carolina. Sept. 14, 1921.)

1. Sales \S 175—Buyer held to have broken contract by cancellation for refusal to deliver contrary to its terms.

Where plaintiff had agreed to buy potatoes, to be shipped 25 per cent. in November, 25 per cent. in December, 25 per cent. in January and February, and 25 per cent. in March, and later demanded 50 per cent. to be shipped in December and the remaining 50 per cent. also in December, or half in December and half in January, and, on the refusal to ship as ordered, canceled the contract, it is guilty of a breach of contract, and cannot recover for failure to deliver.

2. Sales \S 384(1)—Measure of damages for buyer's cancellation stated.

Where contract for the sale of potatoes, by which buyer paid down 50 cents per barrel and was to get a deduction for frozen potatoes, was later canceled by the buyer, the seller was properly permitted to recover the difference between the contract price and the price realized by the sale of the potatoes whose delivery was improperly refused less the amount of the deposit of 50 cents per barrel for those not delivered, and less the value of frozen potatoes delivered under the contract.

Appeal from Superior Court, Pasquotank County; Allen, Judge.

Action by the Elizabeth City Milling Company against Phillips & Co. From a judgment for defendant, plaintiff appeals. No error.

This was an action upon a contract, made by correspondence, for the delivery by de-

fendant to the plaintiff at Elizabeth City of 1,000 sacks of seed Irish potatoes to be shipped subject to weather hazards, and upon receipt of written order from the plaintiff for shipment. The plaintiff deposited with the defendant the sum of 50 cents per sack in advance. The defendant agreed to refund to plaintiff the purchase price per sack for all potatoes frozen before delivery. The defendant actually delivered only 440 sacks, of which 12 sacks were frozen, and the liability therefor acknowledged.

The plaintiff brings this action for \$280, being the refund of 50 cents per sack deposited for the 560 sacks not delivered; for \$52.80, being the purchase price for the 12 sacks of frozen potatoes, and \$896, alleged profit which plaintiff would have made, if potatoes had been delivered according to contract. The first two items were not disputed, but the defendant contended that it was relieved of shipping the potatoes on account of weather conditions, and also by reason of the congestion of traffic caused by the war, and also pleaded as a counterclaim that by reason of the failure of plaintiff to take the potatoes, when offered within the time specified, it was forced to sell the same at a price below the contract. The jury found all issues in favor of the defendant, and assessed the sum due the defendant at \$288.75, and from the judgment plaintiff appealed.

Meekins & McMullan and Thompson & Willson, both of Elizabeth City, for appellant. Ehringhaus & Small, of Elizabeth City, for appellee.

CLARK, C. J. By the contract, which was made September 7, 1917, it was provided that the potatoes should be shipped "between January 1 and February 1, 1918." Owing to congestion in freight shipments caused by the war the contract was changed, as appears by the correspondence, to provide that the potatoes should be shipped, "25 per cent. last of November, 25 per cent. in December; 25 per cent. in January and February, and 25 per cent. in March." The plaintiff failed to order any shipment in November, but demanded 50 per cent. to be shipped in December and the remaining 50 per cent. also in December, or half in December and half in January. These demands were not assented to by the defendant and were contrary to the amended contract as above set out. On March 13 the plaintiff canceled the order and refused to take the remainder of the potatoes though the defendant had under the terms of the contract all the month of March to complete delivery. The plaintiff received about 25 per cent. of the potatoes during December, and in January another shipment covering the deliveries agreed on for February. No written

orders were given for November, and the contract was canceled by plaintiff March 13, before the time for the final deliveries had expired.

[1, 2] The plaintiff had no right to recover upon his own showing, according to which he had breached the contract in four particulars. He was entitled to recover nothing, and the defendant was properly permitted to recover for its damage by reason of the cancellation of its order, after deducting the amount in hand; i. e., 50 cents per barrel for the potatoes not delivered, and for the frozen potatoes. That is, the defendant recovered the difference between the contract price and the price realized by the sale of the potatoes whose delivery was improperly refused, less the amount of the deposit of 50 cents per barrel for the potatoes not delivered, and proper credit was also given to the plaintiff for the frozen potatoes.

No error.

(182 N. C. 9)

HIPP v. E. I. DUPONT DE NEMOURS & CO.
et al. (No. 441.)

(Supreme Court of North Carolina. Sept. 14, 1921.)

1. Pleading \S 214(2)—Demurrers admit all facts sufficiently pleaded.

A demurrer admits all facts sufficiently pleaded.

2. Judgment \S 693 — Judgment against husband suing for injuries not res judicata as to negligence as against wife suing for damages resulting to her.

The wife not being party to action by husband for personal injuries to him, the judgment against him is not conclusive as to negligence against her suing for the damages resulting to her from the alleged negligent injury of him.

3. Husband and wife \S 209(4)—Wife may sue for her damages from negligent injury of husband.

In view of the status and rights of married women under Const. 1868, art. 10, § 6, and C. S. § 2513, a wife may sue for damages to her from negligent injury of her husband, but can recover nothing which he could recover or which in case of his death from the injury his personal representatives could recover.

Appeal from Superior Court, Mecklenburg County; Harding, Judge.

Action by Mrs. W. B. Hipp against the E. I. Dupont de Nemours & Co. and another. From judgment overruling demurrer to the complaint, defendants appeal. Affirmed.

The plaintiff, who is the wife of W. B. Hipp, brings this action alleging that her husband, while working as an employee of the defendant company in Hopewell, Va.,

was, "seriously, painfully, and permanently injured as a proximate result of the carelessness and negligence of the defendants," setting out the manner in which he was injured and the extent of such injuries and the expense, and that, under the law of Virginia, which is set out, the plaintiff was entitled, as a married woman, to sue and be sued as if she were unmarried, and to own and control her property as fully as if she had remained single, and that neither she nor her husband have received anything whatever from the defendants in the way of damages for the serious injuries inflicted on him; and that her husband brought action in Virginia, but, notwithstanding three separate jury verdicts afforded him, the Court of Appeals of that state rendered judgment against him upon demurrer to the evidence; that the plaintiff is entitled notwithstanding to recover in this jurisdiction, she having obtained service upon the defendants, for the personal injuries inflicted on her by the injury to her husband. The defendants demur upon the ground that it appears upon the face of the complaint that judgment has been rendered in Virginia, that her husband was not entitled to recover, and that it appears inferentially therefore that under the law of the state of Virginia she has no action for the loss of her husband's company, for damages to her consequent upon injury sustained by him, caused by the negligence of a third person, where the husband's right of action, if any, is barred. The judge overruled the demurrer, and the defendants appealed.

W. S. Beam and C. A. Cochran, both of Charlotte, and V. S. Thomas, of Wilmington, Del., for appellant Dupont de Nemours & Co.

Clarkson, Tallafarro & Clarkson, of Charlotte, for appellant Stillwell.

John M. Robinson and Hamilton O. Jones, both of Charlotte, for appellee.

CLARK, C. J. [1] The demurrer admits all facts sufficiently pleaded, and therefore we must take it that the plaintiff's husband was "seriously, painfully, and permanently injured as the proximate result of the carelessness and negligence of the defendants," and that by reason thereof the plaintiff has suffered shock, which has impaired her nervous system, impaired and permanently injured and weakened her physical and mental condition, and that she has suffered greatly from loss of sleep, worry, and anxiety on account of the condition of her husband; in watching over and caring for him, causing her to devote her entire time to nursing and caring for him, while at the same time the burden of maintaining the family fell upon her, entailing heavy cost and expense, and that she has been forced to pay out large sums of money to hospitals, doctors, nurses, and medical expenses, and that by reason of

said injuries she has been deprived of the support and maintenance which her husband would have given her, and has suffered mental anguish by being forced to witness the suffering endured by her husband, whereby her own nerves and health have been seriously and permanently shocked, weakened, and impaired; and that by reason of the physical and mental condition of her husband she still continues to suffer in mind and body, and has been denied the care, protection, consideration, companionship, aid, and society of her said husband, and the pleasure and assistance of her husband in escorting her to visit friends and relatives, and has been required to remain at home for long periods of time, denying herself to friends and relatives, and besides has had entailed upon her the fatigue of nursing and caring for him, and incurred expenses, and has paid large sums on that account. These matters are set out more at length in the complaint, but this is a summary of the grounds of her action—all of which allegations of facts are admitted as pleaded by the demurrer. The demurrer in effect presents two questions of law upon these facts:

(1) The first is that the judgment against her husband in *Virginia (Dupont v. Hipp, 123 Va. 49, 96 S. E. 280)* bars any right of action which she might have for damages for grief, mental anguish, labor, and expense devolving upon her by the disability of her husband and the loss and comfort of his society.

(2) The second is that upon the facts admitted the wife is not entitled to maintain this action.

[2] As to the first ground of demurrer, if the wife has a cause of action we do not think the demurrer can be sustained. She was not a party to the action brought by her husband, and she is not estopped by the judgment as to any relief she might be entitled to. It may be that upon the trial of this action an entirely different state of facts as to the manner in which the husband was injured might be developed, either by additional evidence or by the estimate placed upon the evidence by the jury. She was neither a party nor a privy to that action.

In *Laskowski v. People's Ice Co., 203 Mich. 186, 168 N. W. 940, 2 A. L. R. 586*, it was held that—

“A judgment in favor of a wife in an action to recover damages for injuries to her person is not conclusive upon the question of defendant's negligence, and absence of her contributory negligence, in an action by her husband for the damages resulting to him from such injuries.”

Of course the reverse must be true, since, as held in that case, under the Married Woman's Act, he was not a necessary or proper party to the action by his wife to recover damages for injuries to her person, and was not, in fact, a party. See notes to that case (2 A. L. R. 592) citing many cases that nei-

ther the judgment in such cases nor a settlement by compromise on the part of the wife would affect the husband's right to recover for the damages sustained by him, quoting among others *R. R. v. Kinman, 182 Ky. 597, 206 S. W. 880*.

[3] But the second ground of demurrer presents an entirely different question. At common law the husband could maintain an action for the injuries sustained by his wife for the same reason that he could maintain an action for injuries to his horse, his slave, or any other property; that is to say, by reason of the fact that the wife was his chattel. This was usually presented in the euphemism that “by reason of the unity of marriage” such actions could be maintained by the husband. But singularly enough this was not correlative, and the wife could not maintain an action for injuries sustained by her husband. The reason is thus frankly stated by Blackstone:

“We may observe that in these relative injuries notice is only taken of the wrong done to the superior of the parties (husband) injured by the breach and dissolution of either the relation itself, or at least the advantages accruing therefrom; while the loss of the inferior (the wife) by such injuries is totally unregarded. One reason for this may be this: That the inferior hath no kind of property in the company, care or assistance of the superior as the superior is held to have in those of the inferior; and therefore the inferior can suffer no loss or injury.” 3 Blackstone's Commentaries, 143.

By the married women's provision in the Constitution of 1868, art. 10, § 6, this conception of ownership by the husband whereby upon marriage all the personal property of the wife became the property of the husband, and he became the owner of her realty during his lifetime, was abolished. The courts in this state continued for a long while, notwithstanding, to hold that the husband could recover his wife's earnings and the damages for injuries done her; but by Acts 1913, c. 13, now C. S. § 2513, it was provided that her earnings and damages for torts inflicted upon her were her sole and separate property for which she could sue alone.

It follows therefore that the husband cannot sue to recover his wife's earnings, or damages for torts committed on her, and there is no reason why she can sue for torts or injuries inflicted on her husband. The law has never authorized the wife to maintain such action for torts sustained by the husband. We agree with the learned counsel for the plaintiff that if the husband could maintain an action to recover damages for torts on the wife she should be able to maintain an action on account of torts sustained by the husband. Such right of action, if it existed in favor of the husband, should exist in favor of the wife. It should be in favor of both or neither, but, in view of the Constitution of 1868 and our statute on the subject, we think that such action can-

not be maintained by either on account of the injury to the other.

So far as injuries to the husband are concerned and the damages he has sustained, whether the plaintiff recovers or fails to do so the verdict and judgment are conclusive. The wife certainly cannot recover a second time for the injuries of the husband, who alone can sue for them (or, in case of wrongful death, his personal representative); but the action of the wife is not for the injuries to the husband, though formerly the husband was allowed to recover damages for the injuries sustained by the wife because they were his property. *Price v. Electric Co.*, 160 N. C. 450, 78 S. E. 502. That is now swept away.

The cause of action for the wife in this case is not for the injuries to the husband, but for the injuries to herself, which are thus summed up in the brief for the plaintiff in this action:

- (1) Expenses paid by her, made necessary by her husband's injuries.
- (2) Services performed in nursing and caring for him.
- (3) Loss of support and maintenance.
- (4) Loss of consortium.
- (5) Mental anguish.

Though the husband can no longer recover for the damages which his wife has sustained as property belonging to himself, he may still recover for the damages sustained by him by reason thereof which have been held to include expenses incurred, deprivation of society, and loss of aid and comfort.

In *Kimberly v. Howland*, 143 N. C. 398, 405, 55 S. E. 778, 781 (7 L. R. A. [N. S.] 545), the plaintiff's wife received a serious injury by reason of the defendant's negligence. The court said:

"It is contended that the husband has sustained no injury, and as to him the motion to nonsuit should have been allowed. It seems to be well settled that where the injury to the wife is such that the husband receives a separate loss or damage, as where he is put to expense, or is deprived of the society or the services of his wife, he is entitled to recover therefor, and he may sue in his own name."

In *Bailey v. Long*, 172 N. C. 661, 90 S. E. 809, L. R. A. 1917B, 708, decided since chapter 13, Laws 1913, the plaintiff had taken his wife to the defendant's hospital. By reason of the defective condition and construction of said hospital, his wife contracted pneumonia and died. The plaintiff brought the action for damages suffered by him. Mr. Justice Brown, for a unanimous court, held that the plaintiff could recover for expenses which accrued to him for nursing and otherwise, and said:

"In addition, we think plaintiff can recover damages for the mental suffering and injury to his feelings in witnessing the agony and suffering of his said wife while lingering with such cold and pneumonia, and in the act and article of death resulting therefrom."

We do not think that the husband could now recover compensatory damages for her physical and mental anguish, nor for the value of her services, which are matters purely personal to her, and for which she alone could recover, though formerly these were the basis for an action by the husband. As he can no longer sue for her earnings, of course he is not entitled to recover the value of her services. But the great weight of authority sustains the proposition that, under the modern statutes enlarging the rights of married women, the husband is not deprived of his right to recover the damages which he himself sustains, and which are the direct consequences of the injury to the wife. He cannot sue for the injuries she sustained, but for those which accrued to himself as the direct and not the remote consequences of such wrongful act of the defendant. 13 R. C. L. § 642; 21 Cyc. 1527.

In *Holleman v. Harward*, 119 N. C. 150, 25 S. E. 972, 34 L. R. A. 803, 56 Am. St. Rep. 672, where the defendant had sold the plaintiff's wife laudanum or similar drugs despite the plaintiff's protests, the court held that the husband could recover for loss of companionship and loss of services resulting therefrom. While the statute now does not permit the husband to recover for loss of services, which must be recovered solely by the wife, the loss of the companionship of his wife is a loss purely personal to him, and the direct consequence of the wrong of the defendant. For this the wife could not recover, and being the direct and not remote consequence of the wrongful act the husband is entitled to his action.

In *Flandermeyer v. Cooper*, 85 Ohio St. 327, 98 N. E. 102, 40 L. R. A. (N. S.) 360, Ann. Cas. 1913A, 983, where the defendant had sold drugs to the husband over the wife's protests, it was held in exact analogy to the above case from this court, that she could recover for the damages thus resulting to her. The court said:

"A statutory right cannot change except by action of the lawmaking power of a state. But it is the boast of the common law that: 'Its flexibility permits its ready adaptability to the changing nature of human affairs.' So that whenever, either by the growth or development of society, or by the statutory change of the legal status of any individual, he is brought within the principles of the common law, then it will afford to him the same relief that it has theretofore afforded to others coming within the reason of its rules. If the wrongs of the wife are the same in principle as the wrongs of the husband, there is now no reason why the common law should withhold from her the remedies it affords to the husband."

The court in that case aptly cited from *Cooley on Torts* (3d Ed.) 477:

"Upon principle, this right in the wife is equally valuable to her as property, as is that of the husband to him. Her right being the same as his in kind, degree, and value, there

would seem to be no valid reason why the law should deny her the redress which it affords to him. * * * The gist of the action is the loss of consortium, which includes the husband's society, affection, and aid."

And also uses this language:

"There can be no reasonable contention but that the wife suffers the same injury from the loss of consortium as the husband suffers from that cause. His right is not greater than hers. Each is entitled to the society and affection of the other. The rights of both spring from the marriage contract, and in the very nature of things must be mutual, and, while this was always true of the marriage relation, yet there was a time in the history of our jurisprudence when the legal status of the wife was such that she could not, at common law, maintain an action of this character. Now her legal status is the same as that of her husband. She has the same right to the control of her separate property, the same right to sue in her own name, and, in a word, is in the full enjoyment of every right that her husband enjoys, so that she has come clearly within the principles of the common law that allow a right of action by the husband for damages for the loss of the consortium of his wife. Either we must hold that the common law is fixed, unchangeable, and immutable, that it possesses no such flexibility as will permit its ready adaptability to changing conditions of human affairs, or that, when every reason and every theory for denying the wife the same rights as the husband has entirely disappeared from our jurisprudence, she is now equally entitled with her husband to every remedy that the common law affords; and we have no hesitation in adopting the latter view."

To the same purport is *Jaynes v. Jaynes*, 39 Hun (N. Y.) 40. The plaintiff's counsel adds:

"Why should the husband be allowed a recovery in cases of this character and the wife who suffers in the identical same way be denied a recovery? They stand before the same altar; they enter into the same contract."

Necessarily their rights are the same at the bar of justice.

In *Bernhardt v. Perry*, 276 Mo. 612, 208 S. W. 462, in discussing this identical question, it was said by the able Chief Justice Bond of that court as follows in speaking of the rights of the wife:

"She could have had no recovery when she occupied the status of a married woman at common law; for then her legal existence was merged in that of her husband. But under the Married Woman's Acts in this state, beginning in 1875 and culminating in 1889, with slight amendments thereafter, a wife is to all intents and purposes a legal entity distinct from her husband and capable of contracting and being contracted with and suing and being sued, as fully as if she were an unmarried woman and sui juris. While the principles of the common law, previous to her statutory emancipation, debarred the wife from any legal redress in cases like the present, they nevertheless recognized fully the injury to her personal rights caused by the acts set forth in the petition,

and they affirmed such rights to be the same as those which the husband would have been deprived of had the injury in question been inflicted upon the wife, (*Flandermeyer v. Cooper*, 85 Ohio St. 327; *Holleman v. Harward*, 119 N. C. 150; 13 R. C. L. par. 509, p. 1480), and though sanctioning a full right to recover in such cases on the part of the husband they denied it to the wife, although an equal sufferer, because feudalism had decreed that she was a legal nonentity and incapable of maintaining any action for the violation of her rights as a wife caused by wrongful injuries inflicted upon her husband."

Further he says:

"The injury suffered by a husband from the loss of the consortium of his wife is no more direct or immediate than that sustained by her from the loss of his society, aid and affection. Hence, there is no logical basis for the reason upon which some of the adverse rulings are based, that in such cases the injury sustained by the wife is not directly and proximately caused by the wrongful act preventing her husband from giving her the means of a livelihood—which it is his duty to provide—and from performing his conjugal duties."

And again:

"The reasons given in the decisions against the right of a wife to recover from the material injury inflicted on her by a negligent act destroying the power of her husband to labor for her support and thereby imposing on her the task of supporting him and which renders him unable to perform the duties of a consort, are utterly inadequate to support the conclusions reached. It will be noted in all of these cases that they are rested upon the lack of suable capacity of the wife or upon the rules of the common law disabling her as against her husband to acquire title to the money awarded as damages for wrongful injury to him, wherefore the hobgoblin of a foolish consistency impelled the common law to adjudge she could not recover for an injury to her personal rights so caused since the instant a recovery was had it would belong to the husband. Neither of these reasons can exist under the specific provisions of the law governing married women; for, as has been shown, the wife may now sue as a feme sole and the awards for any violation of her personal rights belong to her and not to her husband."

It is true that these citations from the distinguished Chief Justice are in a dissenting opinion (in which Judge Williams concurred), but the decisions in other courts than ours are not authority, and are entitled only to the persuasive weight given them on account of the force and correctness of the reasoning therein, and therefore if there is correct and forceful reason in a dissenting opinion from another state it should command exactly the same consideration as if it were made in the majority opinion.

One of the chief grounds for the plaintiff's recovery is the loss of consortium which was formerly pleaded by the phrase, "per quod consortium amisit." This formerly lay only

in behalf of the husband, but now the term has been extended to give the wife, and with more reason, the same ground of action. The present state of the law is thus fully stated under the heading of *Consortium*, 12 *Corpus Juris*, 532, with full citations in the notes.

"In its original application the term was used to designate a right which the law recognized in a husband, growing out of the marital union, to have performance by the wife of all those duties and obligations in respect to him which she took upon herself when she entered into it; the right to the conjugal fellowship of the wife, to her company, co-operation, and aid in every conjugal relation; fellowship and assistance of the wife; comfort in her society in that respect in which a husband's right is peculiar and exclusive; conjugal society, affection, and assistance of the wife. The term, however, has developed to include the right of the wife to the society and comfort of the husband, and is now used interchangeably to denote the affection, aid, assistance, companionship, and society of either spouse; and as thus employed the term has been defined as those duties and obligations which by marriage both husband and wife take upon themselves toward each other in sickness and health; conjugal affection; conjugal fellowship; conjugal society and assistance; the conjugal society arising by virtue of the marriage contract; the consort's affection, society, or aid; the person's affection, society, or aid; the person, affection, assistance, and aid of the spouse. Loss of services as well as society and affection is included in the legal meaning of the loss of consortium."

There are decisions from other courts denying relief to the wife in cases of this character. Such decisions are necessarily dependent upon two factors: (1) The legislation in reference to the rights of married women in the particular jurisdiction; (2) the attitude of the court in giving either a liberal or restricted construction to new legislation of the nature of that in this state. As was well said by Chief Justice Bond in the above case:

"So prone are the courts to cling to consuetudinary law, even after the reason for the custom has ceased or become a mere memory, that it has required hundreds of years to obtain the meed of justice for married women."

The reasons formerly advanced for a denial to the wife of a recovery for damages sustained by her as a direct result of the injury to him and which are over and above and distinct from the damages which could be recovered by the husband in an action by himself were threefold: (1) The merger of her identity into that of her husband; (2) her incapacity to sue; (3) the right of her husband to recover full damages for his diminished earning capacity, with no corresponding right possessed by her.

Neither of the first two grounds are now valid in this state. It is urged, however, that the plaintiff, after he had obtained a recovery, is presumed to have obtained full pecuniary compensation for all the injuries

sustained by him, and of course, if he failed to recover, no action can be maintained by the wife. This proposition is correct if the action of the wife is for the damages for which the husband could maintain an action, but the facts as admitted by this demurrer are that he was injured by the negligence of the defendants, and that the wife sustained damages, which, though flowing from the injuries to her husband, are purely injuries to herself, and for which the husband could not have maintained an action. She is therefore not barred by the judgment, favorable or unfavorable, in the action brought by her husband. A judgment in an action is not effective as a bar or estoppel in any other action unless between the same parties and for the same cause of action. The present action is not between the same parties nor for the same cause of action as in the litigation between the husband and the defendants.

It has always been held that the husband's action for damages sustained by him on account of injuries to her is not barred by judgment in favor of the same defendant in an action brought by the wife. See cases cited in the notes to 2 A. L. R. 592. Of course the reverse of the proposition is true, 13 R. C. L. § 461.

As already stated, the rights which the wife is asserting in this action are entirely separate and distinct from the grounds of recovery asserted by the husband in his action. In paragraph 12 of the complaint is the following allegation which is admitted by the demurrer to be true:

"That, by reason of the sudden and fearful injury of her husband as above stated, and by reason of being forced to look upon him in his horribly mutilated condition, she was shocked and frightened to such an extent that her entire nervous system was impaired and undermined and left permanently injured and weakened, and her physical and mental condition was permanently injured and impaired."

In *Kimberly v. Howland*, 143 N. C. 398, 55 S. E. 778, the court said:

"We think the general principles of the law of torts support a right of action for physical injuries resulting from negligence, whether willful or otherwise, none the less strongly because the physical injury consists of a wrecked nervous system instead of lacerated limbs."

This was cited and approved, *Walker, J., May v. Telegraph Co.*, 157 N. C. 422, 72 S. E. 1059.

While the wife cannot recover for any damages for which the husband might have recovered (or his personal representative in the case of a wrongful death), we think that she could recover for those injuries which were sustained by her, and, being personal to her, for which the husband could not have recovered in his action. 15 A. & E. (2d Ed.) 861, which is cited in *May v. Telegraph Co.*, 157 N. C. 423, 72 S. E. 1059.

We will not go more fully into the elements of damages which can be considered by the jury when the action goes back for a new trial.

It is objected by the defendant in this case that, if such action can be maintained by the wife, it can be sustained on the part of the children or other dependent relatives. That plea has never been found good when the action has been brought by the husband, and of course it cannot avail when the action is by the wife upon the same state of facts. The wife's cause of action arises from the nature of the relationship created by the contract of marriage as now recognized by our Constitution, and the laws replacing the former status, under which, by the common law, the husband was the sole personage. Such plea has not been held valid in an action for criminal conversation or for alienation of affections, or in any other case in which an action by either husband or wife has been brought for injury to the plaintiff (whether husband or wife), which were personal to the plaintiff therein, and for which the other party could not maintain an action. It does not depend upon the fiction of loss of services of the other party to the marriage, but is based upon the ground that the party bringing the action (whether husband or wife) has been directly injured by the wrongful conduct of the defendant.

It is sufficient to say that the plaintiff has a cause of action for those injuries which were sustained by her, and which are personal to herself, and the direct and not the remote consequences of the negligence of the defendants, which is admitted by the demurrer in this case; and the judgment overruling the demurrer must therefore be affirmed.

ALLEN and STACY, JJ., concur in result.

(182 N. C. 34)

NEWBY et al. v. ATLANTIC COAST REALTY CO. et al. (No. 18.)

(Supreme Court of North Carolina. Sept. 14, 1921.)

1. Frauds, statute of §74(1)—Inapplicable to contract of parties to buy land and share profits of resale.

C. S. § 988, requiring contracts to sell or convey land to be in writing, refers only to a case where, as a result of a sale or exchange, a conveyance from one to the other of the contracting parties is contemplated, and not to an agreement for one of the parties to furnish the money to take up an option for land which the other had and take title in his name and divide the profits on a resale.

2. Joint adventures §5(1) — Action at law maintainable for breach of agreement.

Where defendants, who, under agreement with plaintiffs were to take title to land in themselves, furnishing the money for taking up an option thereon, and on resale were to divide the profits with plaintiffs, breached the contract and sought to thwart or forestall plaintiffs in the enforcement of the trust by associating with them others and taking title in them as well as themselves, plaintiffs need not resort to equity, but may sue for damages for breach of the contract or trust.

3. Trial §139(1) — No nonsuit, where evidence most favorable sufficient to establish plaintiff's cause of action.

Nonsuit may not be granted, where the evidence most favorable is sufficient to establish plaintiff's cause of action, and this notwithstanding discrepancies, inconsistencies, and contradictions; it being for the jury to determine which part is true.

Appeal from Superior Court, Perquimans County; Allen, Judge.

Action by W. G. Newby and another against the Atlantic Coast Realty Company and another. From a judgment of nonsuit, plaintiffs appeal. Reversed, and new trial granted.

This case was here at a former term, and is reported in 180 N. C. at page 51, 103 S. E. 909, to which we refer for a statement of the facts other than those to be found herein. The land was purchased at the sale thereof at public auction, and was bought in for the joint and equal benefit of the plaintiffs and the defendants, and under the new, or substituted, contract, which was in parol, previously made, the land was to be sold under an option and trust deed, plaintiffs to receive one half of the net proceeds of the sale of real and personal property, and defendants the other half, and the property was to be held by the parties for resale; and, it was further provided that the farm should be cultivated during the year 1919, all of which was to be done at the sole expense of the defendants and without any personal obligation on the part of the plaintiffs, the land and crops, and other property, to stand as security to the defendants for any money so advanced or expended by them for the joint benefit of the parties, and in furtherance of their agreement, the profits from the whole transaction to be equally divided between the parties. It is alleged that defendants failed to perform the contract on their part, and, instead thereof, that they entered into an agreement with other parties for the purpose of enabling them to relieve themselves of the burden of paying all the expenses, as they had contracted to do. Instead of paying the money due on the sale and to close the option for the purchase of the land, which was held by plaintiffs, defendants united with other parties, who they thought could assist them

in raising the funds to pay for the land and to defray the other expenses, and took the title to them jointly, the purpose being to break their contract with plaintiffs and to defeat or disregard their rights thereunder. The judge nonsuited the plaintiffs, and they appealed.

J. S. McNider, of Hertford, Ehringhaus & Small and Meekins & McMullan, all of Elizabeth City, for appellants.

Aydlett & Sawyer, of Elizabeth City, Small, MacLean, Bragaw & Rodman, of Washington, N. C., Chas. Whedbee, of Hertford, and Thompson & Wilson, of Elizabeth City, for appellees.

WALKER, J. (after stating the facts as above). [1] When the case was here before, we did not consider the question as to the statute of frauds, because there was no exception requiring us to do so. But in this appeal there was a nonsuit, which may have been granted upon the ground that if there was a contract, as alleged, it was not in writing, and therefore defendants were not bound by it, although the plaintiffs may have established it by their evidence. We will therefore pass upon it, as the question is presented and may arise again unless disposed of by us now. In order to decide this question, we must have a clear conception, or understanding, of the terms of the contract, and, as these were tersely and lucidly stated by Judge Cranmer at the first trial of the case, we adopt what he said about them, though not literally. Plaintiffs contend, said he, that they made a contract with defendants on the 6th day of December, 1918, under which it was agreed that the property be bought by them and held for resale for the joint account of both plaintiffs and defendants, they to share equally in all the profits, and that the farm was to be operated for their joint account, and that the profits from the farming were also to be divided equally; further, that all money necessary for the purchase of the land and the operation of the farm was to be furnished by the defendants, and that plaintiffs were not to furnish any money whatever, or to become in any way liable for any money for the purchase of the land or the farming operations.

With this understanding of the salient features of the contract, we are of the opinion that it is not within the language or spirit of the statute of frauds, which provides that all contracts to sell or convey lands, or any interest in or concerning them, shall be void, unless the contract, or some memorandum or note thereof, be put in writing and signed by the party to be charged therewith, or by some other person by him thereto lawfully authorized. Revisal, § 976 (Consol. Statutes, § 988). There is no such contract in this case as is described in the statute. The plaintiffs have not contracted to sell or convey any land

to the defendants, nor have the defendants agreed to buy and pay for the same, nor vice versa. While the question was not considered in the opinion of this court, by Justice Allen, in the first appeal, the learned justice thus referred to it when deciding as to the measure of damages:

"In the first place, the plaintiffs are not asking to recover damages for breach of contract to convey land. If they had done so, and the contract had been in writing, the rule laid down by his honor would have been the true measure of damages, being one-half of the difference between the option price and the market value of the land at the time of the breach, but being by parol, if one to convey the land, the statute of frauds would be a complete defense." Newby V. Realty Co., 180 N. C. 51, at page 53, 103 S. E. 909, at page 910.

He then continues, and states the terms of the contract very succinctly and clearly as follows:

"The plaintiffs are asking to recover damages for breach of a contract by the terms of which, as they allege, the defendants agreed to furnish the money to take up the option, which expired on January 1, 1919, and to sell the land and pay the plaintiffs one-half the profits, less one-half the expenses of sale, and to furnish the money for the cultivation of the lands for the year 1919, under the management of one of the plaintiffs, and to pay the plaintiffs one-half the profits from the crops."

The parties contracted with reference to the profits to be realized upon a resale of the land, and not with the view of acquiring title to any part of the land. They already had the title, and the land itself was to be held in trust, for the purpose of realizing the profits by another sale of it.

The section of the English statute of frauds, relating to declarations of trust, was never adopted in this state, though enacted in the same or similar form in some other states of the Union. And in this distinction will be found the explanation of the minority decisions in such other states, holding, in an action to raise and declare a trust, that the statute of frauds was applicable in those cases where, upon an agreement similar to this, title to the lands had been taken in the name of one party who wrongfully refused to execute the agreement. The majority view in all the states, however, is that to an agreement of this kind the statute of frauds has no application. 25 R. C. L. pp. 595-597; Morgart v. Smouse, 103 Md. 463, 63 Atl. 1070, 115 Am. St. Rep. 367, 7 Ann. Cas. 1140. In the majority view of the courts such an agreement for the purchase of land for the purpose of resale is regarded, not as a contract to sell or convey lands, but as a contract of partnership or a joint venture, as the case may be, which contemplates, not the transfer of any interest in lands from one party to the contract to the other, but only a division of profits upon a resale of the lands. In

Morgart v. Smouse, supra, 103 Md. 468, 63 Atl. 1072, 115 Am. St. Rep. 371, 7 Ann. Cas. 1141, the court said:

"It has been repeatedly held in different jurisdictions that an agreement by two or more persons to buy land and sell it and share either the profits or the profits and losses constitutes them partners for that venture, and entitles either of them to an accounting in equity from the others of the joint transactions. * * * A verbal agreement is sufficient to constitute a partnership to deal in lands; the statute of frauds not being applicable to such a contract." Parsons on Partnership (4th Ed.) § 6; Lindley on Partnership, 88, 89, and other cases cited.

In the note in Morgart v. Smouse, supra, 7 Ann. Cas. 1142, it is said:

"The widely accepted rule is that a partnership agreement between two or more persons that they will become jointly interested in a speculation for buying and selling lands is not within the section of the statute of frauds, providing that no estate or interest in lands shall be created, assigned, or declared, unless by act or operation of law, or by a deed or conveyance in writing."

In this state, as stated above and in effect, the only statute requiring consideration is Revisal, § 976, providing that contracts to sell or convey lands shall be void unless some sufficient memorandum thereof be reduced to writing. The uniform construction of this statute is that it has reference to those cases alone in which, as the result of sale, exchange, or other form of bargaining, a conveyance of land is contemplated from one of the contracting parties to the other. By the uniform decisions of this court, the statute has no application to those contracts whereby two persons agree to purchase land, either generally, or as a single venture, for the purpose of reselling the same at a profit and sharing the same between them. The reason for this is obviously that, by such a contract, no conveyance of land is intended between the parties to the contract forming the basis of the dispute. And where consequently such a contract has been entered into, and where one of the parties has thereafter taken the title to the lands in his own name and wrongfully refuses to execute the agreement, this court has consistently held that he holds the land as a trustee for the purposes of the joint agreement, and that an action to declare and enforce the trust will lie, as will appear by the case of Brogden v. Gibson, 165 N. C. 16, 80 S. E. 966, where the action was to declare and enforce a parol trust, upon facts practically identical with those in this case. The court held that the action would lie, and that the statute of frauds had no application, citing ample authority in this state to support the ruling. Because of its close likeness to this case is our excuse for quoting liberally from it. In that case, the court said (165 N. C. at pages 19 and 20, 80 S. E. at page 968):

"While defendant has not sold the land, so as to bring this case within the operation of the principle just stated, he has, by his agreement, charged it with a trust which equity will enforce, and the statute, fortunately for fair and honest dealing, is no protection to him. That he is morally bound to its performance will not be questioned, and he is also legally required to fulfill his promise. The law, upon this phase of the matter, is equally well established. We cannot doubt for a moment that the agreement was that the title to the land should be taken in the name of the plaintiff, or, at least, in the joint names of the parties, as the plaintiff was authorized to sell as well as to buy the lots, and everything necessary to carry out this purpose is implied. It surely was not intended that defendant should be able to block the execution of the agreement by taking the title to himself and refusing to convey. But even if it was the purpose that he should have the title to it, the agreement was that he should hold it for the joint benefit of himself and the plaintiff, and upon the faith of this promise he acquired the title, and will not be permitted to hold it discharged of this obligation, but only in trust for the uses declared in the agreement. The further consideration for the promise was that the plaintiff should contribute his skill and labor in securing the property for the purposes of the joint enterprise. This he has done fully and faithfully, and equity will not disappoint his reasonable expectation that defendant would not take the benefit of this skill and labor and refuse to execute the trust and confidence reposed in him."

In the same case (165 N. C. 22, 80 S. E. 969) the court said:

"If we should permit defendant to profit by any such betrayal of the trust so implicitly and innocently reposed in him, it would be not only inequitable, but a reproach to the administration of justice." Anderson v. Harrington, 163 N. C. 140, 79 S. E. 426.

A comparison of the cited case, Brogden v. Gibson, supra, with the instant case, will show a strong similarity of facts, and certainly a substantial one. In both cases there was an agreement that defendant furnish the money to purchase the land—the title to be taken, in the cited case, either in the plaintiff's name, or the names of both parties—and in both cases again the original owner of the property conveyed the same, not according to the terms of the agreement, but in the cited case, by the wrongful inducement of the defendant, to the defendant alone, and in the instant case, by the wrongful inducements of the defendants, to the defendants and other, perhaps, innocent parties, so as practically to preclude an enforcement of the trust. In neither case was there such an execution of the agreement as to remove the bar of the statute of frauds, if otherwise applicable. So that here the defendants' contention, based upon the imaginary distinction, that in the cited case the contract was executed, so far as it contemplated a conveyance of land, is untenable. The only conveyance of land

contemplated by the contract sued on was the conveyance from Fleetwood to the corporation, which plaintiffs and defendants agreed to form, and of which the defendants were to hold all the stock as security until their scheme or project was fully consummated. Fleetwood's contract with the plaintiffs to convey the land was evidenced by a written option, and Fleetwood, furthermore, is not a party to this suit. By the wrongful inducement of the defendants, Fleetwood has, as did the vendor in *Brogden v. Gibson*, supra, conveyed the lands to the defendants and their associates, in violation of the agreement and plaintiffs' equitable rights thereunder. It cannot be contended that the defendants, who, if they had taken title to the lands in themselves alone, would have been charged with a trust in plaintiffs' favor, can, by the ingenious and wrongful method of associating other, perhaps innocent, parties in the acquisition of the title, bar the plaintiffs of all relief. If the lands in defendants' hands, as is well established, would be chargeable with a trust in plaintiffs' favor, it is because the agreement between plaintiffs and defendants was a valid agreement, unaffected by the statute of frauds.

That this contract is not within the statute of frauds is strikingly illustrated by *Michael v. Foil*, 100 N. C. 178, 6 S. E. 264, 6 Am. St. Rep. 577, where it was held by this court that an agreement, made at the time of the sale of land, and as an inducement thereto, that if a certain mineral interest thereon was sold in the grantor's lifetime he was to have one-half of the price, is not a contract for an interest in land. See, also, *Houston v. Sledge*, 101 N. C. 640, 8 S. E. 145, 2 L. R. A. 487; *Ambrose v. Ambrose*, 94 Ga. 655, 19 S. E. 980. And still more to the point is *Trowbridge v. Wetherbee*, 11 Allen (Mass.) 361, cited and approved in *Michael v. Foil*, supra, where it was held that a parol promise to pay to another a portion of the profits made by a promisor on the purchase and sale of real estate is not within the statute of frauds, and may be proved by parol. See, also, *Sherill v. Hogan*, 92 N. C. 345.

[2] If the agreement was a valid one, and the defendants have not only wrongfully breached it, but sought to thwart or forestall the plaintiffs in the enforcement of the trust by the association with them of other innocent and bona fide purchasers for value, and without notice of the trust, then it follows, both in reason and upon authority, that the plaintiffs may properly assert their right through the medium of this action to recover damages for a breach of the trust or the contract, or to follow the fund they have received for the land. *Ledford v. Emerson*, 140 N. C. 288, 52 S. E. 641, 4 L. R. A. (N. S.) 130, 6 Ann. Cas. 107, and cases cited; *Owen v. Meroney*, 136 N. C. 475, 48 S. E. 821, 103 Am. St. Rep. 952, 1 Ann. Cas. 834; *Newby v.*

Harrell, 99 N. C. 149, 5 S. E. 284, 6 Am. St. Rep. 503; and especially *Campbell v. Everhart*, 139 N. C. 503, 52 S. E. 201; *May v. Le Claire*, 11 Wall. 217, 20 L. Ed. 50.

Plaintiffs have an election of remedies. They may sue for specific performance, which would require that the new associates of Ferrall be made parties, so that it might be determined whether they are purchasers bona fide and for value, and without notice of plaintiffs' equity. If they were not, they would be bound by the original contract between plaintiffs and defendants, and if they were, defendants would be liable to a money judgment, in lieu of plaintiffs' right to specific performance which they had lost by defendants' wrongful act. And, second, plaintiffs could waive their right to specific performance and recover damages for a breach of the contract, or a violation of the trust, which they have chosen to do in this action. 39 Cyc. 572; *Seymour v. Freer*, 8 Wall. (U. S.) 202, 19 L. Ed. 306; *Taylor v. Benham*, 5 How. (U. S.) 233, 12 L. Ed. 130. But there is no contention about plaintiffs' right to recover, as we understand it, if the contract is valid, and there was evidence to show that it was made between the parties as alleged. There was clearly a consideration to support it.

[3] This brings us to the second proposition, as to the sufficiency of the evidence to show the contract. We have examined the same carefully, and conclude that there was at least some evidence which should have been submitted to the jury. The testimony of the witnesses Newby and Weeks corresponds with the allegations of the complaint, and, if accepted by the jury as true, entitled plaintiffs to their verdict. It would be of little value in the discussion to recite their testimony here, the only question being whether there was any evidence as to the contract alleged in the complaint. Both Newby and Weeks gave testimony to the effect that the contract as alleged was entered into, and that defendants had failed to comply with it. The plaintiffs in their brief insist that the learned judge who presided at the trial decided the case and ordered the nonsuit upon the ground that a recovery was barred by the statute of frauds. We have disposed of this plea.

On a motion by the defendant for a nonsuit under the statute, or on a demurrer to the evidence, the latter must be construed most favorably to the plaintiff, and every fact essential to the cause of action, which it tends to prove, must be taken as established, and plaintiff also is entitled to the most favorable inferences deducible therefrom, considering only so much of the evidence as is favorable to the plaintiff and rejecting that which is unfavorable. *Sikes v. Life Ins. Co.*, 144 N. C. 626, 57 S. E. 391; *McCaskill v. Walker*, 145 N. C. 252, 58 S. E. 1073; *Cotton v. Rail-*

road, 149 N. C. 227, 62 S. E. 1093; Thompson v. Railroad, 149 N. C. 155, 62 S. E. 883; Morton v. Lumber Co., 152 N. C. 54, 67 S. E. 67; West v. Tanning Co., 154 N. C. 44, 69 S. E. 687. This rule prevails generally in other jurisdictions. Pinson v. Railway Co., 85 S. C. 355, 67 S. E. 464. Applied to this case, the evidence is, in law, fully sufficient to establish plaintiffs' cause of action, if taken to be true, as it should be. It makes no difference if there are discrepancies in it, or inconsistencies or even contradictions, as the jury must determine which part is true, and not the court. But, whichever way we take it, there was error in nonsuiting the plaintiffs, and there must be a new trial, so that the jury may pass upon the facts.

New trial.

(182 N. C. 755)

WALLACE v. SOUTHERN COTTON OIL CO.
(No. 61.)

(Supreme Court of North Carolina. Aug. 14, 1921.)

1. Master and servant — 105(1)—Charge on custom in other mills held proper.

In an action for injuries to an employee struck by a bale of cotton linters, which fell off a slide with no guard rails to prevent bales from falling off, after being placed thereon without lookout or warning, there was no reversible error in the court's charge that the fact that the method of removing linters was similar to that used in other cotton oil mills, though evidentiary, was not sufficient to relieve defendant from liability, unless it exercised reasonable care to provide its employees with reasonable safeguards.

2. Appeal and error — 1066—Abstract charge held not prejudicial.

An instruction in an action for injuries to an employee which was abstract held not prejudicial error.

Appeal from Superior Court, Nash County; Calvert, Judge.

Action by Robert C. Wallace against the Southern Cotton Oil Company. Judgment for plaintiff, and defendant appeals. No error.

Plaintiff alleged that defendant was operating a cotton seed oil and a fertilizer manufacturing plant, and operated in the northern wing of its main factory building a large compress for the baling of linters, or short fibers of cotton taken from the seed after ginning. This press was located in a square room on the second floor of said building, which room was called the "press room." In said room there was a large compress into which the linters were forced up from the room below through the floor. In said compress the linters were compressed into bales and covered with rough bagging, said bales

weighing about 500 pounds each. The only entrance to the press room was through a large double door, or opening through the eastern wall, which door was connected with the ground by a series of steps forming a stairway. Along the sides of said stairway were parallel guides or runners, which formed together with the side rails of the stairway an inclined slide from the press room to the ground. The only means provided by the defendant for entering or leaving the press room and for moving the baled linters out of the press room to the ground was said stairway, and it was the practice of the press operator to shove the baled linters from the press onto the stairway, along which it fell or slid with great force to the ground. Along the sides of said stairway there were no guard rails or guides to prevent the bales from falling off. At the foot of the stairway there were no platforms to receive the bales, no rails to keep the bales from rolling, no rails to keep the passers-by away from the landing place, and no sign or other warning of danger from the falling bales. It was the custom of the defendant's employees in passing around the wing of the building in which the press room was located to pass either in front of the stairway above described or under it and between it and the building. This custom of the defendant's employees was known to defendant through its officers, agents, and foremen. The plaintiff while acting in the course and scope of his employment, about his master's business, and while acting under orders of his superior, undertook to go from the defendant's saw-filing room near the press room near the northern end of the building. Plaintiff's duties had not usually carried him to that part of defendant's plant, and he had never seen the baled linters sliding or tumbling down the stairway. He had never been warned of the danger from that source, and did not know of its existence. No rules had ever been promulgated by defendant to govern its employees in passing in that vicinity, and plaintiff was totally unconscious of the danger there lurking. As plaintiff passed within a distance of some 8 or 10 feet from the stairway, and while he was facing in a direction away from the door of the press room, a young negro employee of the defendant, without looking to see whether any person was near the stairway, and without giving any signal or other warning, pushed a bale of linters onto the stairway. Said negro workman was employed in a department of defendant's plant separate from that of plaintiff who was not acquainted or associated with him. The bale was not placed squarely upon the stairway, and when it reached a point about halfway to the ground it tumbled over the side of the stairway, and struck plaintiff from behind.

His honor charged the jury as follows:

In this case the plaintiff alleges that he was injured by the negligence of the defendant, in that he alleges that the place at which he was injured was not a safe place for an employee to be or pass, that there were no danger signals, and that no rules or instructions as to taking care to avoid the alleged danger had been given to the plaintiff. This the defendant denies. It is denied by the defendant company that there was any negligence on its part, but it alleges that if there was any negligence causing the injury to the plaintiff it was solely the negligence of a fellow servant, negligence solely of the man who threw out the bale. Defendant alleges that the premises were in such condition as is customary in such a place as that. The burden of proof is upon the plaintiff in this issue. Before you can answer this first issue "Yes" you will have to find from the evidence and by the greater weight of it that the defendant was negligent, and that the defendant's negligence was the proximate cause of the injury to the plaintiff.

An employer or master is liable for an injury to an employee who is free from contributory negligence, where it is caused by the concurrent negligence of the employer and of a fellow servant. Nevertheless, to authorize a recovery, the employer's negligence must have contributed to the injury. If the master's negligence is the proximate or efficient cause of the injury, or if the injury would not have been sustained but for his negligence, the master is liable, even though it might have been prevented by the exercise of greater care on the part of the fellow servant.

It is no defense that the negligence resulted from the act of a fellow servant, if the master's negligence concurred with that of the fellow servant. Thus in the present case, if the jury finds that the defendant failed to exercise reasonable care by establishing and continuing a needlessly dangerous method of removing the bales of linters from the press room to the ground, the defendant would be liable to the plaintiff, even though a concurrent cause of the accident was the failure of the negro in the press room to give a signal of danger to the plaintiff, or to others who might have been passing. Where, however, the negligence of the servant is such as to have caused the injury even had the master not been negligent, then the servant's negligence is the sole cause of the injury, and the master is not liable.

With respect to the question as to whether or not this was a safe place, the defendant in this cause owed the plaintiff the duty to exercise reasonable care in providing him a safe place to work. A master fails in his duty to supply his workman a safe place to work if he allows the work to be habitually conducted in a manner needlessly dangerous. This obligation on the part of the defendant extended, not only to the actual place where the plaintiff had to perform his duties, but extended also to such parts of the premises as the plaintiff reasonably had a right to go in performing the work he had to do. The protection which this rule throws around the plaintiff did not extend to out of the way places where the defendant could not have reasonably anticipated his presence, but such protection did extend to those parts of the defendant's premises to which the plaintiff or other employees might have been reasonably expected to go, either in discharge

of their duties or for any other lawful purpose. In this view of the case it is immaterial whether or not the plaintiff was about his master's business at the time of the injury, provided the defendant knew, or by the exercise of reasonable care should have known, of the existence of an unsafe condition at a point where its employees were frequently passing and repassing to the knowledge of the defendant's manager.

The court charges you that the defendant's duty to furnish the plaintiff a safe place to work was not limited to the actual place where the plaintiff performed his customary duties, but extended to such additional parts of the plant to which the plaintiff may have been sent for other purposes connected with his work. If you should find that the plaintiff was injured while passing near the skids leading from the press room while the plaintiff was on his way to get a piece of lumber to make a straight edge, under the direction of the plaintiff's superior officer, then the defendant's duty of furnishing him a safe place to work extended to such parts of the plant as he was reasonably required to pass in obtaining said straight edge.

(The court charges you that if you should find from the evidence that the method of removing the linters which was employed by the defendant, was similar to that used in other oil mills, this fact would be evidence for you to consider, but would not be sufficient to relieve the defendant from liability unless you should also find that the defendant exercised reasonable care in so ordering the operations of its plant as to provide its employees with reasonable safeguards. The custom of other plants is evidence for you to consider, but a negligent method of operation cannot be excused on the ground that other parties or plants are similarly negligent.)

To so much of the foregoing charge as is contained in parenthesis, the defendant excepts.

The court charges you that it is not only the duty of the defendant to establish proper methods for the conduct of its business, but it must also establish rules among its employees for the observance of such proper methods. The employer is bound to warn and instruct his employees concerning such dangers as are known to his employees, or which could be known to him by the exercise of ordinary care.

A master is not bound to indemnify one servant for injuries caused by the negligence of another servant in the same common employment, unless the negligent servant was the master's representative. Therefore, if the jury shall find from the evidence, and the greater weight thereof, that the servant who threw the bale of cotton down the slide, or skid, had been specifically instructed always to give timely notice of his purpose to discharge such bale, and that in this case he did discharge the bale without giving notice, and that the plaintiff's injury resulted solely from the negligent act of the servant in so discharging the bale without notice, they should and are instructed to answer the first issue "No." This would be so, and you should answer this issue "No" if you find the facts so to be (unless you further find that defendant's officers knew, or in the exercise of ordinary care should have known, that the negro operating the press room frequently failed

to look out and give warning of the falling of a bale of cotton).

To so much of the foregoing charge as is contained in parenthesis, the defendant excepts.

As to the duty of the master to instruct the man handling the bales to look out and give warning to any one passing, the employer's duty to establish proper rules is not completed by merely announcing such rules to its employees, because the servant is not affected by a rule which is customarily abrogated to the master's knowledge. (Thus if in the present case you should find that the manager or superintendent of the defendant's plant knew, or in the exercise of ordinary care should have known, that the negro operating the press in the press room frequently failed to give warning of the falling of a bale of cotton, then it would have been the duty of the defendant through its manager or superintendent, to establish such additional safeguards as would have been reasonably calculated to protect its employees from danger from that source.)

To so much of the foregoing charge as is contained in parenthesis, the defendant excepts.

As to the duty to post signs of danger: The court charges you that if you should find that the defendant knew, or in the exercise of ordinary care should have known, that the method employed by it in passing the baled linters to the ground was a source of danger to those passing at that point, it should have posted signs or given other warnings of the danger there existing, and its failure to do so is evidence of negligence.

Gentlemen, it is not the law that the master should use all preventive measures which might be employed, but there has to be applied to such matters what we call the rule of the prudent man. That is, what would a reasonable and prudent person have done under the circumstances of the situation?

On this issue or question, the plaintiff contends that the testimony tends to show that on November 28, 1918, he was working for the defendant as a saw filer, and that that was the third week that he had worked there, and that he found in doing his work that the saw teeth of the machinery referred to were uneven, and that they needed to be straightened, and that he spoke to the superintendent, Mr. Denmark, about it, and also had a talk with Bartholomew, the assistant superintendent, who said he would get a straight edge for him with which to line up the saw teeth. That Bartholomew did not get the straight edge, but instructed the plaintiff to go out for filing material and get a strip, and that he would find some material behind the hydrant house; that the plaintiff went around by the tool house to get a saw, and in going to the material behind the hydrant house, as he turned the corner of the press room, the bale of cotton fell on him, which rendered him unconscious, and that he knew nothing more of what occurred for some days thereafter. Plaintiff further says that the testimony tends to show that at that place

the bales of linters are thrown from the upper floor, that there is a ladder from the ground to the bottom of the floor over which the bales of linters are thrown, and that there is a rail on each side of the steps on the same level with the steps, that there are no cross rails to keep the bales on the skid, that there are paths around and under the skid, which show that employees frequently pass that way, and that at that time there was a coal pile so close that it was necessary for any one passing to go close to the skid, and that there was no guard or arrangement at that time on the ground for catching the bales, and that there was no danger sign at that place, and that there were no rules that had been given about passing that particular point. (Plaintiff further contends that the testimony tends to show that Sherrod, the boy whose duty it was to take the bales from the press room and put them out on the ground, had never been told by the defendant or the defendant's officers to keep a lookout and give warning, and that the defendant was guilty of negligence in permitting him to work without giving warning), and even if you find that the defendant did instruct Sherrod to keep a lookout, and it was Sherrod's negligence in failing to do so, plaintiff contends that you should find from the evidence that the injury would not have happened if the defendant had provided guard rails to prevent the bales from falling sideways off the skid, or had provided guard rails on the ground, and plaintiff contends that in the exercise of ordinary care the defendant should have had guard rails on the side and a guard on the ground, and the failure of the defendant in exercise of ordinary care to provide such conditions concurred with the negligence of Sherrod, if you find that he was negligent, and the concurring negligence of the defendant was the proximate cause of the injury.

To so much of the foregoing charge as is contained in parenthesis, the defendant excepts.

The last three exceptions involve the same point, and are directed to the error of the court below in charging the jury upon an abstract proposition of law not raised by the evidence or the complaint.

M. V. Barnhill and F. S. Spruill, both of Rocky Mount, for appellant.

Battle & Winslow, of Rocky Mount, for appellees.

PER CURIAM. [1, 2] All the defendant's exceptions and assignments of error, not abandoned in its brief, are directed exclusively to the charge. After a careful examination of the court's charge to the jury and the defendant's exceptions thereto, we can find no prejudicial or reversible error. A perusal of the record in its entirety leaves us with the impression that the case has been tried in substantial conformity to our decisions, and we have discovered no sufficient reason for disturbing the result.

No error.

(182 N. C. 788)

STATE v. PRINCE. (No. 91.)

(Supreme Court of North Carolina. Sept. 21, 1921.)

1. Intoxicating liquors \S 236(19), 238(1) — Evidence insufficient to sustain conviction for manufacturing, or to justify submission to jury.

In a prosecution for manufacturing spirituous liquor, evidence held insufficient to support a verdict of guilty, and that it was error for the court not to grant a nonsuit.

2. Criminal law \S 552(3)—Circumstantial evidence, producing mere conjecture of guilt, insufficient.

Where all of the circumstances on which the state solely relies may exist, and yet the defendant be innocent, and either singly or in combination they produce no assurance of guilt, but at most only a mere conjecture or surmise of it, the evidence is insufficient to sustain a conviction.

3. Criminal law \S 741(1) — Legal sufficiency and moral weight of evidence distinct.

The legal sufficiency of proof in a criminal prosecution and the moral weight of legally sufficient proof are very distinct in the conception of the law, the first lying within the province of the court and the last within that of the jury; but the province of the jury should not be invaded in any case, and when reasonable minds, acting within the limits prescribed by the rules of law, might reach different conclusions, the evidence must be submitted to the jury.

Appeal from Superior Court, Chatham County; Lyon, Judge.

Young Prince was convicted of manufacturing spirituous liquor, and appeals. Reversed.

The only question is whether there was any evidence of his guilt, and this was raised by his motion to nonsuit the state. The evidence substantially was that three officers had searched near defendant's premises, on May 10, 1921, and about one-half or three-quarters of a mile from his house they found a distillery that was being operated, and the materials were there for making whisky. There was a path leading from the distillery up a hill about 150 yards to a road, which was intersected by the railroad, and led to the defendant's house; but the road passed his house and extended to the neighborhood beyond and in the direction of Raleigh. There was a path from the house of the defendant to a spring about 200 yards away, and a path led from the spring to an old place where a distillery furnace had once been, "which showed no signs of recent use." A pile of sawdust was found some distance beyond this spring, and beyond this sawdust there was evidence of a distillery furnace having been operated some time in the past,

but which had not been recently used. They found an old still worm in the edge of the woods and back of defendant's garden, but there was nothing to indicate any recent use of it, and it apparently had been lying there, exposed to the weather, for quite a while. Not far from this old and unused distillery worm, a jug of something, having the appearance of tomato beer, was found. It resembled something found at the distillery, three-quarters of a mile away, which they took to be tomato beer.

The defendant was not at home, and they did not see him on this raid or search; his premises and house were searched without objection by his wife, who assured them before they went in that they would find nothing, and they found nothing there, as she had stated. In the barn or granary of the defendant, there was found a barrel containing a few gallons of molasses, estimated to be not over five gallons. Following the road past the defendant's house from the direction of the distillery, going directly west into the woods, something like 300 yards from the defendant's home and about 35 or 40 yards from the road, two five-gallon jugs were found sitting behind a log and were in guano sacks, but were unstopped. One of them was empty, and the other one contained about a cupful of something that had the odor of whisky. All the witnesses admitted that nothing was found in the home of the defendant to arouse the least suspicion that whisky was being stored or kept there. Each witness stated he knew not whether the land belonged to the defendant where the still sites were found, and none of these witnesses knew whether the still worm, or jug of tomato beer, or any jugs, were on the premises of defendant; that the defendant was not seen in connection with either the distillery, the empty jugs, or the still worm, and was not at home on this occasion.

The witness Ferguson, who lived in Prince's neighborhood, testified that the path leading from the distillery in the direction of the defendant's home had been used as a school path for a number of years. Motion to nonsuit, submitted at the close of all the evidence, which is above set forth, was overruled. Defendant excepted and appealed.

A. C. Ray, of Pittsboro, for appellant.
James S. Manning, Atty. Gen., and Frank Nash, Asst. Atty. Gen., for the State.

WALKER, J. [1, 2] We have examined the evidence with close scrutiny, and can find none upon which a verdict of guilty can reasonably be based, if there is any upon which to raise even a well-founded suspicion. All of the circumstances, upon which the state solely relies, may exist, and yet the defendant be innocent. Either singly, or in combi-

nation, they produce no assurance of guilt, but at most only a mere conjecture, or surmise of it, which is certainly not sufficient as evidence. *Byrd v. Express Co.*, 139 N. C. 273, 51 S. E. 851. In *State v. Vinson*, 63 N. C. 335, this court thus states the rule:

"We may say with certainty that evidence which merely shows it possible for the fact in issue to be as alleged, or which raises a mere conjecture that it was so, is an insufficient foundation for a verdict, and should not be left to the jury."

And in *Brown v. Kinsey*, 81 N. C. 245, it is said:

"The rule is well settled that if there be no evidence, or if the evidence be so slight as not reasonably to warrant the inference of the fact in issue or furnish more than materials for a mere conjecture, the court will not leave the issue to be passed on by the jury."

In the later case of *Young v. Railroad*, 116 N. C. 932, 21 S. E. 177, the court says:

"Judges are no longer required to submit a case to the jury merely because some evidence has been introduced by the party having the burden of proof, unless the evidence be of such a character as that it would warrant the jury to proceed in finding a verdict in favor of the party introducing such evidence."

See *Cobb v. Fogalman*, 23 N. C. 440; *Wittkowsky v. Wasson*, 71 N. C. 451; *Sutton v. Madre*, 47 N. C. 320; *Pettiford v. Mayo*, 117 N. C. 27, 23 S. E. 252; *Lewis v. Steamship Co.*, 132 N. C. 904, 44 S. E. 666.

It all comes to this: That there must be legal evidence of the fact in issue, and not merely such as raises a suspicion or conjecture in regard to it. The state must do more than show the possible liability of the defendant for the crime. It must go further, and offer at least some evidence which reasonably tends to prove every fact essential to its success. This has not been done in the case now before us.

[3] We may say generally that evidence should raise more than a mere conjecture as to the existence of the fact to be proved. The legal sufficiency of proof and the moral weight of legally sufficient proof are very distinct in the conception of the law. The first lies within the province of the court; the last within that of the jury. Applying the maxim, "*de minimis non curat lex*," when we say that there is no evidence to go to the jury, we do not mean that there is literally and absolutely none, for as to this there could be no room for any controversy; but there is none which ought reasonably to satisfy the jury that the fact sought to be proved is established, though there is no practical or logical difference between no evidence and evidence without legal weight or probative force. The sufficiency of evidence in law to go to the jury does not depend upon the doctrine of chances. However confidently one, in his own affairs, may base his judgment on

mere probability as to a past event, when he assumes the burden of establishing such event as a proposition of fact and as a basis for the judgment of a court, he must adduce evidence other than a majority of chances that the fact to be proved does exist. It must be more than sufficient for a mere guess, and must be such as tends to actual proof. But the province of the jury should not be invaded in any case and when reasonable minds, acting within the limitations prescribed by the rules of law, might reach different conclusions, the evidence must be submitted to the jury. *Campbell v. Everhart*, 139 N. C. 516, 52 S. E. 201; *Lewis v. Steamship Co.*, 132 N. C. 904, 44 S. E. 666; *Wheeler v. Schroeder*, 4 R. I. 383; *Offutt v. Col. Exposition*, 175 Ill. 472, 51 N. E. 651; *Day v. Railroad*, 96 Me. 207, 52 Atl. 771, 90 Am. St. Rep. 335; *Catlett v. Railway*, 57 Ark. 461, 21 S. W. 1062, 38 Am. St. Rep. 254; *Railroad v. Stebbing*, 62 Md. 504.

The principle is well stated in *Spruill v. Insurance Co.*, 120 N. C. at page 147 (27 S. E. 41), that where the action of the judge, in directing a verdict or granting a nonsuit or dismissal of the action, can be sustained only under the doctrine, firmly established in this state, that where there is no evidence, or a mere scintilla of evidence, or the evidence is not sufficient, in a just and reasonable view of it, to warrant an inference of any fact in issue, the court should not leave the issue to be passed upon by the jury, but should direct a verdict against the party upon whom the burden of proof rests. And Judge Gaston thus stated the rule in *Cobb v. Fogalman*, 23 N. C. 440:

"Although the boundary between a defect of evidence and evidence confessedly slight be not easily drawn in practice, yet it cannot be doubted that what raises but a possibility or conjecture [as to the existence] of a fact never can amount to evidence of it."

See *Crenshaw v. Railroad*, 144 N. C. 320, 56 S. E. 947; *Wittkowsky v. Wasson*, *supra*; *State v. Powell*, 94 N. C. 968; *State v. Satterfield*, 121 N. C. 558, 28 S. E. 491; *Jewell v. Parr*, 13 C. B. (76 E. C. L.) 916; *Ryder v. Wombwell*, L. R. 4 Exch. 32.

This rule is not intended, as said by Justice Douglas in *Spruill v. Insurance Co.*, *supra*, to interfere with the rightful province of the jury to pass upon the weight of the evidence, but it assumes that the determination of its "character and legal effect" belongs to the court, and requires that this preliminary question be first decided before the evidence is submitted to the jury. The sufficiency of proof in law is for the court; the moral weight of legally sufficient proof is for the jury. The rule, as to the legal sufficiency of evidence, is not only well established, but of practically universal application, and under it we cannot perceive how any evidence was produced by the state,

In this case, to convict the defendant. There was circumstantial evidence, it is true, that somebody was illegally operating a still at a place between one-half and three-quarters of a mile from defendant's home, but not on his premises. Old and unused stills and a still worm were found in the neighborhood, and a jug with a cupful of liquor in it was discovered some distance from his house; but none of the witnesses did or could state that any one of the said articles was on defendant's land. There was a path leading from the still to a road, which was intersected by the railroad, and the road passed near the defendant's home; but both path and road were used by the public generally. The few other circumstances do not add anything to the probative force of the testimony. No connection or relation whatever was shown between the operation of the still and the circumstances, or any of them, to which we have referred. We are left to guess or speculate as to whether the defendant was, in fact, running the still, or assisting in the operation of it. There is absolutely no legal evidence to prove that fact, which, of course, must be established by the state before he can be convicted. We considered a case somewhat like this one at this term, and affirmed the conviction; but there other proof was introduced which tended to identify the defendant as the guilty person, or one of those who operated the still. As we said in *Foy v. Lumber Co.*, 152 N. C. at page 598, (68 S. E. 8):

"The evidence is too vague and uncertain, and lacks the probative force which entitles it to be considered by the jury."

The testimony in *State v. Brackville*, 106 N. C. 701, 11 S. E. 284, was much stronger than that to be found in this case, and pointed to the defendant as the guilty person with far more certainty than does the testimony here, and yet the court held that it fell short of legal proof of the alleged crime, and should not have been submitted to the jury.

The case of *State v. Turner*, 171 N. C. 303, 88 S. E. 523, in some of its features was similar to the one in hand, though there was additional positive and direct testimony of guilt, and the court held that, but for the latter kind of evidence, the other would not be legally sufficient as the basis of a verdict.

The isolated facts as to the finding of the still and still worm and jug with the cupful of liquor in it, and the tomato beer, all off the defendant's premises, were really collateral to the issue, being distinct and independent offenses, not connected with the principal charge (even if there was any evidence that defendant was responsible for the articles being where they were), and are not regarded by the law as evidence of defendant's guilt. *State v. Jeffries*, 117 N. C. 727, 23 S. E. 163. Quite a different ques-

tion was involved in *State v. McMillan*, 180 N. C. 741, 105 S. E. 403, and it is therefore not at all pertinent to this case. We have referred to the last two cases because they were cited by counsel, and to exclude the inference that they were overlooked.

The result is that the learned judge who resided at the trial should have granted the motion to nonsuit under the statute, and there was error in refusing to do so.

Reversed.

(182 N. C. 20)

BLANCHARD v. EDENTON PEANUT CO. (No. 21.)

(Supreme Court of North Carolina. Sept. 14, 1921.)

1. Trial \S 165—Evidence considered in most favorable light for plaintiff on motion to nonsuit.

On a motion to nonsuit, the evidence should be considered in its most favorable light for plaintiff.

2. Accord and satisfaction \S 11(2)—Acceptance of check, purporting to be in full settlement of claim, amounts to complete discharge thereof.

Under C. S. \S 895, where amount of an account is in dispute and one party sends the other a check or makes a payment, clearly purporting to be in full settlement, and the other knowingly accepts it on such condition, this is a full discharge of the debt.

3. Accord and satisfaction \S 27—Question whether check accepted in full settlement of account held for jury.

Unless the intention of the parties to an account as to whether the acceptance of a check sent by the debtor to the creditor should amount to a settlement in full is so clearly apparent as to admit of no doubtful inference or uncertain conclusion among men of fair, disinterested, and unbiased minds, the issue must be referred to a jury; the sending of a check to cover what the debtor claimed was the balance due not showing conclusively ipso facto that an accord and satisfaction was a condition annexed to its acceptance.

4. Witnesses \S 37(1)—Testimony not destroyed because contradictory, its credibility only being affected.

The fact that a plaintiff's testimony is self-contradictory does not destroy his favorable testimony, but only affects its credibility.

Appeal from Superior Court, Gates County; Allen, Judge.

Action by M. V. Blanchard against the Edenton Peanut Company. Judgment of nonsuit, and plaintiff appeals. Reversed.

Civil action to recover damages for an alleged breach of contract and loss of commissions growing out of the purchase and sale of certain peanuts during the year 1920.

Plaintiff contends that by agreement he purchased said peanuts as agent for defendant. There was ample evidence tending to show the existence of a contract between the parties and a breach thereof, but defendant pleads in bar a settlement by way of accord and satisfaction.

Plaintiff received from the defendant a statement of his account, accompanied by a check to cover the balance as shown upon said statement. This was not posted or mailed, but sent by one L. M. Blanchard, plaintiff's partner in the guano business. Touching the receipt and acceptance of said check the plaintiff testified as follows:

"I did not accept this check in full settlement of the accounts due me. The statement shown me is the one I received along with the check. [Statement was offered in evidence and bears the notation: "We inclose check to cover."] Mr. L. M. Blanchard handed it to me and said: 'Here is what they sent you. I don't know what it is; take it.' I did not know they claimed it to be in full at that time. There is nothing on the face of the check showing or saying that it is in full.

"Q. You knew that they claimed it was in full of the balance that they claimed was due you? A. That is what they claimed.

"Q. You knew that they claimed this check was to cover all that they owed you up to that date? A. Yes; that is what they claimed, that was all they claimed to owe me.

"Court: What do you mean by saying they claimed? A. No; I didn't know that was all they claimed then.

"Court: You didn't admit that the check was all, but you knew that was what they claimed it was? A. Yes; but I didn't think that was all they were going to pay me. I was satisfied they would pay me the remainder of it. I knew it was not my fees.

"Court: Did you know that they claimed that was in full at that time? A. No, I did not.

"Court: You knew that was what they claimed when L. M. Blanchard brought it to you? A. He handed it to me and said: 'Here is what they sent you.' I looked it over, and I think I remarked to him: 'This is not all they owe me.' I thought maybe they would send me some more.

"Court: You knew at the time that they claimed that was all that was due you, and you claimed it was not? A. Yes, sir."

At the close of plaintiff's evidence defendant moved for judgment as of nonsuit, which motion was allowed, and plaintiff appealed.

A. P. Godwin, of Gatesville, and Ehringhaus & Small, of Elizabeth City, for appellant.

Meekins & McMullan, of Elizabeth City, for appellee.

STACY, J. [1] Considering the evidence in its most favorable light for the plaintiff, the accepted position on a motion to nonsuit, we think the question of settlement by way of accord and satisfaction sufficiently ambiguous to require the aid and verdict of a jury.

[2] Under a uniform construction of our statute, C. S. § 895, as announced in a long line of decisions, it is held with us that where two parties are in dispute as to the correct amount of an account, and one sends the other a check, or makes a payment, clearly purporting to be in full settlement of the claim, and the other knowingly accepts it upon such condition, this will amount to a full and complete discharge of the debt. *Mercer v. Lumber Co.*, 173 N. C. 49, 91 S. E. 588; *Aydlett v. Brown*, 153 N. C. 334, 69 S. E. 243; *Kerr v. Sanders*, 122 N. C. 635, 29 S. E. 943, and numerous cases of like import. The law as it prevails in this jurisdiction is succinctly stated by Mr. Justice Hoke in *Rosser v. Bynum & Snipes*, 168 N. C. 340, 84 S. E. 393, as follows:

"It is well recognized that when, in case of a disputed account between parties, a check is given and received, clearly purporting to be in full or when such a check is given, and from the facts and attendant circumstances it clearly appears that it is to be received in full of all indebtedness of a given character, or all indebtedness to date, the courts will allow to such a payment the effect contended for"—citing a number of authorities, and this has been approved in the recent case of *Supply Co. v. Watt*, 181 N. C. 432, 107 S. E. 451.

The case of *Ore Co. v. Powers*, 130 N. C. 152, 41 S. E. 6, chiefly relied on by defendant, is not at variance with the rule above stated, nor is it more favorable to defendant's contention, for, as appears from the last paragraph of the opinion in that case, the check in question was sent in full settlement of account, and this condition was annexed to its acceptance. An examination of the original papers discloses this fact more clearly than is shown by the report as published.

[3] But it is equally well established that unless the intention of the parties, as gathered from the facts in evidence, is so clearly apparent as to admit of no doubtful inference or uncertain conclusion, among men of fair, disinterested, and unbiased minds, the issue must be referred to a jury. This position is well stated in *Mercer v. Lumber Co.*, supra, as follows:

"It is the well-recognized principle here and elsewhere that when a dispute exists between two parties as to the amount of an account, and one sends another a check or makes a payment clearly purporting to be in full settlement of the claim, and the other knowingly accepts it, this will amount to an adjustment, and further action thereon is precluded. It is a question, however, of the intent of the parties, as expressed in their acts and statements at the time, and unless, on the facts in evidence, this intent is so clear that there could be no disagreement about it among men of fair minds, the issue must be decided by the jury."

In the case at bar, we do not think it appears unequivocally that the check was sent on condition that its acceptance should

amount to a settlement in full, or as a complete discharge of the debt. This may be a permissible view to take of the evidence, but not necessarily the only one. The sending of the check to cover what the defendant claimed was the balance due on the account does not ipso facto show conclusively that an accord and satisfaction was the condition annexed to its acceptance. The ultimate fact can only be determined by a jury under proper instructions from the court.

[4] The contention that the plaintiff's testimony is self-contradictory, and that he should be held to his admissions, or bound by the hurtful parts thereof, cannot avail the defendant on the present record; for, conceding without deciding that such a conflict exists, still, under our decisions, this does not perforce destroy his favorable testimony, but only affects its credibility, which the jury alone may pass upon. *Loggins v. Utilities Co.*, 181 N. C. 221, 106 S. E. 822; *Christman v. Hilliard*, 167 N. C. 4, 82 S. E. 949; *Shell v. Roseman*, 155 N. C. 90, 71 S. E. 86.

The judgment of nonsuit will be set aside, and the cause remanded for trial upon appropriate issues.

Reversed.

CLARK, C. J. (concurring). Concurring in all that Mr. Justice STACY has so clearly stated, the very great importance of the principle at issue, especially to farmers and all other shippers of produce, may justify some additional reasons being given. The mere sending of the statement of an account with check for the balance set out therein, accompanied by a statement, more or less explicit, that such sum is all that is due, will not of itself bind the sendee. There must be an explicit acceptance or agreement by the receiver that the account is assented to, and that the check is accepted in full. It is not the assertion of the sender, but the assent of the sendee, which makes the settlement. When the check on its face states that it is "in full," its use with the indorsement of the receiver is such acceptance, in the absence of fraud or misrepresentation.

But the mere receipt of the statement of an account and the use of the check sent with it for the amount of the balance the sender alleges to be due is not an estoppel. This can be effected only by an acceptance of the check, or of the amount paid with a knowledge of the facts and an agreement that it is received in full, or by the retention of the account stated and check without objection for such length of time that the jury may infer as a fact that it was accepted as correct. *Hawkins v. Long*, 74 N. C. 781.

Indeed, at common law and up to chapter 178, Laws 1874-75, now C. S. § 895, the acceptance of a lesser amount in payment

with full acknowledgment that it is in payment of a larger amount was not valid. *Fickey v. Merrimon*, 79 N. C. 585. Since that statute a full and voluntary acceptance of a smaller amount in payment of a larger sum, voluntarily and with full knowledge of the facts, is binding as a settlement in the absence of fraud.

It would be a serious inconvenience and injustice to the farmers and the like, especially if the mere receipt of the account sales of produce, stating that the balance therein set out was all that was due, and the use of the checks sent therewith, should prevent the creditor from making claim thereafter that the statement was incorrect, or that the amount sent was less than it should have been, when there is no express acknowledgment by the recipient that the check was accepted in full payment. If this were not so the factor or commission merchant could force the consignor of produce to accept a lesser sum than was really due, by compelling him to lay out of the use of the entire sum due him from the sales of his crop until the matter was litigated, or otherwise adjusted.

Few commission merchants or other factors would attempt to force their consignors to accept their statements as true by sending checks stating on their face that they are "in full settlement," and certainly the law does not require that checks not so stating shall be accepted "in full settlement." Those words must be written in the face of the check, or there must be an express agreement that the check is accepted in full settlement, with full knowledge that it is a release of liability, or such lapse of time after receipt of the statement and check, without any objection, that the jury may infer acceptance of the balance as stated by the account as correct.

(182 N. C. 24)

GUTHRIE v. MOORE et al. (No. 22.)

(Supreme Court of North Carolina. Sept. 14, 1921.)

1. Bills and notes \Leftrightarrow 351—Mortgages \Leftrightarrow 338
—Purchaser of past-due purchase-money notes takes with notice of maker's right to rely on agreement with vendor.

In view of C. S. § 446, where purchase-money notes secured by a deed of trust, under which a purchaser of the notes proposed to sell the lands so incumbered, were past due at the time of his purchase, he took them subject to any equities and defenses existing in favor of the land purchaser against the vendor, such as the latter's agreement that prior liens created by deeds of trust to secure notes executed by him should be discharged before the purchase-money notes should be valid obligations, and in such case the purchaser of the notes might be restrained from exercising the power of sale in the trust deed.

2. Mortgages ⇐338 — Exercise of power of sale not allowed where amount for which mortgagor liable is disputed.

Where there was a real dispute between the parties to a deed of trust as to the amount for which the maker was liable, an order, restraining the purchaser of notes secured thereby from exercising the power of sale in the trust deed, was properly continued until final hearing; the exercise of such a power being allowed only in plain cases.

Appeal from Superior Court, Beaufort County; Allen, Judge.

Action by F. F. Guthrie against D. O. Moore and others. From an order continuing an order restraining defendants from selling certain lands, defendants appeal. Affirmed.

This is an appeal from an order restraining the defendants from selling certain lands under powers contained in two deeds of trust.

On October 8, 1918, the defendant Fenner B. Godley and wife executed a deed of trust to E. A. Daniel, trustee for J. B. Patrick, upon a tract of land securing an indebtedness of \$1,275, and on December 5, 1918, the said Godley executed a deed of trust to H. C. Carter, trustee for D. O. Moore, securing an indebtedness of \$1,950.

On December 12, 1919, the defendant Fenner B. Godley and wife executed to the plaintiff a deed for the consideration of the sum of \$10,000, \$4,000 of which was to be paid in cash, and the balance of \$6,000 to be secured by deed of trust, and 12 notes of \$500 each were executed to represent said \$6,000 balance. When the parties closed the said deal, the plaintiff had only \$2,700 in cash, and executed a note due on January 1, 1920 (about two weeks later) for the sum of \$1,300, representing the balance of the cash payment. Said note of \$1,300, together with 4 or 5 of the notes for \$500 each, were deposited with J. D. Grimes in escrow, and were to be turned over to said Godley, when the notes secured by the two deeds of trust to E. A. Daniel and H. C. Carter, above set out, were paid. This agreement was in writing. The said \$1,300 note was not paid when it was due. During the fall of 1920 the defendant Moore purchased from the defendant Godley 12 of the notes of \$500 each, and the note of \$1,300, which said notes were secured by a deed of trust upon all of the property described in the two deeds of trust to Daniel and Carter, which deeds of trust provided that upon default in payment of any note or the interest on any note the whole debt should become due and payable.

On the 18th day of December, 1920, H. C. Carter, trustee for D. O. Moore, advertised under the deed of trust to him the lands therein described, and on the 11th day of

January, 1921, E. A. Daniel advertised under the deed of trust from F. F. Guthrie, the plaintiff, to him. At the time of the advertisements, no part of either the principal or interest on any of the notes had been paid, and the whole, under the terms of the deed of trust, was then due. On January 21, 1921, the plaintiff secured a restraining order, and said restraining order was continued to the hearing at the February term, 1921, of the superior court of Beaufort county, and the defendants appealed.

Daniel & Carter, of Washington, N. C., for appellants.

Ward & Grimes, of Washington, N. C., for appellee.

ALLEN, J. [1] It is admitted in the brief of the defendants that the notes purchased by the defendant Moore and secured by one of the deeds of trust under which the defendants proposed to sell the lands in controversy were past due at the time of the purchase, and, this being true, the defendant took the notes subject to and with notice of any equities and defenses existing in favor of the plaintiff against Godley, who sold the notes to the defendant Moore (C. S. § 446; *Capell v. Long*, 84 N. C. 17), and as against Godley the plaintiff had the right to rely upon the agreement that the prior liens created by the deed of trust to secure the notes to Patrick and Moore should be paid off and discharged before all of the notes secured in the last deed of trust should be valid obligations against the plaintiff.

[2] It is also well settled that—

Powers of sale "are looked upon by the courts with extreme jealousy, because the mortgagor is thereby put entirely in the power of the mortgagee. The exercise of the power is only allowed in plain cases when there is no complication and no controversy as to the amount due upon the mortgage debt, and the power is given merely to avoid the expense of foreclosing the mortgage by action, but when there is such complication and controversy the court will interfere and require the foreclosure to be made under the direction of the court, after all the controverted matters have been adjusted and the balance due is fixed, so that the property may be brought to sale when purchasers will be assured of a title, and not be deterred by the idea that they are 'buying a lawsuit.'" *Mosby v. Hodge*, 76 N. C. 388.

It follows, therefore, as there was a real dispute between the parties as to the amount for which the plaintiff was liable, that the restraining order was properly continued until the final hearing.

Affirmed.

NOTE.—This opinion was written in accordance with the court's decision and filed by order of the court after Justice ALLEN'S death.

STACY, J.

(182 N. C. 54)

NEWTON v. NEWTON. (No. 60.)

(Supreme Court of North Carolina. Sept. 21, 1921.)

1. Evidence §197—Writings are to be submitted to jury for comparison of handwriting.

Under Laws 1913, c. 52 (C. S. § 1784), the admission of testimony as to the genuineness of a writing by comparison of handwriting is now on the same basis as the declarations of agents, and the court determines whether there is prima facie evidence of agency, or of the genuineness of a writing admitted as a basis of comparison, and then the testimony of the witnesses and the writings themselves are submitted to the jury.

2. Appeal and error §1056(2) — Refusal to permit jury to compare handwriting harmless.

Though it was error for the court in a divorce case to refuse to permit a letter claimed to have been written by defendant and defendant's admitted signature to the answer to be submitted to the jury for their inspection along with testimony of witnesses, under Laws 1913, c. 52 (C. S. § 1784), it was not reversible error, where the letter, if genuine, did not tend to prove any fact or circumstance in issue.

Appeal from Superior Court, Edgecombe County; Calvert, Judge.

Action by Thomas B. Newton against Carrie Newton. Judgment for defendant, and plaintiff appeals. No error.

G. M. T. Fountain & Son, and Donnell Gilliam, all of Tarboro, for appellant.

Allsbrook & Phillips, of Tarboro, for appellee.

CLARK, C. J. A letter purporting to be from the defendant was offered as competent evidence against her, as tending to show the misconduct alleged. Its genuineness being denied, the judge admitted witnesses to compare the signature and handwriting of the letter with the defendant's signature to the answer, which she admitted to be genuine, but refused to permit the writings to be submitted to the jury for their inspection.

In *Outlaw v. Hurdle*, 46 N. C. 150, the court held that, while witnesses can testify to the genuineness of the handwriting by comparison with other papers admitted, or proved, to be genuine, the jury must pass upon its genuineness upon the testimony of witnesses, holding:

"Writings are not properly submitted to a jury's inspection. * * * As a general rule, all evidence is addressed to the hearing of the jury and not to their sight."

In *Tunstall v. Cobb*, 109 N. C. 321, 14 S. E. 29, the court said:

"In North Carolina it seems to be settled law that an expert in the presence of the jury may be allowed to compare the disputed paper with other papers in the case, whose genuineness is not denied, and also with such papers as the party whose handwriting gives rise to the controversy is estopped to deny the genuineness of, or concedes to be genuine, but no comparison by the jury is permitted. *Pope v. Askew*, 1 Iredell, 16; *Outlaw v. Hurdle*, 1 Jones, 150; *Otey v. Hoyt*, 3 Jones, 407; *Yates v. Yates*, 76 N. C. 142; *Fuller v. Fox*, 101 N. C. 119."

And this has continued to be the settled law in this state. See cited cases to *Tunstall v. Cobb* in the Anno. Ed. But a recent statute (chapter 52, Laws 1913, now C. S. § 1784) has provided:

"In all trials in this state, when it may otherwise be competent and relevant to compare handwritings, a comparison of a disputed writing with any writing proved to the satisfaction of the Judge to be genuine, shall be permitted to be made by witnesses, and such writings and the evidence of witnesses respecting the same may be submitted to the Court and jury as evidence of the genuineness or otherwise of the writing in dispute, provided, this shall not apply to" actions pending on March 5, 1913.

The last line is an unequivocal declaration of change in the rule obtaining theretofore.

[1] As we understand the statute, the admission of testimony as to the genuineness of a writing by comparison of handwriting is now on the same basis as the declarations of agents. The court determines whether there is prima facie evidence of agency or of the genuineness of writing admitted as a basis of comparison, and then the testimony of the witnesses, and the writings (in the plural) themselves are submitted to the jury. It is fair to the presiding judge to say that this statute was not called to his attention. It was adverted to by Walker, J., in *Bank v. McArthur*, 168 N. C. 55, 84 S. E. 39, Ann. Cas. 1917B, 1054, though the disputed writing in that case did not come within the statute.

[2] Though it was error to exclude the writings from the jury, if the testimony was competent and pertinent, it was not reversible error in this instance; for we are of opinion that the letter, if genuine, was irrelevant, not tending to prove any fact or circumstance in issue, and the refusal to submit the writing to the jury to determine its genuineness was harmless error.

Upon the whole case we see no error of which the plaintiff can complain.

No error.

(182 N. C. 469)

**SASSER v. ATLANTIC COAST LINE R.
R. et al. (No. 117.)**(Supreme Court of North Carolina. Sept. 28,
1921.)**Railroads** ¶446(12)—Nonsuit properly directed against owner leaving team of mules unhitched and unattended.

Nonsuit held properly directed, plaintiff's evidence showing that his team of mules, left unhitched and unattended, turned without apparent cause and went onto the railroad track about 50 feet away, where they were struck by a train, and that the train could not have been stopped within the time between their turning and being hit.

Appeal from Superior Court, Wayne County; Lyon, Judge.

Action by Alex Sasser against the Atlantic Coast Line Railroad and W. D. Hines, Director General of Railroads. From a judgment of nonsuit, plaintiff appeals. Affirmed.

E. A. Simpkins and Hood & Hood, all of Goldsboro, for appellants.

E. M. Land, of Goldsboro, and O. H. Guion, of New Bern, for appellees.

WALKER, J. This action was brought to recover damages for injuries to a mule and wagon. The plaintiff's servant had driven the team, consisting of two mules and a wagon, to a place in front of a garage in Mt. Olive, and left them there unhitched and unattended, and went into the garage for a minute or so. While he was in there, the mules, without any apparent cause, such as fright, turned around and went across the railroad track, and as the mules stopped they were struck by a passing train. One of the mules was killed, and the wagon was broken.

A witness for the plaintiff testified that if the engineer or fireman had seen the action of the mules as they turned with the wagon, and stopped the train as quickly as they could do so, it would not have prevented the collision, "as they could not have stopped the train from the time the mules turned around and the train hit them." The mules were only 50 feet from the track, that being the width of the street on the west side. The driver did not stay in the garage more than a minute, and when he came out it had all happened. The evidence, which was all introduced by the plaintiff, tended to show that the train could not have been stopped in time to have prevented the accident. The judge, on motion of defendant, nonsuited the plaintiff, and dismissed the action under the statute, and plaintiff appealed.

After careful consideration of the evidence and the argument of counsel, we conclude that there was no evidence upon which the plaintiff could have asked for a verdict, and

therefore that the judgment of nonsuit was proper. The sole, efficient, and proximate cause of the alleged injury was the negligence of the plaintiff's servant in leaving the mules unhitched, and their turning around and crossing the railroad so suddenly. *Needham v. Railroad*, 171 N. C. 763, 88 S. E. 495. The plaintiff is wholly to blame for his own misfortune, and must therefore bear the loss.

Affirmed.

(182 N. C. 64)

**TYRRELL COUNTY et al. v. HOLLOWAY
et al. (No. 13.)**(Supreme Court of North Carolina. Sept. 21,
1921.)

1. Statutes ¶34(1)—Change in county government may be by local act.

The power given to the Legislature by Const. art. 7, § 14, to modify, change, or abrogate any and all provisions of the article, and substitute others in their place, need not be exercised by an act general in its operation, or formally abrogating a section of the article and substituting another in its stead; but it is enough that an act makes a change in county government, as by abolishing the office of county treasurer and providing for appointment of a bank as a depository to do the duties of county treasurer, and this though the act applies to certain counties only.

2. Constitutional law ¶63(3)—Legislative power to change county government may be delegated to county commissioners.

The power of the Legislature under Const. art. 7, § 14, to make changes in the Constitution as to county government, may be delegated to the board of county commissioners, as it is by C. S. § 1389, authorizing such boards of certain counties to abolish the office of county treasurer and appoint banks to perform the duty of treasurer.

3. Mandamus ¶100—Lies to compel ex-treasurer to turn over money to successor.

Mandamus is the proper remedy to compel a county treasurer, whose office has been abolished, to turn over to the banks appointed to perform his duties the money which he admits that he received as such officer, but which he claimed right to hold and disburse, under claim that the office has not been abolished.

4. Mandamus ¶170—When to require ex-county treasurer to turn over money pursuant to statute, heard by judge.

Mandamus to compel an ex-county treasurer to turn over public funds, pursuant to requirements of statutes directly applicable, is not a suit on a money demand, within C. S. § 867, requiring the summons to be returnable to term, and that it be proceeded with as in ordinary civil actions, wherein the material issues must be determined by jury unless formally waived; but it comes under section 868, providing for return of the summons before the

judge, in chambers or in term, and that he shall determine all issues of law and fact, unless a jury trial is demanded.

Appeal from Superior Court, Tyrrell County; Allen, Judge.

Action by Tyrrell County and others against S. J. Holloway and others. From an adverse judgment, defendant Holloway and his surety appeal. No error.

The action is in the nature of mandamus to compel the defendant S. J. Holloway to turn over to two banks, the lawfully designated depositaries made parties of record, the public funds of the county, which plaintiffs aver and offered proof to show, had come into the hands of said defendant while treasurer of said county, and which he wrongfully refuses to deliver. Plaintiffs further allege, and offered evidence tending to show, that said office of treasurer had been lawfully abolished by resolution of the Commissioners, and the two banks referred to duly designated as depositaries to act as treasurer without charge, etc., and that defendant continued to withhold the funds, claiming that he was still the lawful treasurer of the county. There was a preliminary order issued, restraining said defendant from other and further disposition of said funds, which was returnable at said term, and which, on proof submitted, was heard at the same term as the principal cause. Defendant admitted that he had received the county funds in controversy while treasurer of the county, and claimed the right to hold and disburse on allegation and evidence tending to show that the office had not been abolished, and that said defendant was still county treasurer, and as such had control and lawful disposition of same. His honor, having heard the case, entered the following judgment:

"This cause coming now to be heard at Columbia, N. C. on April 25, 1921, according to continuances upon motion in this cause, and being heard upon the evidence taken and affidavits filed, the court finds:

"That the board of county commissioners on the 5th day of April, 1920, abolished the office of treasurer of Tyrrell county, to take effect the 1st of December, 1920, and elected the two banks at Columbia, the Merchants' & Farmers' Bank and the Tyrrell County Bank, as its financial agents, to act as its treasurer, upon giving bond and without compensation. That on Monday, the 6th day of December, 1920, being the first Monday in December, the new board of county commissioners, which was elected in November, 1920, at the November election, duly qualified and passed resolutions abolishing the office of treasurer of Tyrrell county, and elected the said two banks as the financial agents, and to act as treasurer for the said county without compensation, and the said banks duly accepted on the said 6th day of December, 1920, and tendered their bonds. That the bonds were accepted, except the bond for the

county road fund, and a question having arisen as to whether the money should be paid to the treasurer of the county or to the treasurer of the highway commission of the county, the question was referred to the Attorney General, and the bonds for these amounts were not accepted until January 8, 1921, which was the next meeting of the board of said commissioners, and that this bond was accepted at that time. That the two banks have been acting as financial agents and treasurer of Tyrrell county ever since the 6th day of December, 1920. That the said S. J. Holloway did not tender any bond on the first Monday in December, 1920, as treasurer of the county, and has not at any time since, and has not paid over to the county the moneys in his hands belonging to the said county, nor to either of its financial agents as required by law.

"The court finds that the defendant S. J. Holloway is not the treasurer of Tyrrell county; that he has not settled with the said county, and has in his hands a large sum of money belonging to the said county; that it is his duty to pay over the same to the duly elected and qualified financial agents of said county, to wit, the Merchants' & Farmers' Bank and the Tyrrell County Bank; and that they have been elected and qualified.

"It is ordered, decreed, and adjudged that the defendant S. J. Holloway pay over to the said Merchants' & Farmers' Bank one-half of all moneys which are due to the county by the said Holloway, and the other half to the Tyrrell County Bank, and that he be and is hereby enjoined and restrained from paying out any moneys belonging to the said county, or its financial agents, except as set out above, and enjoined and restrained from acting as said treasurer.

"It is further ordered and adjudged that he pay over to the Tyrrell County Bank the half of all the moneys due to it as said financial agent of said Tyrrell County on or before the 15th day of July, 1921.

"It is further adjudged that the said S. J. Holloway enter into a good and sufficient bond in the sum of \$50,000 for the faithful compliance with the above order, and that he pay over and account to the said banks, as set out above, the said moneys due to them as financial agents of said county.

"It is further adjudged that the defendant Merchants' & Farmers' Bank execute a good and sufficient bond in the sum of \$50,000 for the faithful handling of the moneys described in the pleadings in this cause, and to account for any and all of the moneys referred to in this proceeding that may come into its hands, or should come into its hands, and that it will faithfully account to the plaintiff for said moneys.

"It is further adjudged that the defendants pay the cost of this proceeding and that this restraining order continue to the hearing."

Defendant and his surety, also defendant, excepted and appealed.

Thompson & Wilson, of Elizabeth City, and R. W. Winston, of Raleigh, for appellants. Aydtlett & Simpson, of Elizabeth City, and W. L. Whitley, of Plymouth, for appellees.

HOKE, J. In section 1389, c. 26, Consolidated Statutes, it is provided that the board of county commissioners of Tyrrell and certain other counties therein specified may abolish the office of county treasurer by resolution to that effect, passed at least 60 days before a primary or convention, held for the purpose of nominating candidates for said office, and when so abolished the board of commissioners may appoint one or more solvent banks or trust companies to perform the duties of treasurer or sheriff acting as ex-officio treasurer of the county, such designated depositaries not being allowed to charge or receive anything in compensation other than the advantages accruing to them from such a deposit; and said banks and trust companies, termed financial agents, are also required to give bond for safe keeping, and proper disbursement of said funds, and for faithful performance of their duties concerning them. Acting under this statute, the commissioners of Tyrrell county, by formal resolution passed in apt time, have abolished the office of county treasurer and designated the banks to act as financial agents of the county, who have duly accepted and qualified, and if these proceedings are valid, we find no good reason for disturbing the judgment of his honor as it appears of record.

[1] The only objection against the propriety of this judgment urged before us on the oral argument, and the original brief filed in behalf of the appellant is that the office of treasurer being one provided for in the Constitution, may not be abolished except by direct legislative action, and the attempt to vest such power in the board of commissioners of any county may not be upheld. It is true that article 7, § 1, of the Constitution, provides in terms that for the ordinary purposes of general county government there shall be elected biennially a treasurer, register of deeds, and five commissioners; but it is also provided in the same article (section 14) that as to this and all other sections of the article, except sections 7, 9, and 13, neither of which have any bearing on the question presented here, the General Assembly shall have full power by statute to modify, change, or abrogate any and all the provisions of this article, and substitute others in their place. In reference to the power conferred in section 14, it has been frequently held and is now the accepted construction that, in order to its exercise, it is not required that an act to effect a change in municipal government should be "general in its operation, or that it should in terms formally abrogate any given section of this article, and substitute another in its stead, but that an act of the General Assembly making such change, and local in its operation, must be given effect under this provision if otherwise valid." *Smith v. School Trustees*, 141 N. C. at page 157, 53

S. E. 529, citing *Harriss v. Wright*, 121 N. C. 179, 28 S. E. 269.

[2] This being the established position, the Legislature, under approved principles, in our opinion, had the undoubted right to confer the exercise of the power referred to in section 14 upon the board of county commissioners of Tyrrell county, and said board, proceeding properly under the act, having formally abolished said office, the judgment of his honor must be upheld. While legislative power granted by the Constitution may not as a rule be delegated, it is fully recognized that under our system of government such power may be delegated to municipal corporations for local purposes, where as agencies of the state they are possessed and in the exercise of governmental powers in designated portions of the state territory, whether such localities are the ordinary political subdivisions of the state or local governmental districts created for special and quasi public purposes. *Trustees v. Webb*, 155 N. C. 379, 71 S. E. 520; *Smith v. School Trustees*, 141 N. C. 143-149, 53 S. E. 524, 8 Ann. Cas. 529; *State v. Austin*, 114 N. C. 855, 19 S. E. 919, 25 L. R. A. 283, 41 Am. St. Rep. 817; *People of N. Y. ex rel. Dunn v. Ham*, 166 N. Y. 477, 60 N. E. 191; *State and Josephine Taintor v. Mayor, etc.*, 33 N. J. Law, 57; 1 *Smith*, *Modern Law of Municipal Corporations*; 1 *Cooley on Taxation* (3d Ed.) p. 101; *Black's Constitutional Law* (3d Ed.) p. 373. In the citation to *Cooley*, the principle is stated as follows:

"There is, nevertheless, one clearly defined exception to the rule that the Legislature shall not delegate any portion of its authority. The exception, however, is strictly in harmony with the general features of our political system, and it rests upon an implication of popular assent which is conclusive. This exception relates to the case of municipal corporations. Immemorial custom, which tacitly or expressly has been incorporated in the several state Constitutions, has made these organizations a necessary part of the general machinery of state government, and they are allowed large authority in matters of local government, and to a considerable extent are permitted to make the local laws."

And in *Black*, at page 374, the author says:

"Municipal corporations are regarded as subordinate agencies of government, created with a view to the more judicious and effective administration of local governmental affairs. The Legislature has power to create such corporations, and to invest them with such powers and prerogatives as are necessary to enable them to make rules for the government of their own affairs, particularly in matters of taxation and police, provided that their by-laws and ordinances shall not be inconsistent with the general laws of the state."

[3, 4] The case before us comes clearly within the principle, and the commissioners of Tyrrell county were well within their powers in the abolition of the office. And the defendant admitting that he received the public funds of the county while he was the treasurer, and insisting on the right to hold and disburse them under a claim that the office has not been abolished and that he has them as of official right, the authorities are to the effect that mandamus is the appropriate procedure. *O'Donnell v. Dusman*, 39 N. J. Law, 677; *State ex rel. Meinger, Collector, v. Disbrow, Late Collector*, 42 N. J. Law, 141; *State v. Oates*, 86 Wis. 634, 57 N. W. 296, 39 Am. St. Rep. 912; 26 Cyc. p. 258, and authorities cited in note 40; 18 R. C. L. title "Mandamus," §§ 120, 186. And it appearing from a perusal of the record that this is an action to enforce the turning over the public funds of Tyrrell county pursuant to the requirement of the statutes directly applicable (C. S. c. 28, § 1400, chapter 62, §§ 3205 and 3206, and chapter 82, § 4385), the case presented is not in strictness a suit on a moneyed demand, coming under section 867, C. S., and which requires that the summons be returnable to term, and to be proceeded with as in the ordinary civil actions, wherein the material issues must be determined by jury unless formally waived, but it comes under the subsequent section 868, C. S., which provides that the summons may be returnable before the judge, in chambers or in term, and he shall determine all issues of law and fact, unless a jury trial is demanded by one or both of the parties. *Coleman v. Coleman*, 148 N. C. 299, 62 S. E. 415; *Audit Co. v. McKensie*, 147 N. C. 461, 61 S. E. 283; *Martin v. Clark*, 135 N. C. 178, 47 S. E. 397.

In the present case, no demand was made for a jury trial by any of the parties, no exception was entered because same was not allowed, nor by exception or otherwise was any objection made to the mode of trial in the oral argument before us nor in any brief as then filed. In a brief filed by one of defendants some 15 days later, and by consent, objection is made that there are disputed questions of fact presented in the affidavits and evidence; but these are only as to differences arising at the hearing, and no demand is therein shown or claimed that any jury trial was claimed on any material issues arising on the pleadings.

There is no error, and this will be certified, that the funds of the county, admitted to be in the hands of defendant Hollaway, shall be forthwith delivered to the financial agents of the county, and that the amounts in dispute be so delivered when determined in accordance with law and the course and practice of the court, and the restraining order in the meantime be continued as directed in the judgment.

No error.

(182 N. C. 26)

JENNINGS v. JENNINGS et al. (No. 14.)

(Supreme Court of North Carolina. Sept. 14, 1921.)

1. Contracts \S 130—Contract held not void as stifling bidding at sale.

Contract that, if plaintiff would raise bid on certain land at a partition sale, he would get a share of any higher bid which might be made, is not void as stifling competition and chilling bidding, since the purpose and tendency of the contract was to increase the bids at the sale.

2. Contracts \S 312(1)—Sale of bid on land held a breach of the purpose of the contract to secure highest bid for land.

Where defendant contracted that plaintiff, in return for raising the bid on land, should receive a share of higher bids, and the latter, after making a higher bid, to prevent a still higher one sold his own to the person intending to raise the bid, he is guilty of breach of contract, and cannot recover the stipulated share.

Appeal from Superior Court, Pasquotank County; Allen, Judge.

Action by G. C. Jennings against W. H. Jennings and another. From a judgment for plaintiff, defendants appeal. New trial granted.

This is an action to recover an amount alleged to be due by contract in connection with a sale of certain lands in a partition proceeding. The lands belonged to the wife of the defendant A. C. Bell, and to a minor son of the defendant W. H. Jennings, in equal parts, and was sold for division in said proceeding on October 11, 1919, R. G. Sawyer being the highest bidder in the sum of \$10,250. On the 31st day of October, 1919, it being the last day on which an increased bid on said land could be made, the plaintiff and defendant entered into the following agreement:

"I hereby agree with G. C. Jennings that if he will raise the bid of \$10,250 made on the R. Nixon Morgan Farm 10%, making his bid \$11,275, that in the event other bona fide bidders should run the price up to \$12,050 to refund to him the \$725 raise, so as to make the property cost him only \$11,275; in consideration of getting him to raise the bid.

"Should said bona fide bidders run the price above \$12,050, and it is knocked off to a responsible bidder other than the said G. C. Jennings, then he, the said G. C. Jennings, is to have one-half of such raise above his bid of \$11,275 when the sale is confirmed and the purchase money paid over in full.

"Should a bidder run up the price on said G. C. Jennings to \$13,000 or \$13,050, and it is knocked off to the said G. C. Jennings, then he is only to pay \$11,775 for the property.

"[Signed] W. H. Jennings.
"G. C. Jennings."

The plaintiff raised the bid as above stated, and the agreement made on October 31, 1919, Exhibit A, was abrogated and a new alleged agreement entered into between plaintiff and both defendants, reading as follows:

"November 11, 1919.

"Whereas, G. C. Jennings raised the bid on the R. Nixon Morgan farm from \$10,250 to \$11,275 on October 31, 1919, and is now desirous of being protected in further bids for the property:

"We hereby agree with him that he is to have one-half of the raised bids from his present bid of \$11,275 up to \$12,075, and one-third of the raise of bids from \$12,075 up to the highest bid at the sale to be made at 12 o'clock noon on Monday, November 17, 1919. The agreement made on October 31, 1919, is hereby declared null and void in so far as it refers to the bidding.

"This agreement is strictly a private memorandum, nonnegotiable, and is to be kept strictly confidential by all the signers hereto, so as to protect the said G. C. Jennings in his future bids at the sale.

"[Signed] W. H. Jennings.

"A. C. Bell.

"G. C. Jennings."

At the resale on November 17, 1919, the plaintiff was the last and highest bidder at the price of \$11,830.00, and he is now seeking to recover in this action under the last agreement one-half of the difference between the first bid by him of \$11,275 and the last bid of \$11,830, or \$277. Thereafter the plaintiff sold his bid to H. C. Ferrell for \$650 without giving any information to the defendants of any offer to buy the bid, or that the said Ferrell intended to increase the bid. F. C. Ferrell testified:

"I am the present owner of the property called the Nixon Morgan property, and mentioned in the papers which have been offered in evidence, having bought the bid made by plaintiff for the land. I was not present at the first sale. I wanted the property, and after the second sale employed a lawyer, Mr. P. G. Sawyer, to endeavor to purchase from G. C. Jennings the bid he had offered at the second sale. Mr. Sawyer and I tried to buy the bid from him, and finally I did buy it, and got him to assign his bid to me by paying him \$650 for it. I did not know he had any agreements with defendants about the matter. He did not tell me so. I had made arrangements to raise the bid, had arranged to get the money, and was able and prepared to do so. If he had not sold his bid I would have raised it, and told him I was going to do."

P. G. Sawyer testified:

"After the second sale Mr. H. C. Ferrell employed me as attorney to try to buy Jennings bid for him. We arranged for Ferrell to get the money and he was able and prepared to buy. I saw the plaintiff and tried to buy his bid, and told him if he did not sell Mr. Ferrell was going to raise the bid on him. He sold to Ferrell."

The following issues were submitted to the jury:

"(1) Are the defendants indebted to the plaintiff, and, if so, in what sum? A. \$277.50.

"(2) Is the plaintiff indebted to the defendants, and, if so, in what sum? A. Nothing."

His honor instructed the jury that if they found the facts to be as testified by the witnesses they would answer the first issue "\$277.50," and the second issue "Nothing," and the defendants excepted.

There was a judgment on the verdict in favor of the plaintiff, and the defendants appealed.

Thompson & Wilson, of Elizabeth City, for appellants.

Ehringhaus & Small, of Elizabeth City, for appellee.

ALLEN, J. [1] The contract on which the action is founded is of doubtful wisdom and propriety. It does not, however, fall under the principle that contracts which stifle competition and chill bidding, so that property may be bought for less than its true value are void (*Nash v. Hospital Co.*, 180 N. C. 63, 104 S. E. 33), because the whole purpose and tendency of the contract was to increase and enhance the bids at the sale, but it is close akin to the employment of by-bidders, which is violative of the implied guaranty that all bids at public sales are genuine, and which may enable the purchaser, who acts promptly, to be relieved from his bid. 16 R. C. L. 71; *Corpus Juris*, 830 et seq.

No other bidder is, however, complaining, and therefore, assuming the contract to be valid as between the parties, who have not been moved by any fraudulent purpose, and have received direct benefits from the contract, there is still a view presented by the evidence which, in our opinion, ought to be submitted to a jury.

[2] The contract was made for the purpose of securing the highest price for the land obtainable at a public sale, and the plaintiff was required to perform his obligations in good faith, and would not be permitted to prevent a sale at which a higher sum would be bid, which is the very object the contract had in view, and then claim benefits under the contract. He acquired the position of advantage as a bidder, and the right to sell his bid under the contract, and he could not defeat the only purpose which caused its execution, and then seek to recover on it, as no principle is better settled than that a party suing upon a contract must show performance.

If the evidence of the defendant is to be believed, the plaintiff knew that, if he did not sell his bid, there would be an increased bid on the property by one who was ready, able, and willing to pay the advanced bid, and that this would inure to the benefit of

the defendants under the contract, and instead of informing the defendants he made a private arrangement to sell his bid, and the sale was confirmed without knowledge on the part of the defendants of the agreement between the plaintiff and Ferrell.

There was therefore error in the peremptory instructions given to the jury, and there must be a new trial.

New trial.

NOTE.—This opinion was written in accordance with the court's decision and filed by order of the court, after Justice ALLEN'S death.

STACY, J.

(182 N. C. 49)

In re FOUNTAIN. (No. 50.)

(Supreme Court of North Carolina. Sept. 21, 1921.)

1. Contempt \S 66(7)—On appeal findings of fact held not reviewable.

On an appeal in contempt proceedings from an inferior court, findings of fact are reviewable, but not where the appeal is from the superior court.

2. Contempt \S 28(1)—Denial of intention to show contempt of court in assaulting juror, not in the presence of the court, held no defense to proceedings for indirect contempt.

Where defendant, during the term of court, but not in the presence of the court, assaulted a juror because of an adverse verdict, a denial of intention to show contempt of court is no defense under C. S. § 984, since the crime does not consist of intention to show contempt, but intention to do the acts constituting a contempt.

3. Contempt \S 14—Assault on juror not in presence of court, coupled with abusive language, held sufficient to found proceedings for indirect contempt.

Although no battery was committed, an assault on a juror for returning a verdict adverse to defendant, by threatening gestures and abusive language, is sufficient, under C. S. § 984, to constitute an indirect contempt of court, as tending "to impede and hinder the proceedings of the court and to impair the respect and authority for the proceedings of the court."

4. Contempt \S 66(1)—Defendant in contempt proceedings is entitled to an appeal.

In contempt proceedings defendant is entitled to an appeal, but if he were not his remedy would be by habeas corpus and certiorari, if necessary, from the Supreme Court.

Appeal from Superior Court, Edgecombe County; Calvert, Judge.

Contempt proceedings against L. E. Fountain. Respondent was convicted of indirect contempt, not in presence of the court, and appeals. No error.

The judge finds as facts that at November term, 1921, of said county the case of

"L. E. Fountain against Calvin Jones" was called for trial on Thursday of the first week (it being a two-week term), and the verdict was rendered on the following day; that Raeford Liles was a talis juror, and after the verdict had been returned he was discharged from further service as a juror; that about an hour or two after the return of the verdict in said cause, and after said talis juror had been discharged from further service, he was met on the street by the plaintiff in the action, L. E. Fountain, "who accosted him, using abusive and insulting language towards him and the other jurors in the case because of the verdict they had rendered, and committed an assault upon the said Liles." The matter was brought to the attention of the court during that term, who thereupon issued a rule against the said Fountain which was not served because of his absence from town until after the said court had adjourned for the term, and was continued by reason of such failure; the March term was a criminal term, and this matter was not reached, but at the April term it was called up, and a new rule to show cause was issued by the judge holding that term, requiring the respondent to appear to answer the rule, which he did in person and by counsel, and—

"upon the hearing then had the court makes these further findings of fact: About an hour or two after court adjourned for the day on which a verdict was rendered the respondent (L. E. Fountain) accosted the said Raeford Liles, using abusive and insulting language towards him, and of and concerning him, and the other jurors in the case, and committed an assault upon him, the said Liles, and that this talis juror Liles that same afternoon informed one, Daniel Harris, who was then a regular juror, and served as such the following day, that the acts and conduct of the said respondent, L. E. Fountain, did tend to impede and impair the respect and authority for the proceedings of the court; and the court finds that the respondent has been guilty of contempt of the court, and so adjudges L. E. Fountain, respondent, to be in contempt of court, and adjudges that he pay a fine of \$100 and the costs of this proceeding.

"Thomas H. Calvert, Judge Presiding."

The respondent excepted to the foregoing findings of fact and the judgment of the court.

G. M. T. Fountain & Son, of Tarboro, for appellant.

The Attorney General and Frank Nash, Asst. Atty. Gen., for the State.

CLARK, C. J. This is a proceeding for indirect contempt, under C. S. § 984, by conduct impeding and impairing the respect due to, and the authority of, the court, by abusing and assaulting a juror. Such conduct occurred during the term of the court, but not in the immediate presence of the court.

The court held *In re Gorham*, 129 N. C. 485, 40 S. E. 311, that in a proceeding as for contempt in attempting to influence a juror, the findings of fact by the trial judge, if there is any evidence, cannot be reviewed on appeal, and that the respondent can purge himself only where the intention is the gravamen of the offense. *Baker v. Cordon*, 86 N. C. 116, 41 Am. Rep. 448. Here there is evidence, and the offense was in the act, and not in the intention.

In this case, moreover, there was slight divergence between the evidence for the state and the respondent, and there was ample evidence to justify the findings of fact by the court. While the respondent denies attempting to strike the juror Liles, he does not deny the abusive and threatening language as to him and the other jurors on account of the verdict they rendered against him. Said juror testified that, when the respondent upon the recess of the court met him and began cursing and abusing him and the rest of the jury who had sat on the case, using profane and vile expressions, he started to walk away from said Fountain, but the latter continued to walk beside him, cursing and abusing him and all members of the jury, and repeatedly raised his hand and shook it in his face, continuing to threaten and abuse both affiant and all other members of the jury, talking in an angry and vehement manner and threatening him so that the affiant had to walk away from him, being an old man 70 years of age, to avoid a battery upon him, and walked into the lot of an adjacent stable to avoid personal encounter and fistcuff, as he thought the said Fountain was going to strike him, and he was actually put in fear, and that this was before the court had adjourned for the term, and about two hours after the affiant had been discharged as a juror.

[1] There was also an affidavit by the deputy sheriff that he was unable at that term of the court to serve the rule upon said Fountain, though his residence and place of business was in Tarboro, he absented himself from the county for the purpose of avoiding said officer or keeping himself concealed, to prevent service of said rule upon him. On an appeal in such proceedings from an inferior court, the findings of fact are reviewable, but it is otherwise when the appeal is from the superior court. *In re Deaton*, 105 N. C. 62, 11 S. E. 244.

The respondent does not deny the use of abusive language as stated by the juror as above, and says that he might have used gestures and raised his hand, but that he did not intend to assault him or put him in fear, and asserts he left town upon business.

In *State v. Hampton*, 63 N. C. 13, where the defendant in striking distance of the prosecutor, his arm being bent, but not drawn back, said to the prosecutor "I have a good mind to hit you." Whereupon the prosecutor

walked away. It was held that the defendant was guilty of an assault.

But it was not necessary, indeed, that there should have been a battery upon the juror. This is not an indictment for such battery. It is sufficient if the juror was called in question in the manner above stated for the discharge of his official duty in rendering his verdict, for the court properly held that such conduct tended "to impede and hinder the proceedings of the court, and to impair the respect and authority for the proceedings of the court," and adjudged that the respondent had been guilty of contempt of the court. C. S. § 984.

[2] The defendant contends that he has purged himself of contempt by denying his intention to show contempt for the court. The question is not whether the respondent intended to show his contempt of the court, but whether he intentionally did the acts which were a contempt of the court. In *re Parker*, 177 N. C. 467, 99 S. E. 342.

[3] The adjustment of differences between parties or the investigation of conduct forbidden by law by legal tribunals, instead of by personal strength, marks the line between civilized government and barbarism. When the tribunals established for that purpose have investigated the matter at issue, or are investigating it, their action is to be respected and obeyed, and is subject to review only in the method provided by law.

In *Ex parte McCown*, 139 N. C. 95, 51 S. E. 957, 2 L. R. A. (N. S.) 603, there was a personal attack upon a judge during the recess of the court, and before it had actually adjourned, though the case on account of which the judge was attacked had been finally disposed of, and the court held that McCown was in contempt; that the right of the court to be protected in the discharge of its duty is an inherent power of which it could not be deprived, for Const. art. 4, § 12, provides:

"The General Assembly shall have no power to deprive the judicial department of any power or jurisdiction which rightfully pertains to it as a co-ordinate department of the government."

It is a most essential power, rightfully pertaining to the judicial department, that those administering it, whether judges or jurors, shall not be assaulted or intimidated by violent and threatening conduct from the untrammelled discharge of their duties, and this is as essential in regard to jurors who are a part of the court as it is to the judges.

There would be small assurance of the impartial and fearless administration of justice if the judges only are to be protected from such misconduct as is here shown, but the jurors who are much more liable to be thus called in question should be left to defend themselves by physical strength or by indictment or prosecution of the offenders.

In *Re Brown*, 168 N. C. 417, 84 S. E. 690,

the court held that a newspaper criticism after the court had adjourned was personal to the judge, and not a matter of contempt. That case was rested upon the ground that the court had adjourned.

In the McCown Case, 139 N. C. at page 110, 51 S. E. at page 962, 2 L. R. A. (N. S.) 603, Judge Walker said:

"As courts can exercise judicial functions only through their judicial officers, an assault upon such officer because he has discharged a required duty is necessarily an attack upon the court for what it has done in the administration of justice."

That case holds that such conduct is direct contempt, and is constructively done in the presence of the court, and falls within subsection C. S. § 978 (1). Besides the able and full discussion of the whole matter in that case, see, also, *State v. Little*, 175 N. C. 743, 94 S. E. 680, in which it is held, Hoke, J., that the power of the court to attach for contempt includes in its protection all officers of the court, jurors, attorneys, and others, who in the line of their official duties are assisting the court in the dispatch of its duties, and all witnesses who are in attendance under subpoena. In that case the defendant in a criminal action had assaulted the state's witness before the trial, for the purpose of hindering or delaying the administration of justice, and he was held to be in direct contempt, and that the respondent had no right of appeal, or to demand trial by jury, or to demand that his hearing be removed before another judge. Nothing could be added to the very full and careful discussion of the subject-matter in *State v. Little*.

[4] The respondent was entitled to an appeal (In re Parker, supra), but, if he were not, if his sentence were excessive or the jurisdiction was doubtful, his remedy was by habeas corpus proceedings and a certiorari, if necessary, from this court. In re Holley, 154 N. C. 163, 69 S. E. 872.

Disregarding, however, this phase of the case, we find in the judgment of the court in this case no error.

(182 N. C. 762)

CORBETT BUGGY CO. v. McLAMB et al.
(No. 105.)

(Supreme Court of North Carolina. Sept. 28, 1921.)

Appeal and error ⇨627(2)—Appeal dismissed, where record docketed long after expiration of proper term.

Where the record on an appeal from a judgment overruling a motion to set aside two judgments was not docketed until long after the expiration of the term at which the case should have been heard, the appeal will be dismissed.

Appeal from Superior Court, Harnett County; Devin, Judge.

Action by the Corbett Buggy Company against Gethro McLamb and others, before a justice. Judgment for plaintiff was affirmed on appeal, and, from a judgment overruling the motion to set it aside, defendants appeal. Appeal dismissed.

This was a motion, filed in the superior court, to set aside two judgments upon the ground of excusable neglect, and upon the further ground that they purported to be consent judgments; whereas, movants allege that said judgments were entered by their codefendant without authority from them and without their consent.

E. F. Young, of Dunn, for appellants McLamb.

L. J. Best and Clifford & Townsends, all of Dunn, for appellee.

PER CURIAM. The judgment which forms the basis of this appeal was rendered at the November term, 1920, of Harnett superior court. The record was not docketed here until August 27, 1921, long after the term at which the case should have been heard had expired. Hence the plaintiff's motion to dismiss the appeal must be allowed. *State v. Telfair*, 139 N. C. 555, 51 S. E. 911.

Notwithstanding the motion to dismiss, we have examined the record, and have been unable to find any reason for disturbing the result below. Upon the merits, the case should be affirmed.

Appeal dismissed.

(182 N. C. 70)

JONES v. BLAND et al. (No. 19.)

(Supreme Court of North Carolina. Sept. 21, 1921.)

1. Negligence ⇨76—Unlawful act of person injured no bar.

The fact that a plaintiff at the time he suffers injury to his person and property from the negligence of the defendant was doing some unlawful act will not prevent a recovery unless the act was of such a character as would voluntarily tend to produce the injury.

2. Trial ⇨285—Charge considered and interpreted in reference to material facts.

A charge must be considered and interpreted in reference to the material facts submitted for a decision.

3. Innkeepers ⇨10—One who enters hotel for ulterior purpose and wanders into portion of building where he is not expected to go is a trespasser.

One who enters a hotel for an ulterior purpose and who goes beyond the scope and purpose of the invitation and wanders into some

remote portion of the premises not covered by the invitation, where there is no reason to expect him to go, is not an invitee, toward whom the hotel proprietor is required to exercise the duty of ordinary care, but is a trespasser or mere licensee, whom the proprietor owes no duty except not to willfully or wantonly injure him.

4. Innkeepers ⇨10—One who entered hotel for purpose of gambling not an invitee, but a mere licensee or trespasser.

One who enters a hotel building by invitation of an inmate for the purpose of going to the room of such inmate to gamble is not an invitee, but a mere trespasser or licensee, toward whom the hotel proprietor owes no duty except not to willfully or wantonly injure him.

5. Innkeepers ⇨10—Evidence held to establish prima facie case of negligence.

In action against hotel keeper for injuries sustained in falling down elevator shaft, proof that plaintiff was an invitee, that he walked into an elevator shaft opening on the lobby, receiving injuries, that the door had been left open, and that by reason of the weather and other conditions the place was so dark that ordinary observation did not disclose the opening or absence of the elevator carriage, held to establish a prima facie case of negligence entitling plaintiff to recover without further proof that defendants knew that door had been left open or that it had remained open long enough for them, in the exercise of ordinary care, to have discovered it.

6. Negligence ⇨121(2)—Res ipsa loquitur doctrine stated.

Where a thing which causes an injury is shown to be under the management of the defendant, and the occurrence is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by defendant, that the accident arose from want of care.

Appeal from Superior Court, Beaufort County; Allen, Judge.

Action by M. M. Jones against T. L. Bland and others. Judgment for defendant, and plaintiff excepts and appeals. New trial.

The action is to recover damages for the alleged negligence of T. L. Bland, proprietor of the Hotel Louise, and another, in leaving open the elevator shaft leading off the hotel lobby and into which plaintiff fell, receiving serious, painful, and enduring injuries. There was denial of liability and plea of contributory negligence on part of plaintiff. On the trial there was evidence tending to show that on the afternoon of January 23, 1918, about 3:30 p. m. plaintiff was invited into said Hotel Louise by W. B. Troy, a boarder at the hotel, and the two were going up to the room of said Troy on the fourth floor of the building; that it was a dark, cloudy day, the elevator being behind the stairs, shutting off much of the light that existed, and the elevator shaft from its placing and color

of paint was such that plaintiff was unable to discern whether carriage was in place, and, believing it was, stepped into the open door, falling to cement floor of the basement, a distance of 9 to 11 feet, and causing painful and permanent injuries, from which he is still suffering and greatly hindered in his ability to work.

It was proved that the carriage of the elevator at the time was at one of the upper floors, where it had been taken by some one, and that the door on the lobby floor was open. It was also shown that Mr. Troy, the inmate of the hotel, had been sick and confined to the house for about a week, and there were facts on evidence permitting the inference that it was the purpose of Troy in calling plaintiff into the building and of the two in going to Troy's room to play cards for money at a fine of 10 cents limit, involving a loss of 25 or 50 cents, etc. There were submitted the three ordinary issues as to the negligence of defendant, contributory negligence of plaintiff, and damages, and, the court having charged the jury, there was verdict for defendant on the first issue. Judgment for defendant, and plaintiff excepted and appealed, assigning errors.

Daniel & Carter, of Washington, N. C., for appellant.

Robert Ruark, of Wilmington, Small, MacLean, Bragaw & Rodman, of Washington, N. C., and Wm. B. Campbell, of Wilmington, for appellees.

HOKE, J. [1] It is earnestly urged for error that his honor charged the jury in part on the first issue that, if they should find that Jones and Troy were on the way to Troy's room for the purpose of playing cards for money, they should answer the first issue for defendants; the objection being that such unlawful purpose, even if established could in no legal sense be considered as the proximate or contributing cause of plaintiff's injury. As an abstract proposition, considered entirely apart from the proprietary rights of the defendant as owner and in the management of the property, the position embodied in this objection should be upheld. In *Sutton v. Town of Wauwatosa*, 29 Wis. 21, 9 Am. Rep. 534, Chief Justice Dixon, in an opinion of great force and learning, approves and sustains the principle that "the fact that plaintiff, at the time he suffered injuries to his person or property from the negligence of defendant, was doing some unlawful act will not prevent a recovery, unless the act was of such a character as would naturally tend to produce the injury"; that is, unless the very unlawfulness of the act would have that tendency. And the principle so stated is fully recognized in this state as in accord with the better considered authorities on the subject. *Ferrell v. Railroad*, 172 N. C.

682, 90 S. E. 893, L. R. A. 1917B, 1291; McNeill v. Railroad, 135 N. C. 682, 47 S. E. 765, 67 L. R. A. 227; Waters v. Railroad, 110 N. C. 338, 14 S. E. 802, 16 L. R. A. 834; Watson on Damages for Personal Injuries, §§ 230-237.

[2, 3] A judge's charge, however, must be considered and interpreted in reference to the material facts submitted for his decision, and on this record it appears that defendant is the owner and proprietor of the hotel where the incident occurred, and plaintiff is insisting upon the position that he was there at the time on the invitation of a guest of the hotel, and has been injured in breach of the duty owed to one in that position. In the case suggested and without more it is very generally held that such a one, termed an invitee, is entitled to the duty of ordinary care from the proprietor and his employees, but the principle does not extend to a claimant who enters a hotel for an ulterior purpose, and who, going beyond the scope and purpose of the invitation, wanders into some remote portion of the premises not covered by the same, and where there is no reason to expect him to go. Under such circumstances, he loses the position of invitee and the privileges incident to it, and is to be considered trespasser or mere licensee, towards whom no duty is owing except not to willfully or wantonly injure him. *Money v. Hotel Co.*, 174 N. C. 508, 93 S. E. 964, L. R. A. 1918B, 493; *Monroe v. A. C. L. R. Co.*, 151 N. C. 374, 66 S. E. 315, 27 L. R. A. (N. S.) 193; *Quantz v. Railroad*, 137 N. C. 136, 49 S. E. 79; *Glaser v. Rothschild*, 221 Mo. 180, 120 S. W. 1, 22 L. R. A. (N. S.) 1045, reported also in 17 Ann. Cas. 577; *Ryerson v. Bathgate*, 67 N. J. Law, 337, 51 Atl. 708, 57 L. R. A. 307; *Reardon v. Thompson*, 149 Mass. 267, 21 N. E. 369; *Plummer v. Dill*, 156 Mass. 426, 31 N. E. 128, 32 Am. St. Rep. 463; *Zoeblisch v. Tarbell*, 10 Allen (Mass.) 385, 87 Am. Dec. 660. And the principle as stated should clearly prevail where under the guise of an invitee the claimant has entered or remains upon the premises for an unlawful purpose, assuredly so where the proprietor has no knowledge of such purpose and takes no part therein. *McGhee v. Norfolk & S. R. Co.*, 147 N. C. 142, 60 S. E. 912, 24 L. R. A. (N. S.) 119; *Newark Electric, etc., Light Co. v. Garden*, 78 Fed. 74, 23 C. C. A. 649, 37 L. R. A. 725; 1 *Thompson on Negligence*, § 969.

In this last citation the position is stated as follows:

"The distinction is that the person coming on the premises to whom this duty of care is due must not come as a mere trespasser or wrongdoer, but for some purpose lawful in itself and such as the owner or occupier might reasonably expect to bring him there."

[4] As applied to the facts of this record, therefore, his honor correctly charged the jury that, if claimant was going to the room

for the unlawful purpose of gambling, they should answer the issue as to defendant's negligence "No," and he gave the right reason for it; "for in such case there would be no duty owing to him except not to willfully or wantonly injure him." *Emry v. Navigation & Water Power Co.*, 111 N. C. 94, 16 S. E. 18, 17 L. R. A. 699. And he was correct also in holding that there were no facts in evidence to justify a finding of that character; there being no claim of willfulness and wantonness in this connection, being negligence so gross as to manifest a reckless indifference to plaintiff's rights. *Everett v. Receivers*, 121 N. C. 519, 27 S. E. 991.

The appellant excepts further that the court charged the jury as follows:

"The burden is on the plaintiff to satisfy you by the greater weight of the evidence that Shepard, the boy in charge of the elevator, or whoever was in charge of it, left the door open, or that, if opened by some one other than an agent or employee of defendants, that defendants knew it, or that it remained open long enough for them, in the exercise of ordinary care, to have discovered it, and if plaintiff has failed to so satisfy you of these facts, you will answer the first issue 'No.'"

The court is dealing here with the general question of defendant's negligence as involved in the first issue and on the assumption that plaintiff was an invitee on the premises and entitled to the duty of ordinary care. In this aspect of the case he so instructed the jury, and correctly charged them further that the burden of the issue was on the plaintiff, and in effect that he was required to establish a breach of duty towards him, the proximate cause of his injury. Going further and referring to some of the contentions of the parties, he gave the instruction excepted to as a further rule to guide the jury in their deliberations, and in this we think there was error to appellant's prejudice which entitles him to a new trial. It will be noted that his honor is here charging the jury as to the burden of proof, telling them in terms that to find the issue for plaintiff the burden is on him to show by greater weight of evidence either that the employee of defendant left the door open, or, if done by a third party, it had remained open so long that defendant should have discovered it.

[5, 6] In this aspect of the case there are facts tending to show, and they are without substantial contradiction, that on January 23, 1918, about 3:30 in the afternoon, plaintiff, an invitee on the hotel premises, walked into an elevator shaft opening on the lobby and fell to the cellar, 11 feet below, receiving permanent and painful injuries from which he still suffers, and disqualifying him to a great extent from active labor in his calling; that it was a dark afternoon, sleet was falling, and from this cause and the color of the paint and intervening ob-

structions to what light was prevailing on the outside the place was so dark that ordinary observation did not disclose the opening or absence of the elevator carriage; that the door leading into lobby where plaintiff was at the time had been left open, or was open, and the elevator carriage was at one of the upper stories. If these facts are accepted by the jury, and, as stated, they are not challenged in the record, a prima facie case of negligence is made out which would justify the jury in finding a verdict on the issue against the defendant without further proof. It is the accepted position here and elsewhere:

"That, where a thing which causes an injury is shown to be under the management of the defendant and the occurrence is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence in the absence of explanation by defendant that the accident arose from want of care."

This was held in the recent case of *Stone v. Texas Co.*, reported in 180 N. C. 546-561, 105 S. E. 425, 12 A. L. R. 1297, and the principle has been approved and applied in many of our decisions on the subject. *Fitzgerald v. Railroad*, 141 N. C. 530, 54 S. E. 391, 6 L. R. A. (N. S.) 337; *Stewart v. Carpet Co.*, 138 N. C. 60, 50 S. E. 562; *Womble v. Grocery Co.*, 135 N. C. 474, 47 S. E. 493; *Haynes v. Gas Co.*, 114 N. C. 203, 19 S. E. 344, 26 L. R. A. 810, 41 Am. St. Rep. 786; *Aycock v. Railroad*, 89 N. C. 321; *Sweeney v. Erving*, 228 U. S. 233, 33 Sup. Ct. 416, 57 L. Ed. 815, Ann. Cas. 1914D, 905; *Cincinnati Traction Co. v. Holzenkamp*, 74 Ohio St. 379, 78 N. E. 529, 6 L. R. A. (N. S.) 800, reported also in 113 Am. St. Rep. 980, with an informing and helpful note on the subject; *Labatt on Master and Servant*, § 834. In the citation to *Labatt*, quoted with approval in *Womble's Case*, it is said:

"The rationale of the doctrine, spoken of in the cases as *res ipsa loquitur*, is that in some cases the very nature of the action may itself, and through the presumption it carries, supply the requisite proof. It is applicable when under the circumstances shown the accident presumably would not have happened if due care had been exercised. Its essential import is that, on the facts proved, the plaintiff has made out a prima facie case, without direct proof of negligence. The doctrine does not dispense with the rule that the party who alleges negligence must prove it. It merely determines the mode of proving it, or what shall be prima facie evidence of negligence."

And a clear and accurate statement of the position will be found in the case of *Stewart v. Carpet Co.*, supra.

In *Fitzgerald's Case* the opinion cites an English decision on the subject as follows:

"In *Scott v. Dock Co.*, 3 Hurl. & Colt, the plaintiff proved that, while conducting his duties as custom officer, he was passing in front

of a warehouse in the dockyard and was felled to the ground by six bags of sugar falling upon him, and the principle is declared as follows: 'There must be reasonable evidence of negligence, but when the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence in the absence of explanation by the defendant that the accident arose from want of care.'"

And again a case from New Jersey is referred to with approval as follows:

"In *Sheridan v. Foley*, 58 N. J. Law, 230, it is said: 'It is urged, however, on behalf of the defendant that the plaintiff was bound, in order to entitle him to a verdict, to prove affirmatively that the injury which he received was caused by the negligent act of the defendant or of his servants; that the mere proof that the plaintiff was injured by a brick falling from the head of one of the defendant's hod-carriers, or from a scaffolding upon which some of the employees of the defendant were engaged in laying a wall, does not, standing alone, raise any presumption of negligence; and that, as there was no evidence offered to show under what circumstances the brick fell, there was nothing in the case to warrant the jury in inferring that the injury complained of was the result of carelessness of the defendant or of his employees. While it is true, as a general principle, that mere proof of the occurrence of an accident raises no presumption of negligence, yet there is a class of cases where this principle does not govern—cases where the accident is such as, in the ordinary course of things, would not have happened if proper care had been used. In such cases the maxim *res ipsa loquitur* is held to apply, and it is presumed, in the absence of explanation by the defendant, that the accident arose from want of reasonable care.'"

On the record, therefore, in charging the jury that in order to render a verdict for plaintiff on the first issue the burden was on him to show by a preponderance of the evidence either that the boy in charge of the elevator left the door open, or, if opened by some other than an agent of plaintiff, that defendant knew it, or it had been open long enough for them to have found it out in the exercise of proper care, the court, in our opinion, was putting on plaintiff a greater burden than is warranted by the proper application of the principle referred to. It no doubt made the impression upon the jury that, in order to a verdict on first issue, plaintiff was required to offer direct and affirmative proof of the facts suggested, whereas the jury, if they so determined, or in the absence of satisfactory explanation, were well warranted in finding negligence from the objective and attendant facts of the occurrence without such affirmative proof.

In many cases on the subject these passenger elevators are likened to railroad carriers of passengers in which there is a pre-

sumption of negligence arising from an unexplained injury. *Edwards v. Manufacturers' Co.*, 27 R. I. 248, 61 Atl. 646, 2 L. R. A. (N. S.) 744, 114 Am. St. Rep. 37, 8 Ann. Cas. 974; *Oberfelder v. Doran*, 26 Neb. 118, 41 N. W. 1094, 18 Am. St. Rep. 771; *Fox v. Philadelphia*, 208 Pa. 127, 57 Atl. 356, 65 L. R. A. 214. But in this jurisdiction the objective facts similar to those presented here, as shown in *Stewart's* and *Womble's* decisions, only make out a prima facie case of negligence and justifying a verdict without further or direct and affirmative proof. Having undertaken to lay down the rule as to the burden of proof, it should have been done correctly, and no prayer for instructions was required. *State v. Wolf*, 122 N. C. 1079-1081, 29 S. E. 841; *Bynum v. Bynum*, 83 N. C. 632.

For the error indicated, plaintiff is entitled to a new trial of the issues, and it is so ordered.

New trial.

(132 N. C. 85)

BARNHILL v. HARDEE et ux. (No. 185.)

(Supreme Court of North Carolina. Sept. 28, 1921.)

Boundaries — 35(2)—Evidence of general reputation as to width of street held competent.

In an action against an adjoining landowner for trespass, evidence of the general reputation, for 30 or 35 years, beginning long before the litigation, and before either of the parties owned any of the land in controversy, as to the width of a street, 30 feet south from the corner of which and another street the disputed boundary line began, was competent.

Appeal from Superior Court, Pitt County; Devin, Judge.

Action by Haywood Barnhill against Richard Hardee and wife. Judgment for plaintiff, and defendants appeal. No error.

F. C. Harding and L. W. Gaylord, both of Greenville, for appellants.

Julius Brown and F. G. James & Son, all of Greenville, for appellee.

CLARK, C. J. This is an action for trespass which turns upon the location of the dividing line of the adjoining lots of the parties in Greenville. Both claim under the same title. The plaintiff's deed from W. A. Taylor in 1907 describes his boundaries as follows:

"Beginning at the corner of Read and Second streets, and running south with Read street 30 feet; thence an easterly course parallel with Second street 59 feet, to the line of Miles Grimes; thence with the line of Miles in a northerly direction 30 feet to Second street; thence in a westerly direction to the beginning, being a part of lot No. 148 in the plan of the town of Greenville."

The description in defendants' deed executed by W. A. Taylor in 1914 is:

"Known as a part of lot No. 148 in the town of Greenville, beginning on the east side of Read street at a point 30 feet south of the intersection of Read and Second streets, it being the southwest corner of the lot which was conveyed to Haywood Barnhill by said W. A. Taylor and wife, and running from thence with Read street south 41 feet; thence east at right angles with Read street 59 feet; thence a northerly direction parallel with Read street, 41 feet to line of the lot now or formerly owned by Haywood Barnhill; thence a westerly direction with the line of the said Haywood Barnhill lot 59 feet to the beginning."

It will thus be seen that the controversy depends upon the location of the corner of Read and Second streets. The southern line of the plaintiff is described as "beginning 30 feet" from that corner and running east 59 feet, and the northern line of the defendant calls for the southern line of the plaintiff's lot.

If the corner on Second street is where the plaintiff claims, then the defendant has trespassed upon 7 feet of the plaintiff's lot eastwardly 59 feet, and the jury has found in accordance with the plaintiff's contention. There is but one exception which requires our consideration.

S. T. Hooker testified that he has lived in the town of Greenville 50 years, knows the reputation of the size of the blocks, and the width of the streets in said town; that his knowledge of this general reputation extends back 30 or 35 years; that he has no knowledge of the width of Second street, except from general reputation; that by the general reputation as to the width of Second street running back as far as 30 years the width of Second street is 49½ feet. He says that the streets of Greenville are of different widths; that he does not know the actual width of Second street below or east of Read street; that he never heard a question raised as to the width of Second street; that he lived on the corner of Second street. The judge permitted the witness to state, as above, the general reputation that the width of Second street was 49½ feet, and defendant excepted.

We think the evidence of the general reputation, 30 or 35 years old, as to the width of the street was competent under the rule laid down by this court in *Threadgill v. Wadesboro*, 170 N. C. 641, 87 S. E. 521; *Sullivan v. Blount*, 185 N. C. 7, 80 S. E. 892; *Bland v. Beasley*, 140 N. C. 628, 53 S. E. 443. He testified as to the general reputation which began long before this litigation, and before either of the parties owned any of the land in controversy.

No error.

(182 N. C. 761)

(108 S.E.)

STATE v. BROWN. (No. 89.)

(Supreme Court of North Carolina. Sept. 28, 1921.)

1. Criminal law \S 619—Indictments consolidated for trial.

Two bills found by grand jury, one charging defendant with common-law crime of arson and the other with the statutory offense of houseburning, both of which arose out of the same transaction, were properly consolidated upon motion of the solicitor, and the defendant was properly tried over his objection on both counts at the same time, under O. S. \S 4622.

2. Arson \S 37(1)—Evidence sufficient to sustain conviction of houseburning.

In a prosecution for common-law arson and the statutory offense of houseburning, evidence held sufficient to support a conviction of houseburning.

Appeal from Superior Court, Hertford County; Kerr, Judge.

Bose Brown was indicted for arson and houseburning and convicted of houseburning, and appeals. No error.

The evidence for the state was as follows:
J. W. Brown testified:

Know Bose Brown. He is my half-brother. Lived with me a part of the time. We were living in the store; that is, it was a store building. I conducted a mercantile business in the front, and had in the store a stock of goods, wares, and merchandise, and there was also in the front of the store a barber shop, and outfit, and the front of the store was used for keeping and selling goods, wares, and merchandise, and for a barber shop. A partition wall about 25 feet from the front cut off the remainder of the building, and we lived in the back part, myself, wife, and three children. My store was burned Saturday night before last. My wife and children were in the bedroom at the time the fire began. My entire store, including part as the dwelling house, was burned. My losses were about \$1,500. The house was all in one, with only partition wall. I left the store 15 minutes before 11 o'clock and it had not been to exceed 40 minutes when I looked out door and the house was on fire. It was on the right-hand corner front of the store. Fire started on the outside. I went out there and saw the fire burning on the outside. It was not burning on the inside when I first got there. Defendant had been living with us up to about three or four weeks before the fire, and had a dispute with my wife and children. Defendant used profane language, and my wife said he would have to go out of her house, she could not room and board him any longer, and I made him leave my house. This was about three weeks before the fire. Bose shines shoes mostly. For awhile he kept his chair in the store. Prior to this time he had taken it out and had asked me to let him return it. He did not put it back. He had also requested me to let him return to my home for room and board. I told

him he would have to see my wife. He went to the back door and called. This was the night of the fire, and some considerable time before the fire. My wife did not answer. Bose said, "The next time he called her he bet she would answer, and be sorry she did not answer this time." I never heard Bose make any threats with reference to the burning. I used the right-hand corner of the store as you come out for barber shop. I did right much barbering and hair cutting on Saturdays and Saturday nights, and the floor was usually covered with hair, paper, and other debris. Defendant said, "If it was not for the electric chair he would kill me and my wife."

To the foregoing evidence defendant objects, as having no connection with burning. Overruled. Defendant excepts.

Ada Brown testified:

We lived in store in rear part which is separate from the main part of the store by partition wall. I was aroused by my husband on the night of the fire. I looked out door and fire was on the outside of building. Before I could get my children out fire had made its way from the corner to about 15 inches of my room door. My room door was about 80 feet from the corner. I told (defendant) if he could not behave he would have to leave. He talked vulgar chat to my children, and said he would destroy their property and said he would put lie in my eyes and in my children's eyes.

To the foregoing evidence defendant objects. Overruled.

The night of the fire he called me, and I did not answer. Prior to this he said he was going to kill me.

To the foregoing evidence defendant objects. Overruled.

I never heard him make any threats in connection with this or any other burning. It was about 15 minutes till 1 o'clock a. m. when I discovered the fire. My husband closed the store about quarter past 11. All the threats he made was to me and my children, the oldest being 9 years of age.

J. S. Simmons testified:

Met Bose Brown on street the night of the fire and before the fire about 25 yards from Mr. Myers' store. It was on the opposite side of street from house burned about 10 o'clock. He asked me to loan him \$5. Said he was behind on his board bill. I had no money to loan. Said he would like to stay with me for a while. I had no room for him. Said John and Ada would not permit him to return to their house. He said they had lost one house by fire and you watch and see if they don't have something else to happen because they treat me wrong and the Lord punishes those who does wrong to others. This conversation happened on the night of the fire, and before the fire, and the house burned was in Cofield, near the Atlantic Coast Line Railroad, and trains north and south were due to pass there during the early night and morning.

H R. Mitchell testified:

Did not see Bose prior during night of the fire. I saw him several days before and he said John and Ada were always after him and he had not done anything to them. Said they had one house burned once before and before three weeks they would get another burn. No; I have never sold Bose's monkey rum. Yes; I have been accused of it.

John Mountain testified:

Went out gate about 11 o'clock on Saturday night of the fire. It was before prosecuting witness had closed his store. Bose was alone at side window looking in, or near the window. I could see him by the reflection of the light through the window. The window was next to the bedroom door of prosecuting witness and wife.

Jack Perry testified:

Remember the night the store was burned. At 10 o'clock the defendant came into my store and bought a box of matches. That was nothing unusual.

Jim Boone testified:

Remember the night the store was burned. I saw the defendant at Wiggin's store about 25 yards away from the store that was burned. He was standing under the stoop at Wiggin's store. He stopped and talked to me. I asked him for a match, and he gave it to me. About 40 minutes later I saw the fire. I am 21 years old.

The question being asked why and what he was doing out at that hour of the night, he answered:

Can't tell you why I was out at 12 o'clock at night and so near the time of the fire.

John Copeland testified:

Remember the night the fire occurred. Three o'clock a. m., myself, John Mountain, and others went to look for the defendant. We found him asleep in a little house on the mill yard of the Cofield Manufacturing Company, one-quarter mile or more away. We called him and asked him about the fire. Defendant said he had not been out since 8 o'clock of the night of the fire. He was not asleep, and opened the door for us, and he was dressed, except he did not have his shoes on. You could see the reflection of the fire in the window to the room in which he was, and there was nothing to prevent his knowing about the fire. He was a short distance from it, but did not go to the fire.

G. E. Holloman testified:

I heard the case at the preliminary hearing. I warned the defendant any statement he made could not be used against him. He said he went to the mill yard about 8 or 9 o'clock and remained there until he was called. I asked him if he did not remember being in my store as late as 12 o'clock. He was in my store as late as 12 o'clock. He said he did not know, because he had no time piece, and no way to tell

the time. I was one of the first to get to the fire. When I reached the store the fire was burning a little on the outside, just opposite the barber chair. Store was not ceiled. I did not get there when the fire first started, but when I got there the fire was mostly burning in the corner of near the barber chair. One of the window panes right near the chair was broken out when I got there and in less time than five minutes all the panes in the window were broken out by the heat. I know the defendant is not considered bright and is far below the average. I am quite sure he really did not know the time unless he was so advised by some one else. He had no watch. I don't think he could tell the time by a time piece. Unlettered and unlearned, and not much mind.

The judge fully recapitulated to the jury the evidence, and correctly laid down to it the law arising thereon, and recited the contentions of the state and defendant, and in addition to the other charge of the court, the judge, at the request of the defendant, charged the jury as follows:

(1) In the case at bar the state relies upon circumstantial evidence for a conviction of the defendant and before you can convict the defendant such evidence must be clear and conclusive in its combination, connection, and exclude all rational doubt as to the defendant's guilt; and the burden is on the state, and it must establish every circumstance upon which it relies beyond a reasonable doubt; and if the state has failed to so satisfy you, you will return a verdict of not guilty and acquit the defendant.

(2) The court further charges you that the state must prove each fact which constitutes a necessary link in the chain of evidence as clearly as if the whole case depended on it; and if the state has failed to so prove and satisfy your mind beyond a reasonable doubt, it is your duty and you should acquit the defendant.

(3) The court further charges you that, in relying upon circumstantial evidence for a conviction, such evidence is no stronger than its weakest link.

The court further defined circumstantial evidence to the jury, and reasonable doubt, and the crimes of arson and wanton and felonious burning of building used in carrying on trade, and properly charged the jury that the burden of proof was on the state to satisfy them from the evidence beyond a reasonable doubt of the defendant's guilt, and, if they were not so satisfied, they would not convict defendant of anything, but they must acquit him, and find him not guilty. There was and is not exception to the judge's charge, except that he refused to give the following special instruction prayed by the defendant in apt time:

If the jury shall believe all the evidence in the case they will acquit the defendant.

The court instructed the jury that, under the bills of indictment, as it found the facts

to be, applying the law as laid down to it by the court, they could render one of three verdicts: Arson, houseburning, or not guilty. The jury for their verdict found the defendant guilty of houseburning, and not guilty of arson.

On the coming in of the verdict of the jury, the defendant moved to set aside the verdict as being contrary to and not supported by the evidence, and against the law of the case. Motion overruled. Defendant excepts.

The court sentenced the defendant to serve five years at hard labor in the state prison. The defendant excepts to the judgment pronounced, and appeals to the Supreme Court.

Notice of appeal given in open court. Further notice waived. The defendant further excepts because the court refused to give special instructions as prayed, and because of the charge as given, and other errors committed during the trial. All of which was urged on motion to set aside the verdict and new trial.

Upon certificate of counsel and affidavit, the defendant is allowed to prosecute his appeal in forma pauperis. The court ordered the sheriff to remove the prisoner from the county jail to the state prison, without prejudice to his rights in this appeal.

Roswell C. Bridger, of Winton, for appellant.

J. S. Manning, Atty. Gen., and Frank Nash, Asst. Atty. Gen., for the State.

PER CURIAM. [1] There were originally two bills found by the grand jury—one charging the defendant with the common-law crime of arson and the other with the statutory offense of houseburning, both of which arose out of the same transaction. Upon motion of the solicitor, the bills were consolidated, and the defendant was tried, over his objection, on both counts at the same time. This was clearly permissible under C. S. § 4622, which provides that—

“If two or more indictments are found in such cases (where they arise out of the same transaction), the court will order them to be consolidated.”

[2] The remaining exception, relied on by defendant, was to his honor's refusal to grant the motion for judgment as of nonsuit. The evidence was entirely circumstantial; but from a perusal of the record we think

it was quite sufficient to support the verdict.

We have found no error, and this will be certified to the superior court.

No error.

(182 N. C. 756)

SYKES v. FOREMAN-DERRICKSON VENEER CO., Inc. (No. 9.)

(Supreme Court of North Carolina. Sept. 14, 1921.)

Appeal and error 999(1)—Finding of jury conclusive.

Where a controversy deals only with questions of fact, the finding of the jury favorable to plaintiff is conclusive.

Appeal from Superior Court, Tyrrell County; Allen, Judge.

Action by S. W. Sykes against the Foreman-Derrickson Veneer Company, Inc. From a judgment for plaintiff, defendant appeals. No error.

Civil action to recover damages for an alleged breach of contract wherein the defendant agreed to sell to the plaintiff 500 truck barrels to be used in moving and marketing a certain quantity of Irish potatoes. Upon denial of liability and issues joined, the jury returned the following verdict:

“(1) Did plaintiff and defendant contract to buy and sell the barrels as alleged in the complaint? Answer: Yes.

“(2) Did the defendant breach the contract as alleged in complaint? Answer: Yes.

“(3) If so, what damages did the plaintiff sustain? Answer: \$400.00.”

From a judgment in favor of the plaintiff the defendant appealed.

Aydlett & Simpson, of Elizabeth City, and H. L. Swain, of Columbia, for appellant.

W. L. Whitley, of Plymouth, and T. H. Woodley, of Columbia, for appellee.

PER CURIAM. The controversy between the parties to this action and here presented deals only with questions of fact. These the jury have answered in favor of the plaintiff. No new point of law is raised by any of the exceptions which would seem to merit an extended discussion. We have carefully examined the record and defendant's assignments of error, but no reversible or prejudicial ruling has been made to appear.

No error.

(182 N. C. 61)

LEE v. LEE. (No. 114.)

(Supreme Court of North Carolina. Sept. 21, 1921.)

1. Divorce \Leftrightarrow 36—Separation for more than five years because of insanity of wife held no ground for divorce.

Laws 1921, c. 63, amending O. S. § 1859, subd. 4, providing that suit by the party injured for divorce may be maintained where separation for five years has been by mutual consent or wrongful act of at least one of the parties, or by judicial decree, does not apply to separation from confinement in the state hospital for the insane because of insanity.

2. Divorce \Leftrightarrow 36—"Party injured" means party wronged.

The party injured means the party wronged by the action of the other.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Injured Person.]

3. Divorce \Leftrightarrow 36—"Separation" defined.

Separation in matrimonial law means a cessation of cohabitation of husband and wife by mutual agreement or in the case of judicial separation, under decree of court, to which is added by O. S. § 1860, subds. 1, 2, separation caused by desertion, abandonment or other wrongful act of the party sued.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Separation.]

4. Divorce \Leftrightarrow 23—Not decreed for insanity after marriage.

Insanity accruing after marriage is not ground for divorce, in the absence of statute.

5. Constitutional law \Leftrightarrow 70(3)—Grounds for divorce cannot be extended by the court beyond those of the statute.

Court cannot by judicial construction extend the grounds of divorce beyond those specified in the statute.

Appeal from Superior Court, Johnston County; Connor, Judge.

Action for divorce by A. R. Lee against Saphrony Ann Lee. From a judgment for defendant, plaintiff appeals. No error.

This is an action by the husband for divorce. The plaintiff and defendant were married May 31, 1896, and there were five children born to them. They lived together till 1910, when the wife was committed to the state hospital for the insane, and has not been home since. This is an action for divorce, alleging that "there has been a separation of husband and wife, and that they have lived separate and apart for 10 successive years."

Wellons & Wellons, of Smithfield, for appellant.

F. H. Brooks, of Smithfield, for appellee.

CLARK, C. J. [1] This appeal presents but one question. The court charged the jury that, though the plaintiff and defendant had lived separate and apart for more than 5 years (Laws 1921, c. 63, amending O. S. § 1859 [4]), such separation, having been caused by incarceration in the state hospital for the insane, is not such separation as is contemplated in the statute under which this suit is brought.

The appellant rests his case solely upon the statement in *Cooke v. Cooke*, 164 N. C. 275, 80 S. E. 179, 49 L. R. A. (N. S.) 1034, that—

"This statute * * * is broad enough to include, and clearly does include, any kind of separation by which the marital association is severed."

But the judge in that case immediately added:

"And which may be made the subject of further judicial investigation. There is nothing in the law to indicate that the right conferred is dependent on the blame which may attach to the one party or the other, nor that the time which may be covered by a judicial decree of divorce from bed and board shall be excluded from the statutory period, nor which permits the interpretation chiefly insisted upon by the defendant, that the statute applies only when there has been a separation by mutual consent of the parties."

The court in that case was not extending the causes of divorce to instances in which the living apart was caused by insanity and immurement in the state hospital, but was combating the idea that the separation must be by mutual consent. It is very clear that the separation must be in contemplation of law a separation at least of the kind recognized by statute, and could not apply to cases where the party driving the other from the home, or who should desert the home, should be the party seeking to take advantage of his own wrong by pleading the separation which he had caused. It is true that in *Cooke v. Cooke* the majority of the court took the view that the application for the divorce was not required to be "by the party injured," but the statute has since been expressly changed, for this section (O. S. § 1859) does now require that the action must be by "the party injured."

[2] The party injured means the "party wronged by the action of the other." Where each party has been guilty of wrong, the defendant can plead recrimination. This statute goes no further than to allow a divorce where the separation has been by mutual consent or wrongful act of at least one of the parties, or by judicial decree, and has existed for five years.

It certainly was not intended that this statute should apply to cases where the sep-

aration was without fault on either side, and involuntary, as in cases like this of incarceration in an asylum for the insane.

[3] The word "separation" is thus defined in Black's Law Dictionary, 1073, "in matrimonial law it means a cessation of cohabitation of husband and wife by mutual agreement," or in the case of judicial separation "under decree of court." To these our statute contemplates the addition of "separation" caused by desertion or abandonment, or other wrongful act of the party sued. It certainly does not intend to give an action of divorce to the party who has caused the separation by driving the other from the home, or has voluntarily deserted it for the specified period. C. S. § 1660 (1) and 1660 (2).

It cannot be contended that the years spent by the wife in the hospital for the insane was desertion or a separation by mutual consent, or even a voluntary, much less a wrongful, act on her part.

[4] There are numerous decisions which hold that insanity accruing after marriage is not ground for divorce. *Lloyd v. Lloyd*, 66 Ill. 87; *Powell v. Powell*, 18 Kan. 371, 26 Am. Rep. 774; *Pile v. Pile*, 94 Ky. 308, 22 S. W. 215.

The grounds for divorce are entirely statutory, and vary in the different states. The status is thus summed up in 19 C. J. 71:

"In some states, insanity is made a ground for divorce by statute" [but it may be said that it seems this is confined to the state of Washington], "while in others a divorce is absolutely prohibited where either party is insane. In the absence of statute, insanity arising after marriage is not ground for divorce."

This state comes under the latter head.

[5] While it is in the power of the Legislature of this state to make the misfortune of either party a ground for divorce, it has not done so, and the court cannot, by judicial construction, extend the grounds of divorce beyond the statute. With us, the law-making power has adhered to the obligation of the marriage vow, that the parties "take each other for better or for worse, to live together in sickness and in health till death do them part," with the exceptions only where the misconduct of the parties, and not their misfortunes, are made by our statute to justify the divorce.

Certainly, the husband whose wife has been placed in the asylum for insanity has not been wronged by her, and he has no ground under our statute to a divorce from her, without any wrongful act on her part. Instead of insanity being a ground for divorce, the wife is still entitled to support from her husband, and to her dower as a support, should she outlive him, and to other rights of which an innocent and faithful wife would be deprived should the misfor-

tune of insanity be imputed to the wife, as a ground for divorce. The same is true where the husband is the insane party.

No error.

(182 N. C. 82)

SIMONDS et ux. v. CARSON. (No. 182.)

(Supreme Court of North Carolina. Sept. 28, 1921.)

1. Justices of the peace §=161(1) — Appeal must be docketed by appellant.

One appealing from a judgment in justice court must docket his appeal in the superior court under C. S. § 660, and if he fails to do so by the next succeeding term of the superior court, the appellee may have the case placed on docket, and have the judgment affirmed.

2. Justices of the peace §=25—Not liable for damages for failure to send up papers on appeal.

Failure of justice of the peace to send up papers on appeal after appellant has paid his fee therefor, under C. S. § 1532, is a judicial duty, and is not actionable, and he is not liable in damages to the appellant, whose own duty it is to see that the appeal is properly docketed, and to apply for a recordari or to apply in time to the justice to make return.

3. Justices of the peace §=27—Not liable for negligent failure to perform offer to docket case in superior court for appellant.

Where one appealing from a judgment of a justice paid to the justice the appeal fee of 30 cents, together with the further sum of 50 cents for docketing the same in the superior court, which he agreed to send up with the papers on appeal, the offer of the justice to send up the fee and docket the appeal was purely a gratuitous offer, and his failure to docket the case in the superior court gave appellant no right to an action for damages, unless there was fraud or intent to defeat the appellant of his rights.

Appeal from Superior Court, Pitt County; Horton, Judge.

Action by A. J. Simonds and wife against S. T. Carson. Judgment for defendant, and plaintiffs' appeal. Affirmed.

J. J. Ford recovered judgment against the plaintiffs in this action, who were defendants in that action, before S. T. Carson, a justice of the peace, the defendant herein. They gave notice of appeal to the superior court, and then and there paid to the said justice of the peace, the defendant, S. T. Carson, the appeal fee of 30 cents, together with the further sum of 50 cents for docketing the same in the superior court, which it is alleged he agreed to send up with the said papers on appeal.

The complaint alleges that the justice negligently and carelessly failed to send up said case, and failed to remit the fee for docketing the appeal, paid to him by the plaintiffs (defendants in said action), whereby the plaintiff in said action at August term, 1916, procured judgment dismissing said appeal because it had not been docketed in time. The court finds as facts that—

"The next term of the superior court of Pitt convened May 20, 1916, after said term of court, the justice of the peace having failed to send up the case with the fee for docketing."

The complaint further alleges that by reason of the dismissal of the said appeal the plaintiffs in this action were required to pay the said J. J. Ford the sum of \$106.12, and that the plaintiffs had a good and meritorious defense to the action brought by Ford; he being indebted to the plaintiffs at that time more than the amount of said claim.

The plaintiffs paid off the Ford judgment, and brought this action in the county court of Pitt to recover the amount thereof, \$106.12, and obtained verdict and judgment for the full amount, whereupon the defendant appealed to the superior court, in which the court nonsuited the plaintiffs, who appealed.

Albion Dunn, of Greenville, for appellants.

F. G. James & Son, of Greenville, for appellee.

CLARK, C. J. This is a case of novel impression in this state, and presents the question whether a justice of the peace is liable in an action for negligence in failing to send up the case on appeal when he has been paid the appeal fee, and the clerk's fee for docketing, and can the injured party recover for damages resulting from such negligent failure?

[1] C. S. § 1532, requires the justice of the peace, within 10 days after notice of the appeal, to send up to the clerk of the superior court all the papers in the cause, provided his fee therefor is paid, which was done in this case. It is then made the duty of the appellant to docket his appeal in the superior court (C. S. § 660), and, if he fails to do so by the next succeeding term of the superior court, the appellee may have the case placed upon docket and have the judgment affirmed. It was the duty of the appellant to pay the docketing fee and have the cause docketed (*Sneeden v. Darby*, 173 N. C. 274, 91 S. E. 956, and cases there cited), and if the case is not docketed in time the appellee may have it dismissed (*Barnes v. Saleeby*, 177 N. C. 256, 98 S. E. 708, and cases there cited).

[2] The action of the justice in not sending up the papers was a judicial duty, and his failure to do so is not actionable. He is liable for a default in a public duty, but not in damages to the plaintiffs, whose own duty it was to see that the appeal was properly docketed, and if the papers were not sent up

in apt time it was their duty to apply for a recordari, or to apply in time to the justice to make another return. Not having done this, they were in laches, and the appeal was properly dismissed. *Abell v. Power Co.*, 159 N. C. 348, 74 S. E. 881; *Tedder v. Deaton*, 167 N. C. 479, 83 S. E. 616; *Bargain House v. Jefferson*, 180 N. C. 32, 103 S. E. 922, and cases there cited.

[3] The plaintiff contends, however, that the justice undertook and agreed to send up the 50 cents to docket the appeal, and that failure to do this was negligence in the discharge of a ministerial duty. But this was purely a gratuitous offer, a mere matter of courtesy or personal accommodation, based upon no consideration, and for the failure to discharge this the plaintiff is not entitled to an action, unless there were fraud or intent to defeat the appellants of their rights.

Besides the appeal was taken May 2 and the next term of the superior court was held on May 20, and it was the appellants' own negligence that they did not ascertain that the case was docketed and ready for trial at that first term as the statute requires. They should have ascertained that the justice had not paid the docketing fee, and have called on him to send up the record. This was not done, and there was no attempt to docket the case until July 8. The plaintiffs have suffered loss by their own negligence, and this action cannot be maintained.

The plaintiffs rely upon the expression at the end of the opinion in *MacKenzie v. Development Co.*, 151 N. C. 278, 65 S. E. 1004:

"The payment of the clerk's fee to the justice cannot avail him [the appellant], for this should have been paid to the clerk, and its payment to the justice merely made the justice his agent. If [the appellant] has lost any rights, he has lost them through the carelessness of his agent and his own neglect to avail himself of the remedies of recordari and attachment that the law gives him."

The court was there referring to the analogy of the cases in which the transcript was not sent up in time and docketed in the Supreme Court by the neglect of the lawyer who undertook to attend to this, and the court has held in a long line of cases that as to such matter the lawyer is acting simply as agent for the appellant, and his neglect is the neglect of the appellant, and does not excuse him. *Truelove v. Norris*, 152 N. C. 757, 67 S. E. 487, 30 L. R. A. (N. S.) 804, 136 Am. St. Rep. 836, 21 Ann. Cas. 646, in which case the statement at the close of the opinion that the client would have an action for the negligence of lawyer as his agent is based upon the fact that the lawyer is acting under a consideration and liable to his principal for negligence. But in this case the justice was acting simply as a matter of accommodation, and under no legal liability, except, as has

been said, when it is alleged and shown that his conduct was fraudulent or with intent to defeat the appellant of his right to have the case reviewed, which is not alleged here.

The court intimated in *State v. Dayton*, 119 N. C. 880, 26 S. E. 159, and *Hewitt v. Beck*, 152 N. C. 757, 67 S. E. 586, that where the clerk of the superior court failed to transmit the transcript in 20 days to this court he might be liable to indictment. Whether the clerk, who is acting, unlike the justice, ministerially, in sending up the record, would also be liable in an action for damages sustained by such default, is not a matter before us. The justice of the peace has no clerk, and his sending up the original papers is a judicial duty, unlike the clerk of the superior court, who makes a transcript of the record for this court, which is sent up by the authority of the judge in pursuance of a duty prescribed by law.

Affirmed.

(182 N. C. 92)

WILSON v. BATCHELOR. (No. 186.)

(Supreme Court of North Carolina. Sept. 28, 1921.)

1. Justices of the peace §90—No formality in pleadings.

Pleadings before a justice of the peace are not required to be in any particular form and need be only such as will enable a person of common understanding to know what is meant, under Consol. St. § 1500 (rule 7).

2. Justices of the peace §103, 174(17)—Defendant may be required to make counterclaim more specific.

If plaintiff so desires, he may call on defendant to make a counterclaim more specific, either in justice court, or on appeal in the superior court, under Revisal 1906, § 496.

3. New trial §56—No error in refusing for conduct of juror where prejudice not shown.

Where plaintiff appellant inquired of jury before they were impaneled if any one of them had retained the counsel for the defendant in the case in any pending cause and received no answer, it cannot be said that the trial court erred in refusing to grant a new trial, where it was discovered after verdict that one of the jurors had retained opposing counsel in a pending cause, but there was no suggestion of bad faith or corruption on the part of the juror, or that movant sustained any damage by his silence when the inquiry was made.

Appeal from Superior Court, Pitt County; Horton, Judge.

Action by Frank Wilson against Roy Batchelor before a justice of the peace. Judgment for plaintiff, and defendant appealed to the superior court. Judgment for defendant, and plaintiff appeals. No error.

Plaintiff sued before a justice of the peace to recover of defendant \$126.19. He had employed the defendant as clerk in August, 1914, at \$50 per month, and the defendant's services having proved satisfactory, the plaintiff contracted with the defendant for 1915 and 1916. The plaintiff contends that he was to pay the defendant for his services for 1915 \$720, and for 1916 the sum of \$800. The defendant contends he was to receive \$800 for 1915 and \$900 for 1916. The defendant had overdrawn his account by \$126.19, about which there was a dispute, and contends that if he had received the proper salary credit it would leave the plaintiff indebted to him in the sum of \$53.81; this being the difference between \$180 due on his salary, and the store account of \$126.19.

It was conceded at the trial that if the plaintiff sustained his contention he was entitled to recover the full amount sued for, and if the defendant sustained his contention that the plaintiff was entitled to recover nothing, and the defendant the sum of \$53.81, and the case was tried upon this theory. The jury sustained the contention of the defendant, found that he was not indebted to the plaintiff in any amount, and rendered a verdict against the plaintiff for \$53.81. Judgment was rendered accordingly, and plaintiff appealed.

W. F. Evans, of Raleigh, for appellant.
Albion Dunn, of Greenville, for appellee.

WALKER, J. (after stating the facts as above). The plaintiff's position is that the defendant has not alleged in his counterclaim that the plaintiff had promised to pay him the sum of \$900 for the year 1916, but that he would raise his salary if there was an increase in the business, and that there was a large increase, which reasonably entitled defendant to a salary of \$900; but we are of the opinion that the oral pleadings contain a sufficient allegation. The pleadings were somewhat informal, it being an appeal from a magistrate; but in the superior court the following entry was made in the record, as appears:

"The defendant admits that the plaintiff's account as introduced is correct, except the salary credits; the defendant claiming that he is entitled to a credit of \$800 for 1915 and \$900 for 1916, instead of \$720 for 1915 and \$800 for 1916."

This gave the plaintiff fair notice of the nature of defendant's demand, and it was substantially a more definite statement of the latter's counterclaim.

[1, 2] We must construe the pleadings and proceedings liberally, and not allow justice to fail because of any mere informality, or irregularity, especially when we are dealing with pleadings before justices of the peace.

"Pleadings (before a justice) are not required to be in any particular form, but must be such as to enable a person of common understanding to know what is meant." *Consol. Statutes*, § 1500 (rule 7), vol. 1, p. 669. We said in *Smith v. Newberry*, 140 N. C. 385, at page 387, 53 S. E. 234, that—

"Large power of amendment is vested in the superior court, limited only by the condition that the amendment show a cause of action within the jurisdiction of the justice. *Mfg. Co. v. Barrett*, 95 N. C. 86; *Planing Mills v. McNinch*, 99 N. C. 517. * * * If the defendants had so desired, they might have called upon the plaintiff to make his counterclaim more specific, either in the justice's court or after the case reached the superior court upon appeal. *Revisal*, 496; cases cited in *Clark's Code*, § 261. In the absence of any more definite pleadings or any motion to make them so, his honor properly submitted the issue upon the cause of action which seemed to be and, as the jury found, was sustained by the evidence."

And to the same effect is *Turner v. McKee*, 137 N. C. (Anno. Ed.) 257, 49 S. E. 330. While the complaint, as it was briefly noted on the justice's docket, and return to the appeal, may state merely that if, in 1916, there was an increase in the business over that of 1915, the salary would be raised, the plaintiff made his promise more definite after he learned what the increase was by fixing \$900 as the amount of the salary, and throughout the trial he was apprised of the true claim made by the defendant. There is no legal merit, in this exception, to the charge of the court that if the jury found that the plaintiff had promised to pay defendant \$900 for the year 1916, they should allow the latter that amount, and deducting plaintiff's claim of \$126.19 from the balance due defendant on his salary, calculated on that basis, which was \$190, their verdict would be for the ultimate balance which is \$53.81.

The plaintiff inquired of the jury, before they were impaneled, if any one of them had retained the counsel for the defendant in this case, in any pending cause, and received no answer. After the verdict was returned, defendant moved for a new trial because the said counsel had been retained by one of the jurors in a pending cause, and such was the fact. The motion was overruled, and properly so. We held in *State v. Maultsby*, 130 N. C. 664, 41 S. E. 97 (op. by the present Chief Justice), that a motion to set aside the verdict on account of relationship between the prosecuting witness and a juror, which was discovered after verdict—even if such relationship is ground of objection, as to which it is not necessary to decide—rested in the discretion of the trial court, and its refusal is not reviewable on appeal. This has been held where the relationship between a party and a juror is not discovered until after verdict. *Spicer v. Fulghum*, 67 N. C. 18; *Bax-*

ter v. Willson, 95 N. C. 137. The same ruling has been made where, after verdict, the juror was ascertained to be incompetent because a minor (*State v. Lambert*, 93 N. C. 618), or not a freeholder (*State v. Crawford*, 8 N. C. 298), or an atheist (*State v. Davis*, 80 N. C. 412), or a nonresident (*State v. White*, 68 N. C. 158), or for other causes, see *State v. De Graff*, 113 N. C. 690, 18 S. E. 507, and *State v. Council*, 129 N. C. 517, 39 S. E. 814, and cases there cited. And in *State v. Perkins*, 66 N. C. 126, at page 128, the court said by Chief Justice Pearson:

"It was the misfortune of the defendant, that neither he nor his counsel had been sufficiently on the alert, to enable them to find out the fact in 'apt time' to make it cause of challenge, that one of the jurors was on the grand jury when the bill was found. This might have been a ground for his honor in the court below, to grant a new trial, if he had any reason to suspect unfairness on the part of the prosecution, but all suspicion of that kind was put out of the question, for it was stated by the juror, 'if he was on the grand jury he had forgotten it, when he was put on the petit jury.' How far this was satisfactory to his honor, was a matter for him. But we will say that we entirely concur in his conclusion. After a defendant has taken his chances for an acquittal, the purposes of justice are not subserved by listening too readily to objections that were not taken in 'apt time.'"

And so in *State v. Patrick*, 48 N. C. 443, this court by Chief Justice Nash held that it is too late, after a juror has been taken and accepted by the prisoner and has served on the trial, to except to him for incompetency, and this was said, in a trial for a capital felony, to be the law, even though the objection to the juror, if taken at the proper time, would have been allowed as a good challenge for cause. In all legal proceedings, it was said, there is an apt time for every step in the proceeding, and every objection or privilege must be made or claimed at the proper time, or the party making it will be considered as having waived it. *Briggs v. Byrd*, 34 N. C. 377. The case of *State v. Davis*, 80 N. C. 412, is an instructive one on this point. It was there held (op. by Ashe, J.) that the objection to a juror after verdict came too late, and that learned justice said:

"It is well settled by English authorities, sanctioned by the uniform practice of centuries and by numerous decisions in this state, that no juror can be challenged by the defendant without consent after he has been sworn, unless it be for some cause which has happened since he was sworn. The challenge propter defectum should be made as the juror is brought to the book to be sworn and before he is sworn; if not then made, the defendant waives his right of challenge." *State v. Seaborn*, 15 N. C. 305; *State v. Perkins*, 66 N. C. 126; *State v. Lamon*, 10 N. C. 175; *State v. Griffice*, 74 N. C. 316; *State v. Patrick*, *supra*; 1

Whar. Cr. L. 472; Joy on Jurors, § 10; Hawkins, P. C. c. 43, § 1; Hale, P. C. 274.

And in conformity to this rule of practice is the ancient formula used by clerks both in England and in this country in their address to prisoners before the jurors are drawn:

"Those men that you shall hear called and who personally appear are to pass between our sovereign (or the state) and you upon your trial of life and death; if, therefore, you will challenge them or any of them, your time is to speak to them as they come to the book to be sworn and before they are sworn."

It was there further held that—

"Where the ground of objection to a juror existed at the time he was sworn, but was not discovered until after verdict, the court may in its discretion allow the challenge and grant a new trial. Its refusal to do so is not reviewable."

To the same effect are the following cases: State v. Lipscomb, 134 N. C. 689, 47 S. E. 44; State v. Patrick, 48 N. C. 443; State v. Parker, 132 N. C. 1014, 43 S. E. 830; State v. Perkins, supra; and Spicer v. Fulghum, 67 N. C. 18, which is directly in point. In the last-cited case it was held:

"Where the plaintiff's counsel, before the jury was impeached, requested that any juror in the box who was related to any one of the defendants by blood or marriage should retire, and no juror retired or replied, held, that it was not error for the judge to refuse to grant a new trial, because after verdict and judgment it was ascertained that a juror was connected with one of the defendants; it being a matter of discretion"—citing State v. Perkins, 66 N. C. 126.

[3] There is no suggestion in this case of bad faith, or corruption, on the part of the juror, whose conduct is in question, or that plaintiff sustained any damage by his silence when the inquiry was made. For all that appears, he may have suffered no prejudice. In State v. Parker, 132 N. C. 1014, 43 S. E. 830, a boy not under ten years of age had drawn the venire. The court, in the absence of bad faith or corruption, refused to set aside the verdict.

The other exceptions are merely formal. No error.

(182 N. C. 4)

OVERTON v. COMBS. (No. 63.)

(Supreme Court of North Carolina. Sept. 14, 1921.)

§. Malicious prosecution ¶16—Want of probable cause and other elements necessary.

To recover for malicious prosecution, it must be shown that an action has been instituted by defendant without probable cause and

from malice, causing damage for wrongful interference with the person or property of complainant, and that the former action has terminated in complainant's favor.

2. Malicious prosecution ¶71(3) — Malice question for jury.

In actions for malicious prosecution, the question of malice is for the jury.

3. Malicious prosecution ¶71(2) — Probable cause question of law on undisputed facts.

In malicious prosecution, the issue as to probable cause, on the facts admitted or as they may be accepted by the jury, must be decided as a question of law by the court.

4. Malicious prosecution ¶25(3) — Judgment held conclusive on question of probable cause.

Where on a former suit the jury found in favor of the present defendant, sued for malicious prosecution, that plaintiff had attempted to dispose of property subject to mortgage, with the view of hindering, delaying, and defrauding defendant, the judgment is conclusive that there was probable cause for the action, although it was later set aside for irregularity.

Appeal from Superior Court, Washington County; Calvert, Judge.

Action by C. W. Overton against S. M. Combs. From judgment for plaintiff, defendant appeals. Reversed.

The action is one for malicious prosecution, involving the arrest of present plaintiff, and was determined for plaintiff on the following issues and verdict:

"(1) Did defendant, S. M. Combs, cause the plaintiff, C. W. Overton, to be arrested under process in the nature of an execution against the person in a suit brought by S. M. Combs against C. W. Overton in Tyrrell county, as alleged in the complaint? Answer: Yes.

"(2) Was such a process of execution against the person duly vacated and set aside upon motion of the plaintiff, C. W. Overton, as alleged in the complaint? Answer: Yes.

"(3) If so, was said action instituted and such process issued wrongfully, maliciously, and without probable cause? Answer: Yes.

"(4) What damage, if any, is the plaintiff, Overton, entitled to recover of the defendant Combs? Answer: \$250.00."

Judgment on the verdict for plaintiff, and defendant excepted and appealed, assigning errors, chiefly refusal of defendant's motion for nonsuit.

Meekins & McMullan, of Elizabeth City, for appellant.

W. L. Whitley, of Plymouth, for appellee.

HOKE, J. On the present trial there was evidence tending to show: That the present defendant had a note against plaintiff for \$250, secured by chattel mortgage on an automobile and other articles of personal property, to wit, a cow and a mare and plaintiff's crops for the then current year,

consisting of cotton, corn, potatoes, etc. That defendant instituted said former action, and filed his verified complaint alleging indebtedness. That said Overton had disposed of all the personal property included in the mortgage other than the Ford car, with the fraudulent intent to hinder and delay plaintiff in collection of his debt, etc. That at, or just before, suit entered, Overton had delivered the car to Combs, and same, having been very much damaged in use by said Overton, was sold on due advertisement for \$70, and amount accredited on the note. That Overton, defendant in the former suit, failed to answer or resist recovery, although he was notified that there were allegations of fraud made against him in the case, and he should appear and defend himself. That on the hearing, the allegations presented by the pleadings were submitted to the jury, who rendered the following verdict:

"(1) Is the defendant indebted to the plaintiff? If so, in what amount? Answer: \$250 and interest subject to credit of \$70.

"(2) Did the defendant execute to the plaintiff a chattel mortgage as alleged conveying the property therein set out? Answer: Yes.

"(3) Did the defendant sell and dispose of the chattel property conveyed in the said mortgage without the consent and for the purpose of hindering and delaying the plaintiff in collecting the said mortgage and notes secured thereby? Answer: Yes."

On which said verdict, there was judgment in favor of Combs for the debt, less the \$70. That if execution against property was returned unsatisfied, execution should be issued against the person of the judgment debtor. Execution having issued against property and returned unsatisfied, there was execution against the person as directed, under which process the arrest and detention of plaintiff, complained of in present suit, was had. The return of sheriff on this process May 23, 1919, was:

"Executed by arresting C. W. Overton, defendant herein named, and he, having given a good and sufficient bond, was released and not imprisoned as ordered."

It further appeared that after this release, on notice and motion, the execution against the person was recalled as having been improvidently issued and later at August term, 1919, on notice and motion, the portion of the judgment directing that execution issue against the person was set aside as being irregular. Thereupon the present suit was entered to recover damages for malicious prosecution and for the arrest and detention of plaintiff wrongfully caused therein.

[1] It is the accepted law, here and elsewhere, that in order to a recovery in an action for malicious prosecution it must be made to appear that an action has been instituted by the defendant without probable

cause and from malice, causing damage by wrongful interference with the person or property of complainant, and that said former action has terminated in complainant's favor before suit brought. *Carpenter, etc., v. Hanes*, 167 N. C. 551, 83 S. E. 577; *Humphries v. Edwards*, 164 N. C. 154, 80 S. E. 165; *Downing v. Stone*, 152 N. C. 525, 68 S. E. 9, 136 Am. St. Rep. 841, 21 Ann. Cas. 753; *Stanford v. Grocery Co.*, 143 N. C. 419, 55 S. E. 815; *Railroad v. Hardware Co.*, 143 N. C. 54, 55 S. E. 422.

[2-4] And these, and authority generally, is to the effect that, while on the issue as to malice, its existence or nonexistence must be determined by the jury, on the issue as to probable cause and on the facts admitted or as they may be accepted by the jury, its existence or nonexistence must be decided as a question of law by the court. And in this state the cases on the subject hold uniformly so far as noted that, where in a former suit a trial court having jurisdiction has decided the essential issues in favor of the plaintiff on proper proof or admission, that finding is conclusive in plaintiff's favor on this question of probable cause, and he may not be held liable in a subsequent action for malicious prosecution. And the principle holds though the verdict or finding for plaintiff in the former suit is thereafter set aside or reversed on appeal or other ruling in the orderly progress of the cause. Thus, in *Smith v. Thomas*, 149 N. C. 100, 62 S. E. 772, action for malicious prosecution against the private prosecutor in a criminal charge before a justice of the peace, defendant pleaded guilty, and on appeal was acquitted of the offense in the appellate court. Held, action would not lie for that, though the innocence of the appellant had been established by the final judgment, the plea of guilty was conclusive against him on the issue as to probable cause.

A like decision was made in *Price v. Stanley*, 128 N. C. 38, 38 S. E. 33, where, the defendant having been convicted in the justice's court, on appeal the solicitor of the appellate court, finding that there was not sufficient evidence to sustain the prosecution, entered a nol. pros. held the conviction before the justice conclusively established the existence of probable cause. And in *Griffis v. Sellars*, 20 N. C. p. 315, it was determined that:

"In an action for a malicious prosecution, a verdict and judgment of conviction in a court of competent jurisdiction, although the party convicted was afterwards acquitted upon an appeal to a superior tribunal, is conclusive evidence of probable cause, and precludes the plaintiff in the action for the malicious prosecution from showing the contrary."

Speaking more elaborately to the principle, Chief Justice Ruffin, delivering the opinion, said:

"This case differs from that which was before the court a year ago between the plaintiff's brother and the same defendant (19 N. C. 492) only in showing more explicitly the innocence of the plaintiff and the malignant motive of the defendant. But the same principle governs both, notwithstanding that difference in the detail of the circumstances. The principle is that probable cause is judicially ascertained by the verdict of the jury and judgment of the court thereon, although upon an appeal a contrary verdict and judgment be given in a higher court. Our opinion being, that probable cause is judicially established by those means, it follows that no evidence is competent to disprove it."

And further in the same opinion:

"So in the present state of the case, another ingredient of the action, namely, the want of probable cause, which is as essential to the plaintiff's action as is his innocence, is completely negated, because the proof that satisfied the jury and court then trying the plaintiff that he was guilty must, upon the ground already adverted to, be deemed by another court to establish that there was then probable cause."

This being the doctrine as it prevails under our decisions, we are all of opinion that it must apply in protection of defendant on the facts of the present record, it appearing that in action in the superior court, plaintiff had filed his complaint, alleging an indebtedness of \$250, and, further, that defendant had disposed of an amount of personal property embraced in a mortgage held by plaintiff to secure the debt, with the view and purpose of hindering and delaying and defrauding plaintiff in the collection of same.

Under the supervision of a capable and learned judge, issues as to the debt and the fraud are submitted to the jury, verdict rendered on both in plaintiff's favor, and judgment on the verdict for the debt and for execution against the person in case of execution against property is returned unsatisfied. Consolidated Statutes, § 673. This was the condition of the record at the time execution was issued against person of defendant after one against his property returned unsatisfied, and the arrest made of which he now complains.

True that later, and before another judge, an order was entered that the execution against the person be recalled, and still later, a year or more, the portion of the judgment directing execution against the person was set aside. This, however, was because of alleged irregularity, and in neither of these subsequent orders, nor in other portions of the record, is there an entry or ruling that challenges, or purports to challenge, the facts established by the verdict, or which militates or weakens its force and effect on

the question of probable cause. There are courts of the highest respectability and learning which hold that where a verdict and judgment has been set aside for fraud, collateral to the principal cause of action, and more especially where it is of such a nature as to have deprived the original defendant of his opportunity to disclose his case, such action will prevent the operation of the principle to which we have adverted. See a learned discussion of this subject in *Crescent City Live Stock v. Butcher's Union*, 120 U. S. 141-149 et seq., 7 Sup. Ct. 472, 30 L. Ed. 614; 18 R. C. L. tit. Malicious Prosecutions, §§ 21, 27.

Others, going further, have held that the position may be made available on allegations of such fraud with adequate proof to support them. But neither of these positions are open to plaintiff on the present record, where, as stated, the former judgment was disturbed on the ground of irregularity only.

On the record and for the reasons stated, we are of opinion that defendant's motion for nonsuit should have been sustained; and it is so ordered.

Reversed.

(182 N. C. 79)

MONROE et al. v. HOLDER. (No. 116.)

(Supreme Court of North Carolina. Sept. 28, 1921.)

Appeal and error 104—Order affirming action of clerk in refusing to strike out order to examine defendant not appealable.

An appeal from an order affirming the order of the clerk of court refusing to strike out an order to examine defendant under C. S. § 900 et seq., will be dismissed in the absence of a showing that defendant will be prejudiced by the examination.

Appeal from Superior Court, Lee County; Cranmer, Judge.

Action by J. M. Monroe and another against W. M. Holder. From an order affirming the order and judgment of the clerk of the superior court refusing to strike out order for examination before trial, defendant appeals. Appeal dismissed.

The plaintiffs, desiring to elicit certain information, which they allege is not otherwise obtainable and is necessary and material to enable them to file their complaint, submitted the requisite affidavit and moved before the clerk for an order to examine the defendant as provided by C. S. § 900 et seq. This was allowed. Whereupon, the defendant entered a special appearance before the clerk and moved to vacate the order of examination on the ground that it had been improvidently and improperly granted.

Hoyle & Hoyle, of Sanford, for appellant.
Williams & Williams, of Sanford, for appellees.

STACY, J. It appearing that the order of examination, as entered by the clerk and approved by the judge, is based upon an affidavit, apparently sufficient in form and substance, and there being no denial of the facts or contrary showing by the defendant, we must dismiss the appeal as premature. *Pender v. Mallett*, 122 N. C. 163, 30 S. E. 324; *Holt v. Warehouse Co.*, 116 N. C. 480, 21 S. E. 919; *Vann v. Lawrence*, 111 N. C. 32, 15 S. E. 1031.

It is true, in *Ward v. Martin*, 175 N. C. 287, 95 S. E. 621, the court, in its discretion, entertained an appeal from an order of this kind, because of the important questions presented; but, in the instant case, it does not appear that the defendant will be prejudiced or injured by the examination.

Of course, as said in *Bailey v. Matthews*, 156 N. C. 81, 72 S. E. 92, and repeated in *Fields v. Coleman*, 160 N. C. 11, 75 S. E. 1005:

"The law will not permit a party to spread a dragnet for his adversary in the suit, in order to gather facts upon which he may be sued, nor will it countenance any attempt, under the guise of a fair examination, to harass or oppress his opponent."

But these are matters which, in the first instance, must be committed to the wisdom and good judgment of those who grant the orders and supervise their execution. Until some right is denied or some wrong is done, the defendant should not be permitted to appeal and thus delay the trial of the cause. *Holt v. Warehouse Co.*, supra.

Appeal dismissed.

(182 N. C. 56)

PROCTOR et al. v. BOARD OF COM'RS OF NASH COUNTY. (No. 62.)

(Supreme Court of North Carolina. Sept. 21, 1921.)

1. Schools and school districts \S 97(3) — Bonds that cannot be paid under tax limitations not to be issued.

Bonds for school improvement purposes cannot be issued by county board of commissioners after a favorable election in a school district and on request by county board of education under Pub. Laws 1915, c. 55, when, under the tax limitations (Pub. Laws 1919, c. 84, § 3), they cannot be paid at maturity.

2. Schools and school districts \S 97(3)—Statutory provision as to bond issues held to control over constitutional provision for six months' school.

Although authorities may provide for a six months' school as required by Const. art. 9, §

3, if they undertake to do so in the manner prescribed by Pub. Laws 1915, c. 55, they must comply with the terms of the statute, and the constitutional provision will not give them the right to issue bonds when, admittedly under the tax limitations, they cannot be paid at maturity.

Appeal from Superior Court, Nash County; Connor, Judge.

Action by W. H. Proctor and others against the Board of Commissioners of Nash County. Judgment for defendant, and plaintiffs appeal. Error.

Civil action to determine the validity of certain proposed bonds. The facts are set out in the judgment of the superior court, which is as follows:

"This is a civil action wherein the plaintiffs are seeking a permanent injunction against the defendants against the issuance and sale of certain school improvement bonds of Oak Level school district, Nash county, N. C. A temporary restraining order was issued against the defendants by Bond, Judge, August 20, 1919, and notice issued to the defendants to appear before Devin, Judge, at Nashville, August 28, 1919, and show cause why said injunction should not be granted. The hearing thereof was continued from time to time without final disposition, and the same now comes on to be heard on this the 1st day of July, 1921, before his honor, Geo. W. Connor, resident judge of the Second judicial district, in chambers at Wilson, N. C., upon motion of the defendants to dissolve the temporary restraining order herein issued. After hearing the complaint and answer and the affidavits in the cause and the argument of counsel, it appears to the court, and the court finds as a fact:

"(1) That on or about April 7, 1919, the county board of education of Nash county filed with the board of county commissioners of Nash county a petition for an election within Oak Level school district in Nash county upon the question of issuing \$20,000 of school improvement bonds for the purpose of building a schoolhouse in said district as provided by chapter 55 of the Public Laws of 1915 of North Carolina, and the said board of county commissioners thereupon ordered an election to be held in said school district for said purpose on July 22, 1919.

"(2) That said election was held as in said order and notice of election directed, July 22, 1919, and was declared carried; that the registration books were closed July 10th, whereas they should have remained open until Saturday night, July 12th; that between July 10 and July 12, 1919, J. B. Wallace and W. J. Bunn, qualified voters of said district, were refused registration by the registrar.

"(3) That there is no public high school maintained in said district.

"(4) That there is a community in said school district consisting of two stores and several residences known as Westrays; that by chapter 39 of the Private Laws of the Special Session of 1908, the territory embracing said community, known as Westrays, was incorporated under the name of the town of Westrays; that by

said act John C. Lindsay was designated as mayor, M. J. Hedrick, J. B. Land, and J. S. Proctor as commissioners; that the said John C. Lindsay, J. B. Land, and J. S. Proctor have each, long since, moved from the territory embraced within said act, and M. J. Hedrick never lived within said territory and that said town has not for the past 10 years elected any officers or employees, levied any taxes, or performed any other duty or exercised any other privilege usually performed or exercised by towns; that said community has had no board of aldermen, nor other body, has held no election or meeting, or kept any minutes or records of same, and in no way held itself out to the public as a town, and has in no manner functioned or attempted to function as such.

"(5) That the total taxable property in said district for the year 1919 was \$476,549, and the total number of polls was 177, and that the total amount of taxes that could be raised by the levy of the maximum amount permitted by said chapter 55, Public Laws of 1915, as limited by chapter 84, § 3, Public Laws of 1919, is \$1,718.13, which amount is insufficient to create a sinking fund for the retirement of said bonds at maturity and pay the interest thereon.

"And upon the foregoing findings of fact, the court is of the opinion:

"1. That the irregularities, if any, in calling and holding said election and in the registration of voters, were cured by the provision of chapter 133, Public Laws of 1921, and that there was not a sufficient number of voters refused registration to affect the result of said election.

"2. That the community designated as the town of Westrays, within said territory of Oak Level school district, is an incorporated town within the meaning and purpose of chapter 55 of Public Laws of 1915.

"3. That the amount of taxable property within said district and the maximum amount of tax that can be raised thereon under the statute does not affect the validity of said bonds but only affects their marketability.

"Whereupon, it is ordered and adjudged by the court that the said temporary restraining order herein issued be and the same is hereby dissolved. It is further ordered that the plaintiffs pay the cost of this proceeding, to be taxed by the clerk of the superior court of Nash county. Geo. W. Connor, Resident Judge."

From the foregoing judgment, the plaintiffs excepted and appealed.

M. V. Barnhill, of Rocky Mount, for appellants.

Finch & Vaughan, of Nashville, and Thorne & Thorne, of Rocky Mount, for appellee.

STACY, J. This case presents for consideration the old but ever new question of taxation. It comes in the form of a proposed bond issue, and we are asked to pass upon the validity or legality of the same.

The following are the objective and controlling facts:

(1) By an election held in Oak Level school district, Nash county, N. C., on or about April 7, 1919, a bond issue of \$20,000 for school-improvement purposes was approved

by a vote of a majority of the qualified voters resident in said district.

(2) Chapter 55, Public Laws 1915, provides that, following a favorable election in such district, the county board of commissioners shall issue said bonds, when requested to do so by the county board of education, and further that said commissioners "shall thereafter levy a sufficient tax (which shall not exceed 30 cents on the \$100.90 on the poll) to pay the interest on said bonds and create a sinking fund sufficient to pay the principal and interest on said bonds when they fall due."

3. The total maximum amount of taxes that could be raised from the taxable property in the present district, under the above limitations, is insufficient to create a sinking fund for the retirement of said bonds at maturity and pay the interest thereon, as required by the law of 1915. Or, to state it differently: In order to meet the obligations which these bonds will impose, it would be necessary to levy taxes in excess of the statutory limitations.

[1] Upon these, the facts chiefly relevant, the question then arises: Will the law sanction the issuance of these bonds when admittedly, under the tax limitations, they cannot be paid at maturity? We think not.

A similar question was presented in the case of *Bennett v. Commissioners*, 173 N. C. 625, 92 S. E. 603, where the defendant commissioners of Rockingham county were sought to be enjoined from issuing bonds in excess of the county's ability to pay under the existing tax limitations. The authority to issue said bonds was denied, the court saying:

"In view of the constitutional provision and the decisions of the court construing the same, we are of opinion that the county commissioners of Rockingham county are without power to incur this indebtedness of \$200,000, issue the negotiable bonds of the county in evidence of their obligation, and stipulate for a continuing tax to pay the interest and provide a sinking fund which is in excess of the established limitation"—citing *Board of Education v. Com'rs*, 107 N. C. 110, 12 S. E. 190; *French v. Com'rs*, 74 N. C. 692; *Millsaps v. Terrell*, 60 Fed. 193, 8 C. C. A. 554.

[2] We do not understand that article 9, § 3, of our state Constitution, is invoked as bearing upon the questions presented by this appeal; or, at least, it does not so appear on the record. But even if such were the case, it has been held with us that, where the Legislature has prescribed a method of procedure of this kind, and such procedure is sought to be followed, the statutory provisions on the subject are controlling. *Hendersonville v. Jordan*, 150 N. C. 35, 63 S. E. 167; *Comrs. v. Webb & Co.*, 148 N. C. 120, 61 S. E. 670; *Robinson v. Goldsboro*, 135 N. C. 382, 47 S. E. 462. Indeed, in certain instances, the legislative method and the

requirements thereof, whether expressed in permissive or mandatory terms, are declared to be exclusive and binding upon those who are chargeable with the execution of such powers. *Ellison v. Williamston*, 152 N. C. 147, 67 S. E. 255; *Wadsworth v. Concord*, 133 N. C. 587, 45 S. E. 948.

The authorities, of course, may provide for a six months' school, as required by the constitutional provision above mentioned; but, if they undertake to do so in the manner prescribed by chapter 55, Public Laws 1915, they must comply with the terms of the statute. And it would seem that the statutory method is exclusive where district bonds are sought to be issued for such purpose. However, this latter question is not before us for decision, as the defendants are proceeding under the statute. *Trustees v. Pruden*, 179 N. C. 619, 103 S. E. 369.

In *Com'rs v. State Treasurer*, 174 N. C. 141, 93 S. E. 482, 2 A. L. R. 726, it was said that—

"An obligation of this kind imports a liability to taxation, and in case of a subordinate municipal corporation, it means that payment can be coerced [if the bonds be valid] and that all the taxable values therein may be made available on the claim."

In support of this position, the following was quoted with approval from *People v. Township Board of Salem*, 20 Mich. 452, 4 Am. Rep. 400:

"The exercise by a municipal corporation of the power to pledge its credit is an incipient step in the exercise of the power of taxation, and unless the object to be promoted be such as may be provided for by taxation, the power to make the pledge does not exist, and the Legislature cannot confer it."

And we may add that, where a bond issue is proposed in excess of the taxing power to care for the payment of said bonds, though for a legitimate purpose, the right to issue the same is not to be found within the pale of the law. The authority to issue bonds, or pledge the faith and loan the credit of a subordinate political subdivision of the state, is limited by its ability, under the law, to provide for the ultimate payment of said obligations. This is the point up to which it may be permitted to go, but beyond which the law does not sanction. To hold otherwise would be to assert a legal proposition which, to say the least, is doubtful in morals.

There has been no sale of the present bonds, and the appeal presents no question with respect to the rights of innocent third parties, or purchasers for value without notice. The legality of the issue is raised upon objection by plaintiffs who are residents and property owners in said district.

The case of *Com'rs v. MacDonald, McKoy & Co.*, 148 N. C. 125, 61 S. E. 643, is not at variance with the principle here declared; for the chief question there debated and

decided was whether a county, which had been authorized, with the approval of a popular vote, to issue certain bonds, could levy a tax, in excess of the constitutional limitation, to provide for their payment, with interest, in the absence of express legislative authority. But it does not appear that such a tax was necessary to meet the obligations incurred by said bonds. The fact was not there established as here admitted. This is made clear from the judgment of the superior court as set out in the record of that case, from which the following is taken:

"And (the court) being further of the opinion that the said board of commissioners have authority to levy tax sufficient to pay the interest on said bonds, and to provide a sinking fund for the payment of the principal thereof, at maturity, and that said board can be compelled, by mandamus, to levy such tax, upon its refusal so to do," etc.

The bonds were declared valid; and it does not appear that a levy in excess of the constitutional limitation was necessary to meet payment, the court saying that a tax up to this limit might be compelled by mandamus, if need be. This restricted tax seems to have been sufficient. Hence, the crucial point now presented was not decided in *MacDonald's Case*, nor was it before the court in *Trustees v. Pruden*, supra. These cases are thus distinguishable.

We are not impressed with the argument, or contention, that the inability to provide for the payment of said bonds affects only their marketability and not their validity. The authority to issue the proposed bonds is derived from the statute, and its limitations are equally as effective and curbing as its enabling provisions are life-giving. Therefore, where the territory embraced in a given district is too small, under the limitations of the statute, to provide for the payment of the bonds, in the amount proposed, and this fact is affirmatively established prior to a sale of the bonds, we must deny the authority to embark upon such an enterprise. In the instant case, the amount of bonds proposed is too large, considering the taxable values within the territorial limits of the school district. The undertaking, as it appears on the record, is top-heavy and wanting in self-sufficiency, for which reason the law must withhold its approval.

Again, as said in *Lang v. Land & Development Co.*, 169 N. C. 662, 86 S. E. 599:

"It is no answer to this position that, in the particular case before us, no harm is likely to occur or that the power is being exercised in a considerate or benevolent manner, for where a statute is being squared to requirement of constitutional provision [or where the contemplated action of a governing body is being squared to statutory regulations], it is what the law authorizes, and not what is being presently done under it, that furnishes the proper test of its validity."

The statute provides that an election of this kind may be held in any school district "which embraces an incorporated town or city, or in which there is maintained a public high school." It is admitted that the present district contains no high school; and it is very doubtful as to whether "Westrays" is such an incorporated town within the meaning and purpose of chapter 55, Public Laws 1915. But for reasons, otherwise sufficient, we do not now pass upon this point as it is unnecessary to do so.

Upon the facts as found, the temporary restraining order should have been made permanent, and this will be certified to the superior court.

Error.

(117 S. C. 44)

TEMPLETON v. CHARLESTON & W. C. RY. CO. (No. 10709.)

(Supreme Court of South Carolina. Sept. 14, 1921.)

1. Trial \S 178—Conflicting evidence not considered on motion to direct verdict.

On motion to direct verdict for defendant, only the facts fairly inferable from plaintiff's evidence, without regard to conflict raised by defendant's evidence, is to be considered.

2. Master and servant \S 289(39)—Contributory negligence as proximate cause of injury to brakeman held question for jury.

There being evidence that cars put on a sidetrack were left without the brakes being set by order of the conductor, direction of verdict for defendant railroad in an action for injury to the brakeman from the cars rolling down to the main track, asked on the ground that his negligence was the sole proximate cause of the accident, was properly refused.

3. Trial \S 178—Testimony not treated as unreasonable on motion for directed verdict.

Testimony of several witnesses, that the conductor ordered cars left on a sidetrack without the brakes being set, will not be disregarded as unreasonable on motion to direct verdict.

4. Appeal and error \S 1050(1)—Admission of hearsay in view of its nature held harmless.

Admission, in action for injury to a brakeman in a railroad accident, of testimony of his witness that he heard a railroad man whom he did not know, say that, while he was not at fault, he expected to lose his job, was harmless, it being rather exculpatory, and not inculpatory of any one.

5. Evidence \S 123(11), 317(8)—Testimony of what witness heard, said some time after the accident, hearsay, and not res gestæ.

Testimony of plaintiff's witness in an action for injury to a brakeman, that he heard the engineer 10 or 15 minutes after the accident say that the conductor caused the collision by an order he gave to plaintiff, was hearsay and not part of the res gestæ.

6. Appeal and error \S 1031(3)—Improper admission of evidence of some probative force presumptively prejudicial.

Admission of improper evidence of some probative force on a material issue of fact is presumptively prejudicial.

7. Appeal and error \S 1053(2)—Error in admission of evidence held not cured by direction to strike and disregard.

Error in admitting evidence of statement of engineer some time after the accident to plaintiff brakeman, that the accident was due to the fault of the conductor in calling plaintiff brakeman down from the car, on the establishment of which fact plaintiff's case depended, held not cured by the judge later directing the stenographer to strike out "such declarations as the engineer and conductor made" and then telling the jury, "Don't consider that testimony that I told the stenographers to strike out."

8. Appeal and error \S 206(1)—Not appellant's duty to call trial judge's attention to insufficiency of withdrawal of evidence.

That appellant may complain that the prejudice from admission of improper evidence was not removed, it was not necessary that he should have called the trial judge's attention to the insufficiency of his withdrawal thereof from the jury's consideration.

9. Trial \S 256(13)—Clearer instruction, if desired, should be requested.

If the instruction as to the rule for diminution of damages under the federal Employers' Liability Act (Comp. St. \S 8657-8665) in case of contributory negligence be thought not sufficient, request for further instruction should be made.

10. Negligence \S 101—Recovery under federal Employers' Liability Act not barred by gross contributory negligence.

Under the federal Employers' Liability Act (Comp. St. \S 8657-8665), all recovery is not barred by the fact of the employee's contributory negligence being gross and that of the employer being slight.

Watts, J., dissenting.

Appeal from Common Pleas Circuit Court of Allendale County; I. W. Bowman, Judge.

Action by Isaac Templeton against the Charleston & Western Carolina Railway Company. Judgment for plaintiff, and defendant appeals. Reversed, and remanded for new trial.

F. B. Grier, of Greenwood, and Harley & Blatt, of Barnwell, for appellant.

Henry C. Roney and J. J. Jones, both of Augusta, Ga., and J. Henry Johnson, of Allendale, for respondent.

COTHRAN, A. J. This is an appeal from a judgment of \$5,000, entered upon a verdict in favor of the plaintiff, on account of personal injuries sustained by him in a collision

between the engine upon which he was temporarily riding and a string of box cars, which had been placed upon a side track, and which ran down the side track, "side-wiping" the engine on the main line as it passed the switch. The injury occurred near Appleton, in Allendale county, on December 14, 1917. The trial was before Judge Bowman and a jury at Allendale, February 4, 1920. At the close of all of the evidence the defendant moved for a directed verdict in its favor upon the ground that the plaintiff's self-negligence (sic?) was the "direct and proximate cause of his injury." The plaintiff was, at the time of his injury, a brakeman employed by the defendant, and was then engaged in interstate commerce; facts that require the application of the Employers' Liability Acts of Congress (Comp. St. §§ 8657-8665).

The appeal involves three subjects of consideration: (1) The motion for a directed verdict; (2) the admission of certain testimony; (3) the judge's charge.

[1, 2] 1. *The Motion for a Directed Verdict.*—The evidence on behalf of the plaintiff, with every reasonable inference in his favor that may be drawn therefrom, shows the following facts: The freight train with 30 odd cars left Augusta, Ga., on the morning of December 14, 1917, bound for Yemassee, S. C., with the usual complement of employees, the plaintiff being a brakeman; the train stalled at a hill a few miles from Appleton, a station between Augusta and Allendale; it became necessary to detach the engine and 12 cars, run them down to Appleton, pass the depot, and back them into a side track at a switch a few hundred yards beyond; the plaintiff went with the detached portion of the train; arriving at the switch the plaintiff turned it for the side track and the cars were backed in; the plaintiff mounted the lead car of the cut of cars for the purpose of fixing the brakes to prevent them running back on the main line; he had never worked upon this side track before, and knew nothing of the grade; as a matter of fact, the side track was on a down grade in the direction of the switch; as he had his hands on the brake wheel to put on the brakes, the conductor called to him that the cars would stand all right without setting the brakes—to hurry up and come down, that a passenger train was almost due, and they must get the part of the train left at the hill into the side track out of its way; in the meantime the engine had pulled out on the main line and stopped below the switch, that the switch might be turned to the main line for the return trip to where the other cars had been left; the plaintiff obeyed the direction of the conductor, came down off of the cars without setting the brakes, and, while in the act of boarding the engine as it passed the switch, was caught between the engine and the cars which had escaped, and, rolling down the

side track, "side-wiped" the engine at or near the switch.

Many of the facts above detailed are disputed by the defendant, but the above statement is based upon the facts which are fairly inferable from the plaintiff's testimony, without regard being had to such conflict, as we understand the rule to be in such motions.

No question is raised in the ground of the motion as to the contributory negligence of the plaintiff, which, under the liability acts, could be so urged, nor as to the assumption of the risk by the plaintiff; the only ground for the motion is that the negligence of the plaintiff was the sole proximate cause of the injury.

Such a conclusion would be impossible from these facts if established to the satisfaction of the jury. The most that the defendant could possibly be entitled to would be the submission to the jury of the issue whether or not, upon the establishment of the truth of such facts, its negligence ought to be concluded by the jury; and, if so, the further issue whether or not the plaintiff was guilty of contributory negligence or assumption of risk, in obeying an order so obviously fraught with peril that a person of ordinary prudence would not have undertaken to obey it.

The conductor was the master of the train—the alter ego of the railroad company; it was the duty of the plaintiff to obey his orders; if he knew that the side track was on a down grade, he knew that without brakes the cars would roll down the track onto the main line; if he ordered the plaintiff not to set the brakes, it was an act of negligence; if the plaintiff knew these facts—knew of the defects and appreciated the danger—he assumed the risk, unless he acted upon the orders of the representative of the master on the spot, under circumstances which, as above stated, would not charge him with negligence in obeying a dangerous order.

Unfortunately for the defendant, so far as this motion is concerned, the inference of its negligence is against it, and the inference of the plaintiff's freedom from both contributory negligence and assumption of the risk is in his favor.

[3] We are asked to hold that the explanation given by the plaintiff of his failure to set the brakes is so absurd and unreasonable as not to amount to even a scintilla of evidence; that it is without even a probability that the conductor should have given such an order. The reasonableness or probability of the truth of testimony is not the test of its admissibility. The plaintiff and several witnesses testified that such an order was given by the conductor. It was denied by the conductor; and this is an issue of fact for the jury.

We think, therefore, that the circuit judge

was right in refusing to direct a verdict for the defendant.

[4] 2. *The Admission of Certain Testimony.*—The testimony objected to was that of two witnesses, Osie Bing and N. H. Walker, offered by the plaintiff. Walker was allowed to testify that he heard some one—a railroad man whom he did not know—say that, while he was not at fault, he expected to lose his job; that he would not have had the accident happen for \$1,000. The circuit judge allowed the testimony, over the defendant's objection, with the reservation that he would strike it out if, upon consideration, he should determine that it was inadmissible. The defendant's objection to the testimony was that it was hearsay, and not a part of the *res gestæ*. While the testimony was clearly inadmissible, the substance of it was rather exculpatory of himself than otherwise, and not inculpatory of any one. The admission of it was therefore harmless, and need not be further considered.

[5] The testimony of Bing, however, was quite different. He was allowed to testify that he heard the engineer say, 10 or 15 minutes after the accident, that he was going to lose his job, that the conductor caused the collision by calling to the plaintiff to come down from the car. Before the testimony was allowed, the defendant objected, upon the ground that the declaration sought to be put in evidence was not a part of the *res gestæ*. The circuit judge sustained the position thus taken, but upon the suggestion of counsel for plaintiff, "Inasmuch as we charge this injury to the negligence of the conductor and the engineer, we contend that a statement made by the engineer as to whose fault it was is competent," he ruled: "I am going to let it come in right upon that point." No reservation was made by the circuit judge that he would strike it out if, upon consideration, he should determine that it was inadmissible, as he did with reference to the testimony of Walker.

Two other witnesses were put up by the plaintiff upon the facts of the case, and then the witness Walker was put up. After the conclusion of his testimony, in which the statements referred to above were allowed, the court adjourned for the night. Immediately upon convening the next morning the following occurred:

"The court: Mr. Stenographer, after considering the matter, I want you to strike out such declarations as the engineer and conductor made. I will rule it out. * * * Gentlemen of the jury, don't consider that testimony that I told the stenographer to strike out a while ago. That is out of the case."

The appellant takes two positions in reference to this matter: (1) That, the testimony being plainly inadmissible, the circuit judge

should not have allowed it to go to the jury at all, and that the error was not cured by directing the jury the next morning not to consider it; (2) that in his remarks to the stenographer in the presence of the jury, and in directing them to disregard the testimony, he assumed as a fact that declarations had been made by the engineer and conductor.

The testimony was inadmissible and out of the case for three reasons: (1) It was hearsay, and not a part of the *res gestæ* (*Alken v. Telegraph Co.*, 5 S. C. 869; *Piedmont Co. v. Ry. Co.*, 19 S. C. 353; *Petrie v. Ry. Co.*, 27 S. C. 64, 2 S. E. 537; *Garrick v. Ry. Co.*, 53 S. C. 448, 31 S. E. 334, 69 Am. St. Rep. 874; *Salley v. Ry. Co.*, 62 S. C. 129, 40 S. E. 111); (2) the circuit judge distinctly ruled that it was not a part of the *res gestæ*, and there is no exception to his ruling; (3) he subsequently ruled it out altogether, and there is no exception to that ruling.

[6] It follows as a legal presumption that the admission of improper testimony of some probative force upon a material issue of fact in the case is prejudicial. The question presented in this appeal is whether or not this presumption has been overcome. Has the error been cured by the effort of the circuit judge to correct it?

[7] No clearer statement of the guiding principles in determining this issue can be found than that made by this court in *Cable Piano Co. v. R. Co.*, 94 S. C. 143, 77 S. E. 868:

"It certainly will not do to lay down the rule that, in every case, where incompetent or irrelevant testimony is admitted, and afterwards stricken out, with proper instructions from the court to the jury to disregard it, a new trial must be granted. On the other hand, it would, perhaps, be equally unsafe to say that in no such case should a new trial be granted. The character of the testimony, the circumstances under which it was offered and admitted, the nature of the case being tried, the other testimony in the case, and perhaps other matters which might be suggested, should be considered by the court in deciding whether the party against whom such testimony was admitted was so prejudiced thereby as to call for the exercise of the discretion to grant a new trial."

The "character of the case," "the circumstances under which it was offered and admitted," "the nature of the case being tried," "the other testimony in the case," and, we may be permitted to add, the effectiveness of the withdrawal, should be considered, etc.

The plaintiff's case depends absolutely upon his establishing the fact that, after he mounted the car to set the brakes, presumably knowing, or at least believing, that it was necessary to do so to prevent them from rolling out of the side track, with his hands on the brakewheel for that purpose, he was called away from that duty by the conductor, who told him that the cars would stand all

right without setting the brakes; to hurry up and come down; that a passenger train was almost due, and that they must get the part of the train left at the hill into the side track, out of its way.

The testimony of Bing, to the effect that the engineer declared that the accident was due to the fault of the conductor in calling the plaintiff down from the car, was directed at the very nerve of the plaintiff's case; nothing could have been so effective as laying the fault at the door of the representative of the defendant on the spot—the alter ego of the railroad company—particularly in view of the erroneous ground upon which the testimony was admitted—that, as the plaintiff charged the injury to the negligence of the conductor and engineer, the statement of the engineer as to whose fault it was should be allowed. If the action had been against the engineer and conductor, and not against the railroad company, the declarations of the engineer exculpating himself and inculpating the conductor would not have been admissible.

The circumstances attending the withdrawal of the testimony from the jury's consideration show an entirely inadequate explanation and correction of the error. The remarks of the circuit judge were addressed, in the first instance, not to the jury, who were supposed to receive the explanation and correction, but to the stenographer, the clerical arm of the court, whose duty it was to take down the entire proceedings of the trial, and to strike out nothing, even upon the order of the circuit judge. It cannot be assumed that the jury would give the same attention to a direction by the judge to the stenographer that they would give to a direct, explicit explanation and correction given by him to them. The instruction given to them was simply by reference to what he had directed the stenographer to do; whether they heard it, heeded it, or understood it is a matter of conjecture. The erroneous testimony was not identified, as it should have been, by the name of the witness and the substance of his testimony, with an explanation to the jury of the error in admitting it, and a direction to erase it from their minds; the only identification indicated was erroneous, for there were no declarations of the conductor testified to, and the remarks of the circuit judge assumed the fact that declarations had been made; not that they had simply been testified to.

[8] It might be suggested that it was the duty of the appellant to call the circuit judge's attention to the insufficiency of his withdrawal of the testimony from the consideration of the jury. We do not conceive that such was the duty of the defendant. If an error in the admission of the testimony was made, as must be conceded, it was as much the duty of the circuit judge to correct it

properly as to correct it at all, and as much the duty of the plaintiff's counsel to see that that was done as of the defendant's. While it is a salutary rule that an attorney should not be allowed to sit silent under an error which he ought to correct and take the chances of a favorable verdict or an appeal, this rule will apply in the present case to the opposing counsel as well; he should not be allowed to sit silent under an inadequate withdrawal and take the chances of an imperfect effacement of the testimony. The high character of the attorneys on both sides of this case forbids the imputation of an unworthy motive to either; we are discussing the matter entirely in the abstract.

The proponent of evidence vouches for its admissibility, and the utmost good faith is expected of him. The propounding of an improper question, to which objection is sustained, may lodge in the minds of the jury a possible answer, the effect of which may be difficult to eradicate; certainly, an improper question allowed to be answered is worse; and where the proponent has brought about this condition, he cannot justly complain that his adversary has not been alert and efficient in his efforts to neutralize the error.

In the case of *Rookard v. Ry.*, 84 S. C. 190, 65 S. E. 1047, 27 L. R. A. (N. S.) 435, 137 Am. St. Rep. 839, certain inadmissible testimony was given before objection was made. This court held that there was no error in allowing it to remain in until counsel could have the opportunity to present the authorities, "for all the harm that could be done by its getting to the jury had already been done."

"Nor can we say that the error was cured by its 'admission, subject to objection.' That may be done in some cases when the court is to pronounce the judgment. But, in a trial by jury, such evidence may have its effect simply by being admitted at all." *National Bank v. Anderson*, 32 S. C. 538, 547, 11 S. E. 379, 383.

The circumstances under which the testimony was admitted and the nature of the testimony were calculated to make a deep impression upon the minds of the jury, and so lasting as not to be effaced except by an equally careful and impressive explanation and correction.

We have already referred to the importance of the issue of fact to which the testimony was directed. When the question of admissibility of the testimony came up, it appearing that the declarations of the engineers were made some 10 or 15 minutes after the collision occurred, the circuit judge promptly ruled that it was not a part of the *res gestæ*; but, responding to the suggestion of counsel for the plaintiff that, as the case rested upon the negligence of the conductor and engineer, the statement of the engineer as to the responsible cause of the collision

was admissible, the circuit judge, after argument of counsel, admitted the testimony upon that ground. The impression created by this ruling, which was never corrected, except inferentially, necessarily was very great.

After stating the general rule that errors are cured by withdrawal, the court, in *Throckmorton v. Holt*, 180 U. S. 552, 587, 21 Sup. Ct. 474, 480 (45 L. Ed. 663), an exceedingly interesting case, says:

"But yet there may be instances where such a strong impression has been made upon the minds of the jury by illegal and improper testimony that its subsequent withdrawal will not remove the effect caused by its admission, and in that case the general objection may avail on appeal or writ of error."

In *Oates v. U. S.*, 233 Fed. 201, 204, 147 C. C. A. 207, 210, Circuit Judge Woods, formerly an honored member of this court, declares as the judgment of the court:

"The exception to this rule is that the incompetent evidence will be regarded harmful, notwithstanding its subsequent withdrawal from the jury, if it was so impressive that it probably remained on the mind of the jury and influenced their finding."

That the testimony in the case was impressive at the time of its admission, there can scarcely be a doubt; that it probably remained on the mind of the jury, we must assume from the inadequate explanation and admonition of the circuit judge, and the consequent imperfect effacement. Where incompetent and improper evidence is calculated to make a strong impression upon the minds of the jurors, the error in the admission is not cured by a subsequent withdrawal of the evidence from the jury. *Whittaker v. Voorhees*, 38 Kan. 71, 15 Pac. 874.

"In an action by a servant against his master for injuries alleged to have been caused by defective appliances, the error of admitting in evidence a statement of the defendant's foreman is not cured by instructing the jury to disregard it." *Whalen v. Gas Co.*, 32 N. Y. St. Rep. 48, 10 N. Y. Supp. 105.

It is held in *Sulkowski v. Zynda*, 160 Mich. 7, 124 N. W. 536, 136 Am. St. Rep. 414, that the admission of improper testimony is not cured by its exclusion the following day, "as the jurors must have had the evidence in mind during the remainder of the trial and argument of counsel."

Error in admitting incompetent evidence is not cured by giving an instruction which does not clearly indicate what evidence is to be disregarded. *Swank v. Elwert*, 55 Or. 487, 105 Pac. 901.

"The admission of irrelevant and incompetent testimony so hurtful to the litigant by reason of its effect upon the jury, relying upon the withdrawal of it to repair the damage, is a dan-

gerous practice, and not to be commended." *Elliott v. Ferguson*, 37 Tex. Civ. App. 40, 83 S. W. 56.

In the *Throckmorton* Case, the court further says:

"There may also be a defect in the language of the attempted withdrawal, whether it was sufficiently definite to clearly identify the portion to be withdrawn. * * * In such a case as this and under the particular facts herein we think the names of the witnesses should have been given, and the specific evidence which was given by them and which was to be withdrawn should have been pointed out."

"In any event in order to effect a cure, the withdrawal must be as broad as the admission, sufficiently definite to identify clearly the evidence to be withdrawn, and so explicit and unequivocal as to preclude the inference that the jury may have been influenced thereby." 4 Corp. Jur. p. 989, § 2972.

Tested by these rules, it cannot but appear how inadequate the explanation and correction in this instance were; how diluted was the emetic compared with the strength of the poison.

We are mindful of the practical necessity in the conduct of jury trials to allow great latitude to the discretion of the presiding judge; it is essential to the administration of justice and the end of litigation. We appreciate the sentiment that justice delayed is justice denied. But in an instance of procedure which falls so far short of reasonable precautions to explain and correct an error, which at the time of its commission was of most serious consequence to the interests of a litigant, the error will be corrected in this court.

[9] 3. *The Judge's Charge*.—The first objection to the charge is that it was misleading, contradictory, and confusing upon the subject of the diminution of damages on account of contributory negligence, under the federal act. The rule approved by the Supreme Court of the United States in the case of *Ry. Co. v. Brown*, 241 U. S. 223, 36 Sup. Ct. 602, 60 L. Ed. 966, which it declares is in practically the words of the statute, is this: In the event that the jury finds the plaintiff guilty of contributory negligence, they must reduce his damages in proportion to the amount of negligence attributable to him. Considering the portion of the charge immediately preceding that excepted to, and the defendant's request to charge which was allowed, in connection with the portion excepted to, the circuit judge committed no error of law. If the law, thus technically correct, was not, in the conception of counsel, sufficiently intelligible to the jury, the way was open for them to prefer a further request "clarifying any obscurity on the subject" which they deemed to exist.

[10] The second objection to the charge is alleged error in stating that the plaintiff would be entitled to recover although his

negligence was gross, and that of the defendant slight. We find nothing in the act, and the appellant has cited no authority, which would indicate error in this proposition. While the statute makes no distinction between degrees of negligence it certainly does not debar plaintiff from all recovery in case his contributory negligence should be gross, and it certainly contemplates the possibility of the negligence of one being greater than that of the other. If, therefore, the plaintiff's negligence should be gross and the defendant's slight, the plaintiff would suffer most in the diminution of his damages. We do not see that the defendant has anything to complain of this.

The writer of this opinion was not a member of this court at the time the appeal was argued; it is his understanding from the records in his possession that the fifth, sixth, seventh, eighth, ninth, twelfth, thirteenth, fourteenth, and fifteenth exceptions were abandoned.

The judgment of this court is that the judgment of the circuit court be reversed, and the case remained to that court for a new trial.

GARY, C. J., FRASER, J., and BABB, Special Judge, concur.

WATTS, J. (dissenting). I dissent from the opinion of Mr. Justice COTHRAN. I see nothing in the exceptions to show such prejudicial error that a new trial should be granted. The opinion requires a circuit judge to measure up in learning, skill, readiness, and infallibility, that no judge I have ever practiced before or been associated with possesses. The opinion is manifestly unfair and unjust to the judge. It practically requires him, when he makes a mistake, to grant a new trial. He is not allowed to correct his mistakes, as Judge Bowman did in this case.

The plaintiff was injured December 14, 1917; a trial was had February 4, 1920. Certain evidence was admitted on the part of the plaintiff over objection. Later his honor told the jury to disregard it. The plaintiff

finally got a verdict. I am not at all certain that his honor was not right in holding the evidence competent in the first instance, but when he concluded to strike it out, no exception was taken, and that goes out of the case. Next morning, when court convened and the case was ready to proceed, his honor turned to the official stenographer—and every one knows who has any experience in court and the trial of cases, how still the courthouse is when the judge speaks, and how alert and watchful the jurors who are trying the case are, as well as lawyers and litigants in the case—the judge then made his statement to the stenographer, and announced he had concluded to strike out the evidence, and told the jury to disregard it.

The jurors understood, and the lawyers on both sides understood, his honor, and, if the defendant's attorneys wanted further instructions on striking out this evidence, they should have asked for it; it was unjust to his honor not to do so, and later get an advantage, which is to result in a new trial. This plaintiff has been injured nearly four years, and can well complain of the law's delay and the uncertainties of courts of justice. To grant a new trial is a reflection on the intelligence and integrity of jurors. Jurors try to do what is right, and follow the instructions of the judge.

While a new trial should be at all times granted for prejudicial error, yet the error should have substance, and be actually prejudicial. In the present case, if his honor had harangued the jury at length, he could not have made them aware more fully than he did, that they were to disregard the evidence mentioned by him, and that it was not to be considered by them. And if attorneys were not satisfied with what he said, they should have asked him for further instructions.

I see no harmful error on the part of his honor. His error, if he was in error, was a trifling one, and a new trial, under all the circumstances of the case, is wrong, and works injustice and hardship on the plaintiff.

For these reasons I think the judgment should be affirmed.

(151 Ga. 826)

MYERS v. STATE. (No 2419.)(Supreme Court of Georgia. Aug. 12, 1921.
Motion to Rehear Denied Sept. 15, 1921.)*(Syllabus by Editorial Staff.)***1. Criminal law §922(4)—Instruction not ground for new trial, as excluding documentary evidence from consideration.**

On a trial for murder, an instruction that the jury are the judges of the law as well as the facts, in the sense, however, that they take the law from the court, the facts from the witnesses, apply the one to the other, and make up their verdict, is not error requiring a new trial, as excluding documentary evidence from the jury's consideration.

2. Criminal law §785(3), §922(3)—Instruction as to impeachment of witness inaccurate, but not ground for new trial.

An instruction that a witness might be impeached by proof of contradictory statements relative to matters connected with the case, and that if the witness be thus successfully impeached the question of what weight should be given his testimony was one for the jury, was inaccurate, but not ground for a new trial. (Affirmed by a divided court.)

3. Criminal law §511(2)—Requisites of corroboration of accomplice stated.

To justify a conviction for murder, the circumstances corroborating the testimony of an accomplice must be such as connect the prisoner with the offense, and it is not sufficient that the accomplice is corroborated as to time, place, and circumstances of the transaction, if there be nothing to show any connection of the prisoner therewith, except the statement of the accomplice.

Error from Superior Court, Bartow County; M. C. Tarver, Judge.

John Myers was convicted of murder, and he brings error. Affirmed.

Shipp & Kline, of Moultrie, and Wm. T. Townsend, of Cartersville, for plaintiff in error.

Joe M. Lang, Sol. Gen., of Calhoun, R. A. Denny, Atty. Gen., and Graham Wright, Asst. Atty. Gen., for the State.

GEORGE, J. [1] 1. On the trial of the defendant, who was indicted for murder, the court charged the jury as follows:

"In all criminal cases you are the judges of the law as well as of the facts, in the sense, however, that you take the law from the court, the facts from the witnesses, apply the one to the other, and make up your verdict."

Held, that the charge is not error requiring the grant of a new trial, upon the ground that it excluded from the consideration of the jury certain documents introduced in evidence by the accused.

[2] 2. In one ground of the motion for new trial error is assigned upon the following charge:

(108 S.E.)

"Some evidence has been introduced relative to the alleged contradictory statements heretofore made by the witness, Tom Gore. I charge you that a witness may be impeached by proof of contradictory statements relative to matters connected with the case; and if the witness be thus successfully impeached, the question of what weight should be given to his testimony is one for the jury."

Upon this assignment of error the Supreme Court is evenly divided, as in the case of *Smith v. State*, 150 Ga. 321, 103 S. E. 457, and the judgment of the trial court in overruling the motion for new trial on this ground stands affirmed by operation of law, though all the Justices agree that the charge given is inaccurate.

[3] 3. In *Childers v. State*, 52 Ga. 106, it was ruled that—

"In a case of felony, where the only witness implicating the prisoners in the crime, was himself avowedly guilty, the corroborating circumstances necessary to dispense with another witness must be such as go to connect the prisoner with the offense, and that it is not sufficient that the witness is corroborated as to the time, place, and circumstances of the transaction, if there be nothing to show any connection of the prisoner therewith, except the statement of the accomplice."

Applying this ruling, there was sufficient corroboration of the testimony of the accomplice to justify the conviction of the accused of the offense of murder. The court, therefore, did not err in overruling the motion for new trial.

Judgment affirmed.

All the Justices concur.

(151 Ga. 801)

UPMAGO LUMBER CO. v. MONROE & CO. (No. 2324.)(Supreme Court of Georgia. Aug. 11, 1921.
Rehearing Denied Sept. 15, 1921.)*(Syllabus by Editorial Staff.)***1. Appeal and error §1198—Rulings in accord with former decision not erroneous.**

In a suit to enjoin interference with the operation of a sawmill in which defendants filed a cross-action for breach of a contract, where the auditor's finding in favor of defendants and the ruling of the court on exceptions thereto was in substantial accord with the ruling of the Supreme Court on a former appeal, no error was committed in refusing to recommit the case, in overruling the exceptions, or in entering judgment for defendants.

2. Reference §105—Exceptions of fact not approved need not be referred to jury in equity case.

Under Civ. Code 1910, § 5141, providing that in law cases exceptions of fact to an auditor's report shall be passed upon by the jury, —and section 5142, providing that in equitable

proceedings if the judge approve any exception of fact it shall be submitted to the jury, exceptions of fact need not be referred to a jury in an equity case where the judge does not approve them.

Error from Superior Court, Thomas County; W. E. Thomas, Judge.

Suit by the Upmago Lumber Company against Monroe & Co. Judgment for defendant, and plaintiff brings error. Affirmed.

Clifford E. Hay, of Thomasville, for plaintiff in error.

J. H. Merrill, of Thomasville, for defendant in error.

HILL, J. This case was here upon a former occasion. 148 Ga. 847, 98 S. E. 498. Headnote 3 of that decision is as follows:

"Treating the cross demand as for a breach of the contract, the measure of damages for the alleged breach in taking so much of the sawmill outfit as was owned by the defendants should be upon the basis of the fair market value of that property at the date it was taken, and not for any amount of money that may have been advanced by the defendants for the equipment, maintenance, or improvement of the property. Demands of the character last mentioned were set up in the answer, and the judge erroneously instructed the jury in regard to considering this in determining the amount of damages recoverable by the defendants. The measure of damages applicable as above stated would also apply to the value of buildings and other appurtenances erected by the defendants as a part of the sawmill outfit."

When the case was returned for another hearing, the defendants, Monroe & Co., in April, 1919, amended their answer and cross-action consolidating substantially what had been set out in the former answer, except that they sought to amend the cross-action so as to form a basis for the recovery of damages for the interference with the operation of the sawmill in connection with the tramway. The plaintiff demurred to the answer and cross-action as amended; and the auditor, to whom the case was referred, sustained the plaintiff's demurrer "to so much of defendants' amended answer except in so much thereof as seeks to recover the fair market value of the property owned by the defendants and taken by the plaintiff, and it is overruled as to the balance." The auditor found in favor of the defendants against the plaintiff and the surety on its bond in a certain sum. The court overruled the motion to recommit and to cite the auditor for contempt, and sustained the auditor in his findings of law and fact and entered judgment in favor of the defendants against the plaintiff and the surety on its bond for a stated sum with interest. To these rulings the plaintiff excepted.

[1] 1. In so far as the exceptions present questions for decision by this court, the trial judge did not err in refusing to recommit the case to the auditor, or in overruling the exceptions of law and fact to the auditor's report, and in entering judgment for the defendants against the plaintiff and the surety on its bond in a certain sum with interest thereon. The finding of the auditor and the ruling of the court on exceptions thereto is in substantial accord with the ruling of this court when the case was formerly before it.

[2] 2. This is an equity case brought by the plaintiff, praying for injunction and other relief; and in equity cases the judge need not refer exceptions of fact to a jury where he does not approve them. Civil Code 1910, §§ 5141, 5142; Mathewson v. Reed, 149 Ga. 217, 218 (2), 99 S. E. 854.

Judgment affirmed.

All the Justices concur.

(151 Ga. 837)

LONG v. FAULKNER et al. (No. 2136.)

(Supreme Court of Georgia. Sept. 13, 1921.)

(Syllabus by the Court.)

1. Boundaries §33 — Abutting owner presumed to own fee in street, though dimensions only carry lot to street.

Suit was brought by S. M. Long against James Faulkner and David Bailey, alleged to be, respectively, the mayor and marshal of the city of St. Marys, to enjoin the defendants from their threatened interference with petitioner in the exercise of his right to gather the nuts from an old and large pecan tree growing in Osborne street, in St. Marys, 16 feet from a lot owned by petitioner and bordering on that street, which is 100 feet in width. On the hearing only the petitioner submitted evidence. The evidence in his behalf showed title in him by prescription to the lot abutting on Osborne street opposite the point where the pecan tree is growing, that the tree was planted by one of petitioner's predecessors in title; that defendants were threatening and preparing to prevent petitioner from gathering the nuts from the tree, and that both of the defendants were insolvent. Held:

The owner of the lot abutting on a public street or highway is usually presumed to own the fee of the soil under that half of the highway which is contiguous to his land, where it does not appear that the title to the fee is in the public. 4 R. C. L. 78, § 7, and cases cited in note 12. And the fact that the distances and dimensions of the lot, when ascertained or as designated, are sufficient merely to carry it to the side of a public street or highway, does not rebut such presumption. Id. note 17; 2 Elliott on Roads and Streets (3d Ed.) 310, § 876, note 5. See Silvey v. McCool, 86 Ga. 1, 12 S. E. 175.

2. Municipal corporations \S 663(3)—Abutting owner has exclusive right to soil in street; abutting owner owns trees in street.

Such abutting owner has exclusive right to the soil, subject only, in general, to the easement or the right of passage in the public and the incidental right of properly fitting the street or highway for use and keeping it so. 2 Elliott on Roads and Streets (3d Ed.) 311, § 876, note 6. In other words, such proprietor has all the usual rights and remedies of the owner of the freehold, subject only to the public easement (Id. note 7); and the trees growing thereon belong to him, unless needed to repair the way (Id. note 12).

3. Municipal corporations \S 663(3), 678—Abutting owner owns trees in street; city may remove trees owned by abutting owner; abutting owner owns fruit of trees.

Where the fee to half of the street is vested in an abutting landowner, subject to the easement in the city for public uses, trees upon the margin, or near the sidewalk, next to the abutter, are his property, although it is within the power of the city to remove the trees in case of public necessity or convenience. City of Atlanta v. Holliday, 96 Ga. 546, 23 S. E. 509. If a tree is his property, it follows, of course, that he owns its fruit.

4. Interlocutory injunction erroneously refused.

Applying these rulings to the uncontradicted evidence submitted in behalf of the petitioner, the court erred in refusing to grant an interlocutory injunction.

Error from Superior Court, Camden County; J. P. Highsmith, Judge.

Suit by S. M. Long against James Faulkner and another. An interlocutory injunction was refused, and plaintiff brings error. Reversed.

Cowart & Vocelle, of St. Marys, for plaintiff in error.

S. C. Townsend, of St. Marys, for defendants in error.

FISH, O. J. Judgment reversed. All the Justices concur, except ATKINSON, J., disqualified.

(151 Ga. 838)

LEE & BRADSHAW et al. v. ROGERS et al.
(No. 2151.)

(Supreme Court of Georgia. Sept. 13, 1921.)

(Syllabus by the Court.)

1. Life estates \S 13—Tenant during widowhood may work trees for turpentine.

A tenant holding under a devise of land "during widowhood" has the right to use the land and pine trees growing thereon by hacking and otherwise working the trees for turpentine purposes, as against a person entitled in reversion, where prior to his death the testator used the land and trees for such purposes.

2. Waste \S 20—Whether manner of working trees for turpentine should be enjoined held a question of fact.

It is a question of fact whether the working of trees for turpentine purposes by a tenant for life is so injurious to the trees as will be prohibited at the instance of a person entitled in reversion, where the working consists of cutting series of streaks on the bodies of the trees extending through the bark in such manner as to make one exposed surface and in some instances more than one, depending upon the size of the tree, whereby crude gum is caused to exude at such exposed surfaces and deposit in metal cups attached to the trees and from which the gum is collected and carried away.

Error from Superior Court, Thomas County; W. E. Thomas, Judge.

Action by W. J. Rogers and others against Lee & Bradshaw and others. Judgment granting a temporary injunction, and defendants bring error. Reversed.

In 1894 Moses Dukes executed a will, and died in 1898. The testator left a widow and ten children. Item 1 of the will gave direction as to disposition of testator's body. Item 2 directed all just debts to be paid. Item 3 provided:

"I give and bequeath to my beloved wife, Sarah Jane Dukes, for and during her widowhood, all the property I own and possessed of: consisting of lands and tenements, horses, mules, cows, hogs, household and kitchen furniture, plantation tools, wagons, carts, buggies, carriages, all notes and accounts, cash and whatsoever."

Item 4 appointed testator's wife, Sarah Jane, sole executrix.

The will was probated in 1898. At the time of his death testator was seized and possessed of a tract of land known as the Dukes place, containing about 500 acres and comprising parts of lots Nos. 425 and 450 in the Thirteenth district of Brooks county, of which about 300 acres was woodland. On the 3d day of February, 1919, Sarah Jane Dukes, the widow of the testator (who had not again married), executed a lease to Lee & Bradshaw, turpentine operators, covering all of the timber on the land. The lease stated that it was "for all the purposes of boxing, working, and otherwise using said timber for turpentine purposes. * * * The above timber formerly worked by B. O. Wood. The life of this lease four (4) years from above date, for all virgin timber on above lot." The lessees entered upon the land and commenced to work all the timber thereon suitable for turpentine purposes by the cup method, which involved cutting streaks through the bark and sap of the tree so that it would exude gum; and attaching metal cups to the tree in such manner

as to catch the gum. Subsequently and between the dates May 17, 1919, and August 20, 1919, inclusive, W. J. Rogers, having notice of such lease and operation thereunder, acquired by purchase several undivided interests amounting to six-tenths interest in all of the land. He was a son of Mrs. Mary Lizzie Rogers, a daughter of the testator, and purchased directly from some of the children, and in other instances from transferees of children and heirs of deceased children of the testator.

In October, 1919, W. J. Rogers and his mother, Mrs. Mary Lizzie Rogers, asserting title as tenants in remainder under the will of the testator, instituted an action against Lee & Bradshaw, to enjoin the working of the trees for turpentine purposes, on the ground that the trees were part of the realty and the working of the trees for such purposes was permanent injury to the trees and the land on which they were growing, amounting to waste, which the widow as a tenant during widowhood had no right to authorize. At the interlocutory hearing there was an issue, under the pleadings and evidence, as to whether the trees which defendants were working had been worked prior to the death of the testator and as to whether the manner in which the trees were being worked was injurious to the trees.

The plaintiffs' evidence was to the effect: That during the life of the testator the land had been worked for turpentine, but all trees that had been so worked were cut off for sawmill purposes before the death of the testator, and practically all of the trees that defendants are working are young trees that have grown up since the death of the testator; that B. O. Wood had worked the land for turpentine purposes, covering a period of six years which ended in 1918, which was subsequent to the testator's death; also, that the working of the trees extracted the sap to such extent as to be permanently injurious, and defaced the trees in such manner as to render them liable to burn and blow down, and consequently the use to which the trees were being put by the defendant was destructive of the estate.

The defendants' evidence was to the effect: That in the main the trees which they were working were being worked by the old "box" process at the time the will was executed, and were being so worked at the death of the testator, and had been continuously worked by successive lessees up to the time of the lease to defendants; that such "box process" involved cutting boxes in the tree into which the gum would run, the "box" serving the purpose of the metal cup employed in the new or "cup process"; that the old method of extracting turpentine was to cut a number of faces and boxes on the same tree, boxes being cut in such way as to catch and hold the gum that would flow;

that even under this method the percentage of the trees that were killed was very small; that where trees have been worked by this old method and do not die, the reworking or back-boxing of them by putting streaks thereon will not injure them; that the taking of the gum from the trees is not injurious to trees or to the land; that each year the tree makes for itself a new supply of gum or sap, and contains as much gum the second year as it did the first, which is true of subsequent years; that the idea of putting a streak upon the tree is simply to scarify the surface so as to cause, at the proper season, the gum to flow from this wound into the cup that has been attached to receive it; that after the gum has run for one season this streak will heal up, and it will not run again the next year unless a new streak is placed upon it for the same purpose; that defendant's method of working the trees was by this "cup process," and was not injurious to the trees or land; and that all of the income of the estate left by the testator would be insufficient to support the widow, if she were not allowed the income derived from leasing the timber.

The judge hearing the case rendered a decision at chambers as follows:

"After consideration of the law and the evidence in this case, it is ordered and decreed that the defendants be restrained and enjoined from cutting, boxing, or putting streaks upon the timber described in plaintiff's petition, until the hearing. In so ordering, the chancellor is not so doing in the exercise of the legal discretion vested in him, but upon the ground that as matter of law the life tenant could not legally, in this case, lease the right to box, cut, and work the timber for turpentine purposes."

The exception is to this judgment.

Titus & Dekle, of Thomasville, for plaintiffs in error.

Branch & Snow, of Quitman, for defendants in error.

ATKINSON, J. [1] 1. Under a proper construction of the judgment granting the interlocutory injunction, the trial judge did not consider the conflict of evidence, but, viewing the evidence in its most favorable light for the defendants, decided as a matter of law that they did not have the right, as lessees of the life tenant whose term had not expired, to work the trees growing upon the land for turpentine purposes. Under one phase of the conflicting evidence, the trees growing upon the land were being worked for turpentine purposes under leases executed by the testator at the time the will was executed and at the time of his death; and the manner in which the defendants are now working the trees for such purposes is less injurious to the trees than was the manner of operating under the old process which was in vogue

during the life of the testator, and is not destructive of the trees. Under these circumstances, the correctness of the judgment involves two questions of law which it is proper to decide, both of which are controlling: First, has a tenant holding under a devise of land "during widowhood" the right to use the land and pine trees growing thereon, by hacking and otherwise working the trees for turpentine purposes, as against a person entitled in reversion, where prior to his death the testator used the land and trees for such purposes? Second, conceding that the land was not being so used by the testator, is the working by such tenant for turpentine purposes (which consists in cutting series of streaks on the body of the tree extending through the bark, in such manner as to make one exposed surface or more according to the size of the tree and causing the crude gum to exude at such exposed surface and deposit in metal cups attached to the tree, from which it is collected and carried away to be distilled and sold) so injurious to the tree that such use must be held, as a matter of law, to be waste as against a person entitled in reversion?

It is declared in the Civil Code, § 3634, that estates for widowhood are subject to the same rules as life estates. Among the rules applicable to life estates are the provisions of the Civil Code, § 3666, which is as follows:

"The tenant for life is entitled to the full use and enjoyment of the property, so that in such use he exercises the ordinary care of a prudent man for its preservation and protection, and commits no acts tending to the permanent injury of the person entitled in remainder or reversion. For the want of such care, and the willful commission of such acts, he forfeits his interest to the remainderman, if he elects to claim immediate possession."

This law was included in the Code of 1863 (section 2235) which was regularly adopted by the Legislature, and also included in the several subsequent Codes, some of which have likewise been adopted by the Legislature; and consequently it has all the binding effect of a statute. *Central of Georgia Ry. Co. v. State*, 104 Ga. 831, 31 S. E. 531, 42 L. R. A. 518. This Code section was construed in *Woodward v. Gates*, 38 Ga. 205, 213, where it was said:

"This section of the Code declares that the tenant for life is entitled to the full use and enjoyment of the property, so that, in such use, he exercises the ordinary care of a prudent man for its preservation and protection, and commits no acts tending to the permanent injury of the person entitled in remainder or reversion. In determining what amounts to waste, regard must be had to the condition of the premises, and the inquiry should be, did good husbandry, considered with reference to the custom of the country, require the felling of the trees, and were the acts such as a judicious,

prudent owner of the inheritance would have committed?"

Again, in *Roby v. Newton*, 121 Ga. 679, 682, 49 S. E. 694, 695, 68 L. R. A. 601, it was said.

"While the section of the Code does not use the terms 'permissive waste' or 'voluntary waste,' or the term 'waste' at all, still an analysis of that section will indicate that its author had in mind the distinction between the two classes of waste. It imposes upon the life tenant the duty of exercising the ordinary care of a prudent man for the preservation and protection of the estate, and the failure to do this is permissive waste; and it also prohibits the commission of any act tending to the permanent injury of the person entitled in remainder or reversion, and the commission of such acts is voluntary waste."

And in *Belt v. Simkins*, 113 Ga. 894, 896, 39 S. E. 430, 431, it was held that—

"A tenant for life who holds the estate without impeachment for waste is not liable at law to a remainderman for waste committed, though he may be restrained by a court of equity, at the instance of a remainderman, from committing further acts of waste in the future which are destructive of the inheritance, or are of a wanton and malicious nature."

In the course of the opinion it was said:

"One who creates a life estate for the benefit of another, either by will or by deed, may, if he sees proper, provide that the tenant for life shall not be held liable for waste. Such a tenant is characterized as a tenant for life who holds without impeachment for waste. No matter what may be the character of the waste committed, no one interested in the property has a right to call such a tenant into a court of law on account of his conduct. If a particular tenant exercises this power in an unconscientious manner, a court of equity may interfere to restrain him, and a waste committed by such a tenant which would be enjoined by a court of equity is called equitable waste; but a life tenant who holds the estate without impeachment for waste is not liable for acts of waste except those which are destructive of the inheritance or wanton and malicious in their character. *Bisp. Prin. Eq.* § 434; 28 *Am. & Eng. Enc. L.* (1st Ed.) 864; 12 *Enc. Laws of Eng.* 536; *Dickinson v. Jones*, 36 Ga. 105."

In applying this statute regard must be had for the provisions of the instrument creating the life estate and the nature of the property in which the life estate was given, and the use to which it was put at the time the will was executed and when it went into effect. If a testator, having nothing but a turpentine farm which was a going concern, bequeathed that to his wife during widowhood, it could hardly be said that the testator intended that she should take nothing under the will; yet that would be the effect if the trees on the farm could not be worked at all for turpentine purposes. The trees constituted a part of the realty (North Georgia

Co. v. Bebee, 128 Ga. 563, 57 S. E. 873), but not more than minerals in the land. By the great weight of authority in other jurisdictions a tenant for life may remove for his own profit minerals from mines which were open at the time the life estate was created. By analogy the same rule has been applied when the life interest related to timber estates. In *Bartlett v. Pickering*, 113 Me. 96, 99, 92 Atl. 1008, 1010, it was said:

"It is undoubtedly true that the general rule is that trees cut and sold are treated as principal and not as income, and that a life tenant is guilty of waste in cutting trees. But we think this rule is not applicable to trees on 'wild land' so called in this state, which is kept and held merely for the produce of salable timber. These lands are held for income-producing purposes, and the only income derivable from them ordinarily comes from the cutting and sale of marketable timber trees. The bequest of the income of the trust estate in this case, consisting, as it did, in considerable part of timberlands, contemplated, we think, that the income should be obtained from the cutting of trees, or the sale of the stumpage rights. See *Drown v. Smith*, 52 Maine, 141; *McNichol v. Eaton*, 77 Maine, 246; *Honywood v. Honywood*, L. R. 18 Eq. Cas. 306. A similar rule has been applied to the rights of life tenants in analogous cases of iron, coal, oil, and gas mines, opened in the lifetime of the testator, even when the exercise of the right might in time exhaust the mine, and practically destroy the estate of the remainderman. *Gaines v. Green Pond Iron Min. Co.*, 33 N. J. Eq. 603; *Sayers v. Hoskinson*, 110 Pa. St. 44; *Koen v. Bartlett*, 41 W. Va. 559."

See, also, on the subject, *Dashwood v. Magniac*, 64 Law Times New Series, 99; *Poole v. Union Trust Co.*, 191 Mich. 162, 157 N. W. 430, Ann. Cas. 1918E, 622; *Rutherford v. Willson*, 95 Ark. 246, 129 S. W. 534, 37 L. R. A. (N. S.) 763; *Swayne v. Lone Acre Oil Co.*, 98 Tex. 597, 86 S. W. 740, 69 L. R. A. 986, 8 Ann. Cas. 1117; *Phillips v. Smith*, 14 Mees. & W. 589; 21 C. J. 951, notes 64, 65; *Ballentine v. Poyner*, 8 N. C. 110; *Beam v. Woolridge*, 3 Pa. Co. Ct. R. 17; *Williard v. Williard*, 56 Pa. 119, 128. In the report of the last-cited case, it was said:

"In considering the question of waste by a life tenant, respect must be had to the nature of the property. Here the evidence proves clearly that the tract was bought by Jacob and John as timber land, that this was its chief value, and that they were both engaged in cutting and rafting timber from it. The timber was the intended source of profit, and the parties treated it accordingly. It is difficult

to draw a distinction in this respect between profits actually drawn by the owner from the timber where it is the source of profit, and profits drawn from opened mines. Timber is no more a fixed part of the realty than coal or other minerals, and yet a life tenant may mine without limit from opened mines."

In North Carolina the same principle has been applied where dower was set apart to a widow in lands on which the trees were being worked for turpentine purposes at the time of the decedent's death. *Carr v. Carr*, 20 N. C. 317. From the standpoint of the evidence tending to show that at the time the will was executed, and at the time of the death of the testator, the wooded lands of the testator were being worked for turpentine purposes, the widow would be entitled, under the devise, to work the land for such purpose during her widowhood.

[2] 2. If the lands were not so worked for turpentine purposes by the testator so as to bring the case within the principle above discussed, it would nevertheless be a question for the jury, under the conflicting evidence, to say whether the working of the trees was such a permanent injury to them as was beyond the rights of the defendants as lessees of the widow during the existence of her term. In a somewhat similar case it was said in *Drake v. Wigle*, 24 Upper Can. O. P. 405:

"It is a question of fact for a jury, what extent of wood may be cut down in such cases, without exposing the party to the charge of waste."

Again it was said in *Campbell v. Shields*, 44 Upper Can. Q. B. 449:

"It is a question for the jury whether the tapping of trees for sugar making has the effect of destroying the trees, or of shortening their life, or injuring them for timber purposes."

In the recent case of *Gleaton v. Aultman*, 150 Ga. 768, 105 S. E. 445, being a suit by remaindermen to enjoin the lessees of a life tenant from working the trees for turpentine purposes, it was held that the judge did not abuse his discretion in granting an interlocutory injunction. This was an implied ruling that the question of injury to the trees was one of fact. It follows that the judge erred in holding, as matter of law, that the plaintiffs were entitled to an injunction.

Judgment reversed.

All the Justices concur.

(132 N. C. 762)

(193 S.E.)

COBURN v. AMERICAN RY. EXPRESS CO.
(No. 100.)

(Supreme Court of North Carolina. Sept. 28, 1921.)

Carriers — 136—Refusal of nonsuit, and leaving to jury whether express packages were properly packed for shipment, held proper.

Under the evidence in action involving question whether packages which were stolen during the night after they were left with an express company, and which it claimed were not in condition for shipment, had been accepted by it for shipment, or whether its duties with respect thereto were only those of a warehouseman, *held* that the question whether the packages were properly packed for shipment was properly left to the jury.

Appeal from Superior Court, Halifax County; Cranmer, Judge.

Action by F. M. Coburn against the American Railway Express Company for loss of express packages, alleged to be worth \$136.75, through robbery during the night after they were left with defendant. From a judgment on a verdict for plaintiff, defendant appeals. No error.

The plaintiff's evidence, in part, is as follows:

C. E. Vaughan testified: I was a drayman for myself on the 6th day of May, 1919, and delivered to the express company at Roanoke Junction two packages of merchandise for Mr. F. M. Coburn. I delivered these to John Scull, express agent. The packages at the time I delivered them were in good condition. He told me to leave the packages there—I laid them on the shelf there—and that he would give me a receipt for them in the morning when I come back, which he had been doing for months. I had been doing that for months. He received the packages and told me he would give me receipt the next morning. I left them laying on the shelf where he gives receipts. These packages were marked for shipment.

F. M. Coburn testified: I am the plaintiff in this action, and am a shoe merchant at Roanoke Rapids. On the 6th day of May, 1919, I delivered to Mr. Vaughan, to be carried to the express company office, at Roanoke Junction, two packages for shipment. The shoes and clothing were packed by me and Mr. King, the man who works for me. The packages were in good condition when delivered to Mr. Vaughan for transportation to the express office. I did not receive the packages back. I do not know what became of them. The next morning Mr. Coleman told me they were stolen. Cross-examination: Q. What did Mr. Coleman tell you that afternoon when he called you up over the phone? A. Mr. Coleman called me up around 4 or 5 o'clock and told me that the packages I had sent to the express office were not packed right and were in bad order, and that I would have to repack them before he could ship them. Mr. Coleman was hauling express, and I told him to bring them back to me. He had been

hauling for me and I told him to bring them back to me so that I could repack them. I didn't have no way to send for them. I was in a big hurry, and I knew it was almost closing time, and I wouldn't have time to repack them then. I told Mr. Coleman to bring the packages back after he told me that they were not in shipping condition. It was late in the afternoon then. I told Mr. Coleman to bring them back, but only when he told me he could not ship them until they were repacked. When they left my place of business they were in good shape. The reason I did not get them was that it was late in the afternoon when he called me and told me that and it was almost closing time. These packages were all right, and marked for shipment when they left my store. Q. He told you that they were not packed correctly, and that he could not accept them for shipment? A. That was late in the afternoon, about closing time. Q. And you then told him to bring them back to you? A. He had been hauling express for me, and that was the reason I asked him to bring them back. Q. And you instructed Mr. Coleman to bring them to you? A. I told him I would take them back and repack them. I did not have any receipt for them, but I had sent stuff up there several times before, and receipt would be sent me the next day. They would be put there overnight, and send receipt for them the next day. He did not call me up over the phone, and tell me he could not accept the packages for shipment the same day they were left there until after dinner. Mr. Coleman was the general agent of the express company, and that day, when he went to the office and examined the packages, he found them in bad order, and called me up and told me he could not accept them for shipment, and I instructed him to bring them back to me, but he did not let me know anything about it until late in the afternoon, and it was about time to close up, and I would not have time to go after them. I told him to bring them back. I did not mean before they closed up, but I mean it would have been closing time before I could have gotten them myself. The express office was broken into that night.

Defendant offered the following testimony:

Deposition of H. G. Coleman, offered in testimony by the defendant and read: My name is H. G. Coleman; age 28, residence Boykins, Va., and occupation merchant. On May 8, 1919, I was employed at the time of the alleged loss of these goods at Roanoke Junction, N. C., as agent of American Railway Express Company. These goods were delivered to our office improperly packed, and were refused by us. F. M. Coburn was notified before closing time, notified by telephone. He or his clerk instructed us to hold shipment until he could come and properly pack the packages. This took place before the closing hour, which was 5 o'clock p. m. He had plenty of time to come and repack the goods before the office closed. The packages were left by a public drayman in the lobby, and were not placed in the storeroom; the freight office and the express office being in the same room. That afternoon the office was closed at the usual hour. Mr. Coburn had not come to repack the goods. About 8 o'clock the

next morning it was discovered that the office had been broken open and robbed the night before. Upon investigation I learned that one case of clothing was taken, and one case robbed of everything except one suit of clothes. The other cases were robbed of several pairs of shoes. These goods taken were left by the public drayman for Mr. Coburn the afternoon before. No receipt was given for them.

Defendant's objection to the charge and the refusal of an instruction, as stated in its brief, is that the jury were allowed to pass on the question whether the packages were properly packed for shipment. Defendant claimed that this was not at the time of the robbery an open question, but that it had been determined by the agent and accepted by plaintiff, and that therefore defendant held the goods for the convenience and accommodation of plaintiff, he having agreed to receive and repack the goods without protest or claim that they were in proper condition for shipment.

Daniel & Daniel, for appellant.

PER CURIAM. The controversy on trial narrowed itself to a question as to whether the defendant had accepted the packages for shipment in its capacity as a common carrier, the defendant contending that its duties were only those of a warehouseman at the time of the loss of the goods. Upon this disputed question of fact, his honor submitted the case to the jury, and they have found in favor of the plaintiff.

There was an exception to the charge and the refusal to give one of plaintiff's prayers for instructions. Upon the record, we do not think these exceptions can be sustained. The motion to nonsuit was properly overruled. We have discovered no sufficient reason for disturbing the result.

No error.

(182 N. C. 781)

STATE v. JONES. (No. 1.)

(Supreme Court of North Carolina. Sept. 14, 1921.)

1. Criminal law §114(1)—Error assigned must appear in the record.

Although errors in the charge may be first assigned on appeal, the error must appear in the record.

2. Criminal law §112—Assignment of error held contradicted by record.

In the absence of a full charge to the jury, a statement of the record that the court, at the conclusion of the argument, charged the jury at length with respect to the case, and stated fully contentions of the state and defendant, to all of which there was no exception, contradicts an assignment of error that there was no charge as to manslaughter.

3. Criminal law §114(2), 1144(14)—In absence of charge in record, no inference of error will be drawn, and burden of proof is on appellant.

Where the record is silent as to a part of the charge, the appellate court cannot draw an inference of error in refusal to charge as to manslaughter, since the presumption is that the instructions of the court were correct, and the burden is on the appellant to show the contrary, and the fact that defendant's counsel confined his argument to second degree murder, does not alter the case.

4. Criminal law §825(4)—Instruction as to reasonable doubt, if error, held not available, in absence of request for more definite charge.

An instruction to the effect that, if the jury found beyond a reasonable doubt that defendant committed the homicide, they should find him guilty, while a general statement of the rule, if erroneous, is unavailable in the absence of a request to charge more definitely.

5. Criminal law §1172(2)—Instruction that jury must be convinced to a moral certainty held not prejudicial to defendant.

An instruction that the jury must be convinced to a moral certainty was not prejudicial to defendant, especially when followed by a correct instruction on reasonable doubt.

6. Criminal law §1144(14)—If charge was erroneous, presumption is in absence of entire charge in record that defendant's counsel would have excepted.

Whether a charge as to reasonable doubt the defendant committed the homicide was too general in its terms, and since the record states that the judge charged the jury as to the case, and stated fully the contention of the parties to which there was no exception, it will be presumed that, if error in charging had been made, defendant's counsel would have excepted.

7. Criminal law §822(1)—Charge must be considered as a whole.

A charge must be construed as one connected whole, and not by detached portions.

Appeal from Superior Court, Hyde County; Allen, Judge.

Henry Jones was convicted of murder in the second degree, and appeals. No error.

The defendant, with others, was indicted in the court below for the murder of James Smith, and was convicted of murder in the second degree. The solicitor for the state withdrew the charge of murder in the first degree. There was no suggestion from defendant's counsel that the question of manslaughter was involved, or that there was any evidence of the same. No instruction was requested on that subject, and no reference to manslaughter made by defendant, until the defendant, after verdict and judgment, filed his exceptions, and upon them based his assignment of errors, in which he made his first reference to manslaughter, when he excepted because the court failed to charge as to man-

slaughter. The substance of the record on this point is as follows:

The case was fully argued by both the state and the defendant, neither the state nor the defendant's counsel discussing any question except the guilt or innocence of the defendants on the charge of murder in the second degree. No allusion was made in the course of the argument by either the solicitor or associate counsel for the state, or by any counsel for either of the defendants, to the guilt or innocence of the defendants of any crime except murder in the second degree, and specifically no contention was made either by the state or the defense that the defendant was guilty of either murder in the first degree or of manslaughter, the only question argued being whether the defendants were guilty or innocent of the charge of murder in the second degree. During the course of the argument for the defendant, the defendant's counsel read the statute defining the crime of murder in the second degree to the jury, and argued to the jury the punishment that was permissible upon a conviction under the same, and told the jury that, if the defendants were convicted, they would be punished by imprisonment from 2 to 30 years, in the discretion of the court. The solicitor likewise admitted to the jury that the statute had been correctly read, and that the punishment suggested by the defendants' counsel was possible upon a conviction, but argued to the jury that the matter of punishment was not for their determination, but should and could be left to the court to administer in justice and mercy. At the conclusion of the argument, the court charged the jury at length with respect to the case, stating fully the contentions of both the state and the defendants, to all of which there was no exception.

There was testimony to the effect that one of the witnesses had heard the defendant fighting the deceased the night of the homicide, and that, before the homicide, he had heard him threaten to kill him. There was evidence tending to show that McArthur and Smith were killed with a heavy singletree, made of solid oak, and having iron bands at each end of it, and which was a deadly weapon. The indentations in the skull of McArthur corresponded with the shape of the ends of this singletree. The dead bodies of McArthur and Smith were hauled in a cart belonging to John Jones (which was borrowed by defendant, Henry Jones) to the canal near Henry's home, and thrown into the canal, Henry having said that he wanted the cart to carry the boys (McArthur and Smith) to the canal and "chunk them in." There was evidence that blood stains were found on Henry's kitchen floor, and the singletree in the bottom of the cart. There was other evidence tending to identify the defendant, as the one who committed the homicide, in addi-

tion to his admission in jail that he and his wife had killed the boys, and that he intended to "put it on Dad," and also his threat to kill Smith because of some real or fancied grievance.

The jury, under the evidence and the charge of the court, convicted the defendant of murder in the second degree, and from the judgment upon the verdict, he appealed.

Daniel & Carter, of Washington, N. C., and Clifton Bell and Mann & Mann, all of Swan Quarter, for appellant.

James S. Manning, Atty. Gen., and Frank Nash, Asst. Atty. Gen., for the State.

WALKER, J. (after stating the facts as above). The principal exception of the defendant is that the court failed to define manslaughter, or to charge that the jury could find the defendant guilty of manslaughter or murder in the second degree. The full charge is not in the record. We will first consider, therefore, whether it appears from the record that the court failed to give any such instruction. We are governed, in this respect, entirely by the record, which cannot be altered by a mere exception or assignment of error.

[1] Exceptions must be confined to something alleged as error which appears in the record, and an assignment of error must ordinarily be based upon an exception duly taken. Errors in the charge may, of course, be assigned the first time in the case on appeal, but the error must appear in the record, and not only in the assignment. This is necessarily true, because, if the showing of error depended upon the mere allegation of it, when the error did not appear in the record, it would be useless to consider the record, but only the assignment as to the ruling of the court. Of course this would not do, and could not for a moment be accepted as a principle in the law of appellate procedure. The law is the other way, as we do not presume error was committed, but the opposite; and he who alleges that there was error must show it by the record, and not by assertion only, an assignment being of no avail unless it rests upon matter appearing in the record or case on appeal. *Wilson v. Wilson*, 174 N. C. 755, 94 S. E. 669; *In re Smith's Will*, 163 N. C. 466, 79 S. E. 977; *Todd v. Mackie*, 160 N. C. 352, 78 S. E. 245; *Allred v. Kirkman*, 160 N. C. 392, 76 S. E. 244; *Worley v. Logging Co.*, 157 N. C. 490, 73 S. E. 107. So, in this case, we must presume the correctness of the trial below, because we cannot see any such error in it as is alleged, as it has not been made to appear.

[2] The defendant assigned as error that the judge failed to charge the jury as to manslaughter. Not only does this not appear in the record, as the full charge is not here, but what does appear contradicts it, as the rec-

ord states that Judge Allen, who presided at the trial—

"at the conclusion of the argument, charged the jury at length with respect to the case, and stated fully the contentions of the state and the defendant, to all of which there was no exception."

And this disposes of the assignment as to manslaughter, as it excludes the idea that there was no instruction as to it, the statement in the record being sufficient to show that the charge embraced every phase of the case. If so, there can be no error in the charge, even if there was evidence to support the contention as to manslaughter. The appellant has not, therefore, shown that there was no instruction as to manslaughter, and, as was held in the above cited cases and *Powers v. City of Wilmington*, 177 N. C. 361, 99 S. E. 102:

"Appellant must show error; we will not presume it, but he must make it appear plainly, as the presumption [as to the correctness of the trial] is against him"—citing *In re Smith's Will*, supra.

The same was said in *Baggett v. Lanier*, 178 N. C. 129, p. 131, 100 S. E. 254, 255, the language in that case, being:

"The burden of showing error is upon him, for, in the absence of anything to the contrary, we presume that the ruling of the court was correct."

And the following, which was said in *Bell v. Harrison*, 179 N. C. 190, at page 198, 102 S. E. 200, 204, is also pertinent and analogous to the question here:

"A party cannot complain of an instruction given at his own request; nor will an assignment of error be sustained which conflicts with the statement of the case upon the question whether the instruction was so given. The judge's statement, as to what was done, must stand, in the absence of any correction of the record by certiorari or otherwise."

As held in *State v. Harris*, 181 N. C. 600, 107 S. E. 468, "The statement of the case on an appeal imports absolute verity." We must therefore accept it as we find it, and can add nothing to it, nor can we take anything from it. The appeal must stand or fall by what we find in the case, without regard to any assignment of error, unless supported by it.

[3] As the whole of the charge is not here, we are unable to know what it was, or whether what is not here embraced a sufficient charge as to manslaughter. We only know that defendant deemed it adequate, as he did not ask for any further instruction. We are not permitted to draw an inference favorable to the defendant merely because the record is silent as to a part of the charge. We should presume to the contrary, as the burden is upon the defendant to show any error.

[4] The fact that counsel for defendant

chose to narrow the discussion and confine his argument to second degree murder does not alter the case. That is their act, and not that of the court. They may have thought, and perhaps rightly so, that the evidence as to manslaughter, if there was any at all, was entirely too conjectural, and would not lead the jury to adopt that view. It was hardly as substantial or probative in character as was the evidence in *Byrd v. Express Co.*, 139 N. C. 273, 51 S. E. 851.

We have discussed this exception upon the assumption that there was evidence of manslaughter, which is exceedingly doubtful, as all the evidence tends to show that defendant was the aggressor, and, if there was a quarrel, that he brought it on and killed the deceased with malice, and not in hot blood, during a sudden quarrel, or upon legal provocation. The exception and assignment of error are not, therefore, sustainable and must be overruled.

All that we have said is based on the assumption that, if there was evidence of manslaughter, it was the duty of the judge to give a proper instruction in regard to it, whether he was asked to do so or not. This was decided in *State v. Merrick*, 171 N. C. 788, 88 S. E. 501, where we held, as shown by the third headnote:

"Upon a trial for murder, a verdict for a less grade of crime is permitted, and where the indictment is for murder, and there are facts in evidence tending to reduce the crime to manslaughter, it is reversible error for the trial judge not to submit this phase to the jury, under a proper charge, though not requested by the defendant to do so, and although he has offered to submit to a verdict of murder in the second degree, which has been refused"—citing *Revisal*, § 535.

[5] The exception to the judge's charge on reasonable doubt is untenable. He did say that the jury must be convinced "to a moral certainty," but he added:

"If you find from the evidence that the defendants, or either of them, committed the homicide, and you so find beyond a reasonable doubt, you will return a verdict of guilty as to the one or ones whom you so find."

This was stating the rule generally, but there was no request to state it more definitely, and, in the absence of such a request, the error, if any, is not available to the defendant. *Simmons v. Davenport*, 140 N. C. 407, 53 S. E. 225.

There is no special formula of the law for charging upon the doctrine of reasonable doubt. It was said in *State v. Adams*, 138 N. C. 688, 695, 50 S. E. 765, 767:

"There is no particular formula by which the court must charge the jury upon the intensity of proof. * * * 'All that the law requires is that the jury shall be clearly instructed, that unless after due consideration of all the evidence they are "fully satisfied" or "entirely

convinced," or "satisfied beyond a reasonable doubt" of the guilt of the defendant, it is their duty to acquit, and every attempt on the part of the courts to lay down a "formula" for the instruction of the jury, by which to "gauge" the degrees of conviction has resulted in no good.' We reproduce these words from the opinion delivered by Pearson, C. J., in *State v. Parker*, 61 N. C. 473, as they present in a clear and forcible manner the true principle of law upon the subject. The expressions we sometimes find in the books as to the degree of proof required for a conviction are not formulas prescribed by the law, but mere illustrations. *State v. Sears*, 61 N. C. 146; *State v. Knox*, Id., 312; *State v. Norwood*, 74 N. C. 247. The law requires only that the jury shall be fully satisfied of the truth of the charge, due regard being had to the presumption of innocence and to the consequent rule as to the burden of proof"—citing *State v. Knox*, supra.

The dictionaries define "moral certainty" as—

"A very high degree of probability, although not demonstrable as a certainty; a probability of so high a degree that it can be confidently acted upon in the affairs of life: as that there is a moral certainty of his guilt."

This expression that the evidence must produce a moral certainty of guilt was not, in any degree, prejudicial to the defendant, especially when it was immediately followed by what was said as to reasonable doubt, giving the prisoner the full benefit of that doctrine. As the full charge is not before us, it may be that the learned judge further elucidated the doctrine, and we would not impute error upon mere conjecture that he did not do so, even if this part of the charge, which is before us, was not precisely correct. But we see no substantial error in it as it stands.

[8] The charge that, if the jury found beyond a reasonable doubt the defendant committed the homicide, the verdict should be guilty, was somewhat too brief and general, but not so when considered in connection with the statement in the record that the judge charged the jury at length as to the case, and stated fully the contentions of the parties, to which there was no exception. In other words, he charged the jury correctly as to the case, or counsel would have excepted. It is the fair presumption that they would have excepted if there was error in the charge. We could not well presume otherwise with such able counsel, as the defendant had to protect his interests, and it is a fair and reasonable inference from this statement in the record that the charge covered the whole

range of questions involved in it, including, of course, instructions as to murder in the second degree, manslaughter, and excusable homicide, and that the verdict should designate the particular degree of homicide if the jury found defendant guilty of either one below murder in the first degree, which had been eliminated. As we have shown, the presumption is that the court instructed the jury correctly. When the charge is thus considered as an entirety, we cannot conclude that the jury misunderstood or disobeyed explicit instructions given to them.

[7] That the charge must be construed as one connected whole, and not by detached portions, has grown into an axiom of the law. *State v. Exum*, 138 N. C. 599, 50 S. E. 283; *Kornegay v. R. R.*, 154 N. C. 389, 70 S. E. 731; *In re Will of Hinton*, 180 N. C. 206, 216, 104 S. E. 341; *Haggard v. Mitchell*, 180 N. C. 255, 258, 104 S. E. 661; *State v. Chambers*, 180 N. C. 705, 708, 104 S. E. 670, and the many other intervening cases where the principle has been approved. If the charge is read under this rule with the proper presumption in favor of its correctness constantly kept in mind, we can have no doubt that the jury fully understood what they were trying, and were not led into the error of supposing that the mere commission of the homicide would justify them in returning a verdict of murder in the second degree, or even for manslaughter. The course of the trial, as it appears by the case on appeal and the verdict, shows that the jury clearly understood the case and the law "arising thereon." We do not see how they could have decided otherwise than they did. If they have found a wrong verdict, it was not the fault of the judge. Great stress was laid upon second degree murder by counsel in argument, in the hope and belief, perhaps, that the jury would be more apt to choose to acquit as between a verdict for the higher felony and one of "not guilty" than they would as between manslaughter and acquittal, and to those acquainted with court trials, this was a shrewd, and to a trained lawyer, a not unusual, view to take of the matter.

The defendant was no doubt most ably defended in the court below, and we know that Mr. Carter made an exceptionally strong defense of him before us.

The other exceptions, not specially discussed by us, although not mentioned in the defendant's brief, have been fully considered, and found to be without any merit.

We find no error in the case or the record. No error.

(152 N. C. 42)

BROWN v. BROWN. (No. 58.)

{Supreme Court of North Carolina. Sept. 14, 1921.)

1. Appeal and error §690(3)—Ground of exception must appear in record.

On appeal, grounds of exception to evidence must appear in record that the court may pass on its legal sufficiency, and appearance only in the exception or assignment of error is not sufficient.

2. Trial §165—On motion for nonsuit, only evidence favorable to plaintiff considered.

On motion for nonsuit, the court may consider only plaintiff's evidence, and so much of defendant's as is favorable to plaintiff, or supports his case.

Appeal from Superior Court, Washington County; Allen, Judge.

Suit by Mrs. Eva Brown against Henry Ward Brown, for divorce. From a decree for plaintiff, defendant, by guardian ad litem, appeals. No error.

This is an action for divorce a vinculo, upon the ground that the parties have lived separate and apart from each other for five years before the commencement of this action, and was brought under the provisions of Public Laws of 1921, c. 63. Plaintiff had previously obtained a decree for divorce from bed and board. Upon the findings of the jury, judgment was entered for the plaintiff granting her an absolute divorce. The defendant, being insane, appeared by guardian ad litem, who appealed from the judgment, and the only exception is that the court refused to nonsuit the plaintiff, it being stated in the exception that it appeared from the evidence that defendant had been an inmate of the state hospital a part of the statutory period of five years.

W. L. Whitley, of Plymouth, for appellee.

WALKER, J. (after stating the facts as above). [1] The evidence is not in the record, and therefore we are unable to determine whether the insanity so appeared or not, and besides, we should know, at least, the substance of the evidence in order to pass upon its legal sufficiency. We have often held that the ground of exception must appear in the record, and not only in the exception or assignment of error itself, which is the case here. State v. Jones (at this term) 152 N. C. —, 108 S. E. 376, citing Wilson v. Wilson, 174 N. C. 755, 94 S. E. 669;

In re Smith's Will, 163 N. C. 406, 79 S. E. 977; Todd v. Mackie, 160 N. C. 352, 76 S. E. 245; Allred v. Kirkman, 160 N. C. 392, 76 S. E. 244; Worley v. Logging Co., 157 N. C. 490, 73 S. E. 107. Those cases apply directly to the exception taken in this case, for, upon such a motion as one for a nonsuit, we must see what appears in the evidence, so that we may adjudge for ourselves whether the motion was well based. Besides, even the exception does not state from whose evidence the alleged fact appeared, and if from the defendant's alone, the motion was properly overruled. We accept the evidence as true upon such a motion, and view it in the light most favorable to the plaintiff, rejecting so much as is unfavorable to her, because the jury might do that very thing if the case were submitted to them. Morton v. Lumber Co., 152 N. C. 54, 67 S. E. 67; West v. Tanning Co., 154 N. C. 44, 69 S. E. 687.

[2] The court, on a motion for nonsuit, can only consider the plaintiff's evidence, and so much of the defendant's as is favorable to him or supports his case. Shives v. Eno Cotton Mills, 151 N. C. 290, 66 S. E. 141; Brittain v. Westhall, 135 N. C. 492, 47 S. E. 616; Daniel v. Railroad Co., 136 N. C. 517, 48 S. E. 816, 67 L. R. A. 455, 1 Ann. Cas. 718; Biles v. Railroad Co., 139 N. C. 523, 52 S. E. 129. Defendant, as is attempted here, cannot state evidence in his exception, not appearing in the case, and then demur to it or ask for a nonsuit, or a dismissal of the case.

But, if we should consider the verdict, though this is not permissible, the same result would follow. We get no more definite information from it than we do from the motion for a nonsuit, or from the other parts of the record. It finds that the defendant is now (at the time of the trial) an inmate of the asylum, but there is nothing in the verdict to show how long he has been there, or when he first became insane, or whether he has been continuously insane, and, if so, during what length of time. The record is entirely devoid of such information as we should have to decide the question intended to be presented, but which is not properly raised. We must therefore refuse to reverse the judgment, and grant a new trial.

If the plaintiff had asked us to do so, we would have dismissed the appeal for want of a brief for the defendant. 174 N. C. 837, 81 S. E. xii, rule 34. But she did not do so, and we have considered the case on its legal merits.

No error.

(182 N. C. 87)

(108 S.E.)

MORRIS v. KRAMER BROS. CO. (No. 16.)

(Supreme Court of North Carolina. Sept. 28, 1921.)

1. Trial \Leftrightarrow 29(3)—Reflections by judge on witness at any time during trial error.

It is error for a judge, at any time during a trial, to cast reflections on a witness tending to discredit him, under Revisal 1906, § 535; C. S. § 564, although such statute refers in terms to intimations and opinions by a judge in the charge.

2. Trial \Leftrightarrow 29(3)—Questioning ethics of witness during trial error.

A dialogue between a judge and witness, wherein it appeared that judge was questioning the ethics of action of witness, as an attorney from another state, in obtaining a release within the state, was erroneous and prejudicial, under Revisal 1906, § 535; C. S. § 564.

3. Appeal and error \Leftrightarrow 1046(5) — Error of judge in criticizing witness held not cured by attempt to correct.

Where judge in dialogue with witness criticized him by questioning the ethics of the witness, as an attorney from another state, in obtaining a release within the state, the error was not cured by an attempt on the part of the judge to correct the error by telling the jury that they were not to consider the matter.

Appeal from Superior Court, Pasquotank County; Allen, Judge.

Action by William Morris against the Kramer Bros. Company. Judgment for plaintiff, and defendant appeals. New trial.

This action was brought to recover damages for injuries alleged to have been caused by defendant's negligence. Plaintiff had been employed by the defendant to work in his sawmill, and was engaged, at the time of his injury, on the platform in loading sawed lumber upon trucks preparatory to hauling it to the dry kilns, or to the yard of the mill. The lumber was brought to the platform by a chain or conveyor, and, while so performing his duties, he was knocked from the platform by a heavy board, which had fallen from the conveyor, and injured. Plaintiff alleged negligence in several particulars. Defendant answered and denied that there was any negligence on their part, and pleaded assumption of risks and contributory negligence.

There was much evidence taken upon the questions of negligence, contributory negligence, and assumption of risks, and exceptions entered to rulings, but they need not now be considered, as we are of the opinion that a material error was committed in another respect. Defendant pleaded that the plaintiff had executed a release to them from all damages growing out of said alleged injury, and Mr. Hoag, an attorney at law of Norfolk, Va., who procured the release, was examined at length, as a witness for

the defendant, in regard to its execution, the plaintiff having alleged that the release was obtained by fraud or mistake. The following appears in the record of the case as to what occurred between the judge and the witness, during the redirect examinations of the witness Mr. Hoag:

At this point his honor, the jury being present, announced that he wanted to ask the witness a question, and did so as follows:

"Q. You say you are a lawyer in Virginia? A. Yes, sir.

"Q. Is it in accordance with your idea of professional ethics in Virginia for a lawyer to go to a man and approach him, if he has not brought any lawsuit, and get written statements from him? A. Absolutely so. We do not approach him if he has employed a lawyer first, but if he has not we do that quite frequently. It is considered ethical.

"Q. I wish you would show me one of the rules."

To all the foregoing questions by the court, the defendant, in apt time, objected. Objection overruled, and defendant excepts. His honor continued:

"I would like to see the ethics for my own information. Is it ethical for a lawyer of one state to go into another state and prepare a case when he is not licensed in that state? A. We have done that so frequently in Virginia without any question of the bar, just as a matter of information so I could make a settlement. I came here to ascertain the facts."

To the foregoing questions by the court, the defendant, in apt time, objected. Objection overruled, and defendant excepts. The court continues:

"I don't want the jury to be prejudiced against the witness on account of my asking these questions. It is so unusual for a lawyer from another state to come into the state, doing professional work, that I wanted to see what standard he was governed by.

"Q. You don't practice in this state? A. No, sir.

"I think it is the duty of the court to look into those matters and protect anything wrong going on, but I don't see anything wrong going on in this case. I think it is proper for the court to inquire, but the jury is not to consider it at all; it is a matter between witness and court, and he being a lawyer."

To the foregoing questions and statements by the court, the defendant, in apt time, objected. Objection overruled, and defendant excepts.

This dialogue between the judge and the witness was duly and specially excepted to by the defendant as it progressed, and has been assigned as error by it.

There was a verdict, followed by a judgment, for the plaintiff, and defendant appealed.

Hughes, Little & Seawell, of Norfolk, Va., and W. A. Worth, of Elizabeth City, for appellant.

Meekins & McMullan, of Elizabeth City, for appellee.

WALKER, J. (after stating the facts as above). We will repeat here what we said in *Bank v. McArthur*, 168 N. C. 48, at page 52, 84 S. E. 39, 40 (Ann. Cas. 1917B, 1054):

"We are of the opinion that the remark of the learned and unusually careful judge, in regard to calling [a certain witness] should not have been made, and was calculated, as an intimation, if not a direct expression, of opinion upon the facts, to prejudice the plaintiff, and is forbidden by the statute, which provides: 'No judge, in giving a charge to the petit jury, either in a civil or criminal action, shall give an opinion as to whether a fact is fully or sufficiently proven, such matter being the true office and province of the jury; but he shall state in a plain and correct manner the evidence given in the case, and declare and explain the law arising thereon.' There have been numerous decisions upon this statute, and this court has shown a fixed purpose to enforce it rigidly as it is written. There must be no indication of the judge's opinion upon the facts, to the hurt of either party, either directly or indirectly, by words or conduct. The judges should be punctilious to avoid it, and to obey the statutory injunction strictly. We are absolutely sure that they fully desire to do so, and their occasional expressions which have come before this court for review and held to be violations of the statute have evidently been inadvertent, but none the less harmful. The evil impression when once made upon the jury becomes well-nigh ineradicable. Judge Manly, who was one of the most eminent and just of our judges, said in *State v. Dick*, 60 N. C. 440: 'He [the presiding judge] endeavored to obviate the effect of his opinion by announcing in distinct terms the jury's independence of him, but this was not practicable for him to do. The opinion had been expressed and was incapable of being recalled. The object [of the statute] is not to inform the jury of their province, but to guard them against any invasion of it. The division of our courts of record into two departments—the one for the judging of the law, the other for the judging of the facts—is a matter lying on the surface of our judicature, and is known to everybody. It was not information on this subject the Legislature intended to furnish, but their purpose was to lay down an inflexible rule of practice, that the judge of the law should not undertake to decide the facts. If he cannot do so directly, he cannot indirectly; if not explicitly, he cannot by innuendo. What we take to be the inadvertence of the judge, therefore, was not cured of its illicit character by the information which he immediately conveyed. The error is one of the casualties which may happen to the most circumspect in the progress of a trial on the circuit. When once committed, however, it was irrevocable, and the prisoner was entitled to have his case tried by another jury.' And to the same effect did Justice Hoke speak in *State v. Cook*, 162 N. C. 586, citing and approving *S. v. Dick*: 'The learned and usually careful judge was evidently conscious that he had probably and by inadvertence prejudiced the prisoner's case, for he added: "But the court has no right to express an opinion about the case," but the forbidden impression had already been made, and as to the vital portion of the prison-

er's plea, and on authority, the attempted correction by his honor must be held inefficient for the purpose.' So in *State v. Ownby*, 146 N. C. at p. 678, we said: 'The slightest intimation from a judge as to the strength of the evidence or as to the credibility of a witness will always have great weight with the jury, and therefore we must be careful to see that neither party is unduly prejudiced by an expression from the bench which is likely to prevent a fair and impartial trial.' And again in the same case: 'We know that his honor unguardedly commented upon the testimony of the witnesses, but when the prejudicial remark is made inadvertently, it invalidates the verdict as much so as if used intentionally. The probable effect or influence upon the jury, and not the motive of the judge, determines whether the party whose right to a fair trial has thus been impaired is entitled to another trial.' Like views and cautionary requests to the judges were stated in *Withers v. Lane*, 144 N. C. 184, as follows: 'The learned and able judge who presided at the trial, inspired, no doubt, by a laudable motive and a profound sense of justice, was perhaps too zealous that what he conceived to be right should prevail; but just here the law, conscious of the frailty of human nature at its best, both on the bench and in the jury box, intervenes and imposes its restraint upon the judge, enjoining strictly that he shall not in any manner sway the jury by imparting to them the slightest knowledge of his opinion of the case.' The case of *Perry v. Perry*, 144 N. C. 330, repeats this injunction to observe the mandate of the statute, for it is there said: 'Any remarks by the presiding judge, made in the presence of the jury, which have a tendency to prejudice their minds against the unsuccessful party, will afford ground for a reversal of the judgment.' It is very strongly and urgently reiterated in *Park v. Exum*, 156 N. C. at page 228, as follows: 'The court has always been swift to enforce obedience to our law which forbids a presiding judge to express an opinion on the disputed facts of the trial, and under numerous decisions construing the statute we must hold this remark of his honor, in the presence of the jury and before the verdict, to be reversible error.'

We have cited these cases in order to show how very carefully this court has guarded the rights of parties under the statute. Revisal 1905, § 535; Consol Statutes, § 564. There are other and more recent cases in which reflections by the presiding judge upon a witness have been followed by reversals, and the attention of the judges directed to the language and meaning of this important statute, and among others are *Chance v. Ice Co.*, 166 N. C. 495, 82 S. E. 845, *State v. Rogers*, 173 N. C. 755, 91 S. E. 854, *L. R. A.* 1917E, 857, and *Ray v. Patterson*, 165 N. C. 512, 81 S. E. 778, and in some of those decisions the disparagement of the witness was not so pronounced, and certainly less harmful, than was the language of the judge in this case.

[1,2] It was considered so essential to protect the right of trial by jury that the statute was broadly worded, and was among

the earliest of our remedial enactments, and, while it refers, in terms, to the charge, it has always been construed as including the expression of any opinion, or even an intimation of the judge, at any time during the trial, calculated to prejudice either of the parties. *Park v. Exum*, 156 N. C. 228, 72 S. E. 309; *Withers v. Lane*, 144 N. C. 184, 56 S. E. 855; *State v. Dick*, 60 N. C. 440, 86 Am. Dec. 439; *Pell's Revisal*, § 535.

[3] The learned and just judge attempted to correct the error into which he fell by the remarks he made and the criticism of Mr. Hoag, and his conduct as an attorney acting in behalf of his client, but there is nothing better settled by our cases than that he cannot do so, for the harm is ineradicable. *State v. Dick*, supra; *State v. Cook*, supra. When the damage is once done, it cannot be repaired, because, as we know, the baneful impression on the minds of the jury remains there still. What a judge says in condemnation of a witness is generally fatal to the party in whose behalf he testifies. The witness stands before the jury, not only impeached, but thoroughly discredited. What the judge says in disparagement of him counts for far more than witnesses or counsel may utter against him. It would be dangerous to hold otherwise. There are other cases than *State v. Dick*, supra, and *State v. Cook*, supra, in which this court has held that the impeachment of a witness, emanating from the judge, becomes so deep-seated in the minds of the jury, as to be beyond the reach of the judge, however much he may endeavor to counteract its evil influence, and it will, at least, leave the party once prejudiced by it so completely handicapped as to prevent that fair and impartial trial which the law guarantees to him and to which he is justly entitled. One word of untimely rebuke of his witness may so cripple a party and blast his prospects in the case, as to leave him utterly helpless before the jury.

It must not be understood that we think that the judge was at all sensible, at the time, of the effect of his remarks upon the jury, for we know that he was not, and that they were made inadvertently and unconsciously. The case then is brought directly within the language of this court quoted from *Withers v. Lane*, supra. For the judge even to intimate that the conduct of the witness, an attorney, was unprofessional and unethical was undoubtedly calculated to prejudice the defendant, whatever in the way of explanation or atonement of it he may have said afterwards and however praiseworthy the motive or intention of the judge may have been. The enforcement of a moral principle, when time and occasion call for it, is highly commendable, but the statute does not permit it to be

done from the bench, when the rights of one of the parties may be seriously impaired, if not destroyed, by it. We close this branch of the discussion with what was said by the court in *Chance v. Ice Co.*, 166 N. C. 495, at page 497, 82 S. E. 845, 846:

"We are quite sure that it was not intended to prejudice the defendant's case by the able and painstaking judge who tried this case, but it undoubtedly was well calculated to prejudice the jury against that particular witness, and was practically an expression of opinion upon the part of the judge as to the credibility of such witness."

To the same effect is the language of the Chief Justice in *Ray v. Patterson*, 165 N. C. 512, 81 S. E. 773.

As the case must go back for another trial, it is not necessary to discuss the other questions raised. We may, however, say that there appears to be some evidence of negligence on the part of the defendant, and the references to the insurance company, in one phase of the case, were relevant, though they may, in some respects, have gone too far.

We order a new trial, for the error of the judge in his remarks to Mr. Hoag, defendant's witness.

New trial.

(182 N. C. 77)
KANNAN et al. v. ASSAD. (No. 64.)

(Supreme Court of North Carolina. Sept. 28, 1921.)

1. Estoppel §68(2) — Admissions made by party during trial cannot be withdrawn after verdict.

Where party, during trial and before verdict, solemnly made certain admissions, he should not be permitted to withdraw the admissions after verdict.

2. Landlord and tenant §310(1) — Judgment declaring forfeiture of lease held sufficiently supported by findings.

In a summary proceeding in ejectment, where the issue, "Did defendant fail to perform on his part the terms of said contract?" was answered in the affirmative, and the parties conceded at the trial that such failure to perform would constitute a breach forfeiting the lease, a judgment declaring forfeiture was supported without a recital therein that forfeiture resulted from the breach.

3. Trial §343 — Verdict interpreted by reference to pleadings, evidence, admissions, and charge.

The verdict of a jury may be given significance and correctly interpreted by reference to the pleadings, evidence, admissions of the parties, and the charge of the court.

Appeal from Superior Court, Wilson County; Calvert, Judge.

Action by Charles Kannan and others against H. Assad. From judgment for plaintiffs, and from refusal to enter contrary judgment on the verdict, defendant appeals. No error.

Summary proceedings in ejectment tried originally before a justice of the peace, and then de novo upon appeal in the superior court, where the following verdict was rendered by the jury :

"(1) Did plaintiff and defendant enter into a contract for the rental of the property in question for a term of three years beginning February 25, 1921? A. Yes.

"(2) Did defendant, Assad, fail to perform on his part the terms of said contract? A. Yes.

"(3) What is the reasonable rental value per month of the property? A. \$20."

As bearing upon the meaning and sufficiency of the issues, the following appears in the record :

"At the close of the testimony, attorneys for both plaintiffs and defendant and the court indulged in some discussion as to the proper issues to be submitted. During the course of the discussion it was conceded by attorneys for both plaintiffs and defendant that, if the jury should find that the plaintiffs and defendant did enter into a contract for the rental of the property for a period of three years beginning February 25, 1921, and should further find that the defendant had failed on his part to do and perform the things that he had agreed to do as to the making of the repairs, such breach on the part of the defendant, Assad, would constitute a forfeiture of the rental contract. The whole case was tried upon the theory that, if the jury should find that the contract was entered into, as they did find, and should further find that the defendant had failed to perform on his part, as the jury did find, then such failure would constitute a breach of contract. Counsel for both plaintiffs and defendant conceded this position before the court, and in the argument of the case before the jury. It was only after the jury had returned the verdict that any point was made by the defendant that he was entitled to judgment upon the verdict."

From a judgment declaring the lease forfeited, and that the plaintiffs are entitled to the immediate possession of the premises, and from his honor's refusal to enter a contrary judgment on the verdict, the defendant appealed.

O. P. Dickinson, of Wilson, for appellant.
W. A. Finch, of Wilson, and Connor & Hill, of Wilson, for appellees.

STACY, J. We do not think the defendant is entitled to a judgment on the verdict in

view of the admissions and concessions made in open court, and before the rendition of the verdict. The case was tried on a different theory, with a different understanding, and it would seem that the defendant ought to be content with the result.

[1] It is well understood that, except in proper instances, a party to a suit should not be allowed to change his position with respect to a material matter during the course of litigation, nor should he be allowed to "blow hot and cold in the same breath." *Ingram v. Power Co.*, 181 N. C. 359, 107 S. E. 209; *Lindsey v. Mitchell*, 174 N. C. 458, 93 S. E. 955. A fortiori, after a verdict has been rendered against him, he should not be permitted to withdraw his admissions solemnly made on trial. This would not be conducive to the ending of litigation, a policy much favored in the law. *Webb v. Rosemond*, 172 N. C. 848, 90 S. E. 306; *Coble v. Barringer*, 171 N. C. 445, 88 S. E. 518, L. R. A. 1916E, 901.

[2] His honor might well have found as a fact, and embodied it in his judgment, that an affirmative answer to the second issue was conceded to mean, and admittedly would work, a forfeiture of the lease. This would have cured any apparent irregularity. But we think the judgment is supported by the record, and is entirely sufficient without such finding being incorporated therein.

[3] It has been held with us in a number of cases that the verdict of a jury may be given significance and correctly interpreted by reference to the pleadings, the evidence, admissions of the parties and the charge of the court. *Howell v. Pate*, 181 N. C. 117, 106 S. E. 454; *Reynolds v. Express Co.*, 172 N. C. 437, 90 S. E. 510, Ann. Cas. 1918C, 1071; *Bank v. Wilson*, 168 N. C. 557, 84 S. E. 866. Tested by this rule or standard, we have experienced no difficulty in arriving at the conclusion that the judgment below should be affirmed.

"He that sweareth to his own hurt, and changeth not," is promised an abiding place, from whence he "shall never be moved" (Psalm xv), but the present defendant apparently has not brought himself within the protection vouchsafed to this class. He invokes the promise, and asks not to be moved, because he has spoken to his own hurt, but he seems unwilling to comply with the steadfast or "changeth not" condition.

After a careful consideration of the defendant's exceptions and assignments of error, we conclude that the judgment of the superior court must be upheld; and it is so ordered.

No error.

In re HAMILTON. (No. 23.)

(Supreme Court of North Carolina. Sept. 21, 1921.)

1. Infants \S 16—Irregular transfer of cause by superior court immaterial where case was later heard by it on appeal from juvenile court.

Under O. S. \S 5039 et seq., providing that the superior court shall have exclusive original jurisdiction in case of a child less than 18 years of age whose custody is the subject of controversy, and that the clerk of the superior court shall be judge of the juvenile court, and allowing an appeal from the juvenile court to the superior court, a judge of the superior court has authority to hear a dispute over the custody of such child either on institution of proceedings therein or on appeal from the juvenile court, and an irregularity of an order of the superior court transferring cause to the juvenile court makes no material difference, where it was heard by the superior court on appeal.

2. Infants \S 16—Superior court has authority to review findings of fact and the judgment of its clerk sitting as a judge of juvenile court.

The superior court has authority to review findings and judgment of the clerk sitting as a judge of the juvenile court.

3. Appeal and error \S 1010(1)—Findings of fact of superior court made on competent evidence held binding on appellate court.

Findings of fact made by a judge of the superior court found on competent evidence are conclusive on the appellate court.

4. Habeas corpus \S 99(3)—Right of father to custody of infant child held not an absolute right.

Although prima facie a parent has a right to the custody of his child in preference to others, this right is not absolute, and must yield when the best interest of the child requires it.

5. Habeas corpus \S 99(5)—Findings of fact held to warrant refusal to award custody of child to his father.

Where the trial court found as facts that the father of the child was not a fit, suitable, or proper person to have care or custody of it, and that the child was afflicted by spinal trouble, requiring treatment by specialist, and that its grandparents, who had it, were able and willing to provide this treatment, and were proper persons to have the custody of the child, and that its father had practically abandoned it, a refusal to award custody of the child to its father will be sustained.

Walker, J., dissents.

Appeal from Superior Court, Beaufort County; Allen, Judge.

In the matter of the custody of Rosa Gray Hamilton, an infant. Petition for writ of habeas corpus by R. H. Hamilton against George D. Davis and wife. From a judgment for respondents, petitioner appeals. Affirmed.

This is a petition for a writ of habeas corpus to determine the right to the custody of a child then about 15 months of age. The petition was filed before one of the judges of the superior court, who transferred the same to the juvenile court. The judge of the juvenile court heard the affidavits and evidence, and made his findings of fact, and adjudged that the petitioner, who is the father of the child, was entitled to her custody. The respondents, who are the maternal grandparents of the child, appealed to the judge of the superior court, who heard the evidence and affidavits, and reversed the findings and order of the clerk, and adjudged that the respondents were entitled to the custody of the child. The following are the facts found by his honor, and his order thereon:

"(1) That the petitioner, R. H. Hamilton, in November, 1917, married Aleen Davis, daughter of respondents, George D. Davis and Bettie Davis, against the will of her parents, and that, in the fall of 1918, the infant, Rosa Gray Hamilton, was born. That in January, 1919, the said Aleen Hamilton contracted influenza, and in February, 1919, was carried, at her request, by the said R. H. Hamilton, her husband, to the home of respondents, the father and mother of Aleen Hamilton, where she and her child, Rosa Gray Hamilton, then 4 months of age, remained, the said Aleen Hamilton continuing in poor health and requiring care and medical attention. That, following influenza, and as a consequence thereof, the said Aleen Hamilton developed tuberculosis, and on December 28, 1919, died at the home of her parents.

"(2) That during the time the said Aleen Hamilton and her infant child, Rosa Gray Hamilton, were at the home of her parents, the respondents herein, the said R. H. Hamilton, petitioner, furnished nothing for the support and maintenance, medicine, or medical attention of said Aleen Hamilton or the infant child, with the exception of one bottle of Wampole's Cod Liver Oil and a small quantity of fresh meat, both of which were furnished in February, 1919, notwithstanding the request of said Aleen Hamilton of her husband, the said R. H. Hamilton, that he contribute to the support of her and their child, nor did he visit them after February, nor show the personal attention which indicated any interest in them and their welfare, living at the time not more than one mile away, and that his conduct and attitude during the year 1919 constituted an abandonment of his wife and child.

"(3) That on the 6th day of August, 1919, the said Aleen Hamilton, wife of petitioner, realizing that she could not live, made her last will and testament, which was prepared by her in her own handwriting, and without suggestion or influence from others, wherein she directed that her child, Rosa Gray Hamilton, be left in the care, custody, and jurisdiction of George Davis and Bettie Davis, the respondents, during their lifetime, and at their death to her sister, Ina Davis, which is set out in the record.

"(4) That during the entire time from Febru-

ary, 1919, until the death of Aleen Hamilton, respondents, George D. Davis and Bettie Davis, provided for and supported the said Aleen Hamilton, providing for her medical attention and medicine, and paying all of her funeral expenses, except \$25 on a coffin, upon which the respondents paid \$75, and the petitioner paid \$25.

"(5) That the respondents rent a comfortable home in the town of Pantego, have educated all of their children in the Pantego High School, their two daughters having held certificates as teachers. That respondents are members of the Christian Church, and are people of good character, and able to provide for the tuition and education of the said infant child, Rosa Gray Hamilton.

"(6) That the said Rosa Gray Hamilton is afflicted with spinal trouble, requiring the treatment of a specialist, and respondents are ready, able, and willing to provide this treatment for the child, and have frequently offered and endeavored to do so since this cause has been pending.

"(7) That the petitioner, R. H. Hamilton, is 35 years of age, has no property, and is unthrifty; and should said infant child be awarded to him, it will be in effect awarding her to the custody of his father and mother, at whose home he lives, while, if the custody of the child is left with George D. Davis and Bettie Davis, the parents of the dead mother, she would have the advantage not only of the care of her maternal grandmother and grandfather, but also of the sister of the dead mother, Ina Davis, whom the court finds to be a young woman of character, refinement, and education, and whose influence will be an advantage to said infant in her upbringing.

"(8) That the petitioner, R. H. Hamilton, is not a fit, suitable, or proper person to have the care and custody of this infant girl child, now a little more than 2 years of age, and that the best interest and welfare of the said child will be subserved by leaving her in the custody and care of respondents; and it is so ordered. The order of the clerk is reversed."

From this judgment, awarding the custody of the child to the respondents, the petitioner appealed.

Tooley & McMullan, of Belhaven, for appellant.

Ward & Grimes and Small, MacLean, Bragg & Rodman, all of Washington, N. C., for appellees.

STACY, J. [1] The juvenile court act (C. S. 5039 et seq.) provides that the superior courts shall have exclusive original jurisdiction of any case of a child less than 16 years of age "whose custody is subject to controversy." By this same law, juvenile courts are established as separate parts of the superior courts for the administration of the act, and the clerk of the superior court of each county is made the judge of the juvenile court. It is also provided in a later section that the term "court," when used without modification, shall refer to the juvenile court, and that an appeal may be taken from any

judgment or order of the juvenile court to the superior court. It thus appears that the act confers jurisdiction upon the superior courts, and that the juvenile courts, as separate parts (but not necessarily as independent parts) of the superior courts of the district, have been created and organized for the administration of the law and for the hearing of matters and causes arising thereunder. *State v. Coble*, 181 N. C. 554, 107 S. E. 132. Again, in *State v. Burnett*, 179 N. C. 740, 102 S. E. 711, it was held that the act—

"creates no limitations on the jurisdiction of the superior court in these cases which, under the first sections of the act and by virtue of its powers, as a court of general jurisdiction administering both law and equity, may always, on proper application and appropriate writs, make inquiry and investigations into the status and conditions of children disposed of under the statute, and make such orders and decrees therein as the right and justice of the case may require."

This supervision and oversight of the superior courts, of course, should be exercised in an orderly way, by appeal from the juvenile court, where such is provided by the statute, and otherwise by appropriate writ, where no appeal is available.

Assuming this to be the proper interpretation of the law, we need not consider the regularity of the order transferring or sending the petition to the juvenile court for original investigation. This could have no effect upon the jurisdiction of the superior court, nor would it make any material difference, for, when the matter again reached the judge of the superior court, he had ample authority to hear the case, either because it was properly instituted in the first instance, or by virtue of the appeal from the juvenile court. Therefore, viewing it in any light, the case was competently before the superior court in the last instance for final adjudication.

[2] His honor also had authority to review the findings of fact and judgment of the clerk, which were under the supervision and control of the superior court. *Mills v. McDaniel*, 161 N. C. 112, 76 S. E. 551.

[3-5] The findings of fact made by the judge of the superior court, found, as they are, upon competent evidence, are also conclusive on us (*Stokes v. Cogdell*, 153 N. C. 181, 69 S. E. 65), and we must therefore base our judgment upon his findings, which amply sustain his order. We recognize fully the principle that prima facie the parent has the right to the custody of his child in preference to others, but that this right is not an absolute one and must yield when the best interest of the child requires it (In re Warren, 178 N. C. 43, 100 S. E. 76), and his honor has found as a fact that the petitioner "is not a fit, suitable, or proper person to have the care and custody of this infant girl, and that the best interest and welfare of the child

will be subserved by leaving her in the custody and care of the respondents." He also finds that the child is afflicted in an unusual way by spinal trouble, requiring the treatment of a specialist, and that the respondents are ready, able, and willing to provide this treatment for the child, and have frequently offered and endeavored to do so, and that the petitioner had practically abandoned his family prior to the death of his wife.

Upon the record, the judgment of the superior court must be sustained.

Affirmed.

WALKER, J., dissents because the court did not have the requisite jurisdiction under the juvenile court statute, and further because, if it had such jurisdiction, there was not any evidence that justified the findings as to fact and law, or which should deprive the father of, or impair his preferential right to, the custody of his child. One of the most important and essential facts was not found by the court below, and the failure of the father to visit his wife and child, if there was such a failure, is fully explained by the testimony, which shows that it was not the father's fault, but the fault of those who now seek to retain the custody of the child. The right of the father, in my opinion, should be upheld upon the principle so often applied by us in such cases, when the father's natural right was recognized and enforced. *Newsome v. Bunch*, 144 N. C. 15, at page 18, 56 S. E. 509, 510. In that case, this court said (and it is strikingly applicable to the facts in this appeal):

"While the court, in the exercise of a sound discretion, may order the child into the custody of some person other than the father, when the facts and circumstances justify such a disposition of the child, we do not think that any such case is presented in this record as should induce us to adopt that course and except this case from the general rule. The father has done nothing by which he has incurred a forfeiture of his right to the custody of his offspring. There is no room for the exercise even of a sound discretion in favor of the grandparents who now have possession of the child. Speaking for himself, and not committing the court to his view, the writer of this opinion would hesitate to remove the child from its present custody if the law were more elastic, and we were vested with a larger discretion than is given by the law. We must follow the precedents and the general principles of justice established by them, though the result may be contrary to what we may consider as the real merits of the particular case, and though by the facts, even as found by the court, our sympathies may be enlisted in behalf of the grandparents. The insistence upon his strict right under the circumstances may not be very creditable to the petitioner, yet the law is inexorable in such a case, and cannot be made to yield in deference to a mere sentiment or to a tender regard for the feeling of one of

the parties; nor, are we permitted to exercise an arbitrary discretion."

The *Newsome* Case has been frequently approved and affirmed. In *re Jones*, 153 N. C. 312, 69 S. E. 217, 138 Am. St. Rep. 670; In *re Turner*, 151 N. C. 474, 66 S. E. 431; In *re Fain*, 172 N. C. 790, 90 S. E. 928; *Howell v. Solomon*, 167 N. C. 588, 83 S. E. 609; *Brickell v. Hines*, 179 N. C. 254, 102 S. E. 309, where the cases are collected. See, also, *Latham v. Ellis*, 116 N. C. 30, 20 S. E. 1012.

The mother of this child is dead. The father is able to take care of the child, and, if the evidence is at all credible, is better able to do so than those to whom its custody has been awarded. It has been said by this court in the cases above cited that the parent has the preferred right of custody, and for cogent reasons, and in *Brickell v. Hines*, supra, by Justice Hoke, that this right, "being a natural and substantive right, may not be lightly denied or interfered with by action of the courts." It is true, as we have often held, that the welfare of the child deserves, and should have, consideration, but the court should proceed cautiously, and not deprive the father of his right except upon clear and strong evidence, which is not present in this case.

(182 N. C. 80)

DUNCAN v. OVERTON et al. (No. 119.)

(Supreme Court of North Carolina. Sept. 28, 1921.)

1. Pleading ¶127(2) — Automobile owner's knowledge of use by son held to justify inference of consent.

In an action for injury caused by defendant's son in negligently operating the father's automobile, *held*, that an admission by answer that the son was driving his father's car with the knowledge of the father justifies the inference that it was done with the father's consent.

2. Master and servant ¶305 — Automobile driver's deviation held not to release master.

A father, having placed his son in charge of an automobile to carry him to a college, and thence to a garage, is responsible for injuries accruing from the negligence of the son while in charge of the auto, and is not released therefrom by an incidental divergence in discharging the duty intrusted to the son before reaching the garage.

Appeal from Superior Court, Chatham County; Devin, Judge.

Action by Annie W. Duncan and husband against J. D. Overton and D. H. Overton. From judgment for plaintiff, defendant J. D. Overton appeals. **Affirmed.**

Little & Barnes, of Raleigh, for appellant.

Manning, Bickett & Ferguson, of Raleigh, for appellee.

CLARK, C. J. There are two exceptions; one that the court should have charged the jury as prayed; that if they believed the evidence they should answer the first issue "No" as to the defendant J. D. Overton. The other exception is that there should have been a nonsuit as to the defendant J. D. Overton. There is thus no question raised as to the negligence or the amount of the damages. The sole question is as to the liability of J. D. Overton, the owner of the machine, and the father of the other defendant, who was the driver whose negligence, as the jury find, was the cause of the injury.

In the second paragraph of the complaint it is alleged that—

"The defendant, J. D. Overton was the owner of the automobile which was being driven with his knowledge by his son, D. H. Overton, in the city of Raleigh, at the time hereinafter mentioned."

[1] This allegation is admitted in the answer. This admission that the minor defendant was driving the car with the knowledge of his father justifies the inference that it was done with his consent (*Taylor v. Stewart*, 172 N. C. 206, 90 S. E. 134), and indeed this case falls within the principle laid down in *Tyree v. Tudor*, 181 N. C. 214, 106 S. E. 675, in that his father admits that he authorized the son to use the car on this occasion. According to the defendant's evidence the father had directed his son to drive this car from Nashville to Raleigh, to carry himself and his luggage to the A. & E. College, and thereafter to take the car to the garage in Raleigh for repairs. The son testifies that he met some other college students at the Union Depot and was conveying them and their suitcases in the car to the college at the time the injury to the plaintiff occurred.

[2] The court instructed the jury:

"If you should find from the evidence that the defendant J. D. Overton, who was the owner of the car, only gave permission to his son to take the car to the garage for repairs directly after having gone to the college, and that his instructions in this respect were disobeyed by his son without the knowledge or consent of J. D. Overton, and that the son was not accustomed to drive the car without the express permission of J. D. Overton, then you would answer the first issue 'No' as to J. D. Overton; but if you should find from the evidence and the greater weight thereof that it was customary for the son to drive the car, or that at the time of the injury he was engaged in carrying out the father's instructions, then the defendant D. H. Overton would be the agent of the defendant J. D. Overton, and the said J. D. Overton would be liable for the acts of his agent; and if you should find from the evidence and the greater weight thereof that there was negligence, you would answer the issue 'Yes' as to both defendants."

There is no assignment of error to this charge, nor that it is not justified by the

evidence. We do not think that the defendant has any cause to claim that he was prejudiced thereby. The case on appeal states that there was other evidence on the part of the plaintiff which the appellant does not set out in his case on appeal.

Indeed, we think the law is stricter against the defendant than as stated in the charge. The father, having placed his son in charge of the machine to bring it from Nashville to the A. & E. College at Raleigh, and thence to the garage, is responsible for injuries accruing from the negligence of his agent while in charge of the machine on that errand, and is not released therefrom by any incidental divergence in discharging the duty intrusted to him before the driver reached the garage, such as is testified to in this case.

No error.

(182 N. C. 768)

NATIONAL BANK OF HOPEWELL v. CARSON. (No. 184.)

(Supreme Court of North Carolina. Oct. 5, 1921.)

Appeal and error ⇐1023—Exceptions overruled where chief controversy was determined by special finding of jury.

Where the chief controversy in suit on note was whether plaintiff was holder in due course and the jury specially found that he acquired the note in good faith, for value, before maturity, and without notice of any defect or failure of consideration, exceptions appearing in the record on appeal will be overruled.

Appeal from Superior Court, Pitt County; Devin, Judge.

Action by the National Bank of Hopewell against S. T. Carson. From judgment for plaintiff, defendant appeals. No error.

Civil action to recover the face value of defendant's promissory note, executed and delivered to the Limestone Products Company, and, by the latter concern, sold and transferred to the plaintiff bank.

Upon denial of liability and issues joined, the jury returned the following verdict:

"(1) Did the plaintiff acquire the note sued on, in good faith for value, before maturity, and without notice of any alleged defect or failure in consideration of said note? Ans. Yes.

"(2) What amount, if any, does the defendant owe on said note? Ans. \$1,200 with interest."

From a judgment on the verdict in favor of plaintiff, the defendant appealed.

Julius Brown, of Greenville, for appellant.
G. M. T. Fountain & Son, of Tarboro, and
F. G. James & Son, of Greenville, for appellee.

PER CURIAM. The controversy on trial in the superior court narrowed itself principally to the question as to whether the plaintiff was a holder in due course (C. S. § 3033) of the note sued on, under the doctrine announced in *Bank v. Exum*, 163 N. C. 199, 79 S. E. 498, and *Worth Co. v. Feed Co.*, 172 N. C. 342, 90 S. E. 295. This fact having been established in plaintiff's favor by the jury's answer to the first issue, we think the exceptions appearing in the record must be overruled. The case presents no new point, or issue, which would seem to merit an extended discussion.

No error.

(182 N. C. 107)

ROSE v. FREMONT WAREHOUSE & IMPROVEMENT CO. et al. (No. 120.)

(Supreme Court of North Carolina. Oct. 5, 1921.)

1. Pleading \Leftrightarrow 195 — Owner's counterclaim against contractor and cross-complaint against architects held demurrable for misjoinder of parties and causes of action.

In contractor's action against owner for balance due on contract, owner's pleading, complaining that the building was improperly constructed, set up as a counterclaim against the contractor and as a cross-action against architects whose contract with owner provided merely for the preparation and delivery of the plans and specifications, without alleging privity of contract or community of interests between the contractor and architects, held demurrable; there being a misjoinder of both parties and causes of action.

2. Pleading \Leftrightarrow 218(1) — Court cannot order separation where there is misjoinder of both parties and causes of action.

Where there is a misjoinder of both parties and causes of action, the court on demurrer cannot order a separation or division under C. S. § 516.

Appeal from Superior Court, Wayne County; Lyon, Judge.

Action by W. P. Rose against the Fremont Warehouse & Improvement Company, in which Benton & Benton were made parties and in which the defendant set up a pleading by way of cross-action and counterclaim, to which Benton & Benton demurred. Demurrer sustained, and defendant appeals. Affirmed.

Civil action to recover the balance due on a building contract. Upon motion of the defendant, Fremont Warehouse & Improvement Company, the architects, Benton & Benton, who drew the plans and specifications for said buildings, were made parties defendant. The original defendant then answered, admitted the plaintiff's contract, but set up

by way of cross-action and counterclaim the following:

"That by the terms of the contract entered into between the plaintiff and this defendant the plaintiff agreed to have said buildings constructed in a proper and workmanlike manner, which, as this defendant is informed and believes, he failed to do, in that the roof trusses of both of said tobacco warehouses were improperly constructed by the plaintiff, and that by reason of said defective construction the said trusses have buckled, thereby rendering the roofs of said warehouses unsafe and dangerous and thereby rendering said buildings defective and unworkmanlike in their construction; or that if the buckling of the trusses is not caused by improper and unworkmanlike construction by said plaintiff, it is due to the defective plans and specifications prepared and delivered by said defendants Benton & Benton; and that by reason of the said improper and unworkmanlike construction or by reason of the defective plans and specifications, or by reason of both the improper and unworkmanlike construction and the defective plans and specifications, this defendant is damaged in the sum of \$20,000."

Benton & Benton demurred to this pleading upon the ground of a misjoinder of parties and causes of action. The demurrer was sustained, and the defendant, Fremont Warehouse & Improvement Company, appealed.

E. M. Land and Dickinson & Freeman, all of Goldsboro, for Fremont Warehouse & Improvement Co.

W. A. Lucas, of Wilson, and Langston, Allen & Taylor, of Goldsboro, for Benton & Benton.

STACY, J. [1] It will be observed from the allegations of the defendant's cross-action and counterclaim that the architects, who furnished the plans and specifications, did not undertake to superintend the erection and construction of the buildings. Their agreement called for the preparation and delivery of the plans and specifications and no more. The buildings were constructed by the plaintiff, but without assistance from or consultation with the architects. There is no allegation of any privity of contract or community of interests between the contractor and the architects. Indeed, they seem to have been employed at different times and for different purposes. Therefore the defendant's cross-action against Benton & Benton is based upon one contract, and its counterclaim against the plaintiff is founded upon another. The two causes of action are separate and distinct; they are set up against different parties, and they are incorporated in the same pleading. This is demurrable. *Roberts v. Mfg. Co.*, 181 N. C. 204, 106 S. E. 664; *Lee v. Thornton*, 171 N. C. 209, 88 S. E. 232; *Cromartie v. Parker*, 121 N. C. 198, 28 S. E. 297; *Quarry Co. v. Construction*

Co., 151 N. C. 345, 66 S. E. 217, and cases cited.

The several causes of action which may be united or joined in the same complaint are classified and enumerated in C. S. § 507; and, in addition, the following limitation is expressly incorporated therein:

"But the causes of action so united must all belong to one of these classes, and, except in actions for the foreclosure of mortgages, must affect all the parties to the action, and not require different places of trial, and must be separately stated."

Under a proper interpretation of this section we think his honor's ruling, sustaining the demurrer, must be upheld.

[2] But it is contended that if the two causes of action have been improperly united in the same pleading, his honor should have ordered a separation or division under C. S. § 516. It is well settled, by a number of decisions, that this cannot be done where there is a misjoinder of both parties and causes of action. *Roberts v. Mfg. Co.*, supra; *Morton v. Tel. Co.*, 130 N. C. 299, 41 S. E. 484; *Thigpen v. Cotton Mills*, 151 N. C. 97, 65 S. E. 750; *Campbell v. Power Co.*, 166 N. C. 488, 82 S. E. 842.

Upon the record, we think his honor was correct in sustaining the demurrer and dismissing the defendant's cross-action as to *Benton & Benton* in this particular proceeding.

Affirmed.

(182 N. C. 114)

McCALL et al. v. LEE, et al. (No. 221.)

(Supreme Court of North Carolina. Oct. 5, 1921.)

Frauds, statute of § 108(5) — **Petition of record on which judgment was entered held sufficient memorandum of contract.**

Within C. S. § 988, declaring void a contract to convey lands unless some memorandum thereof be put in writing and signed by the party to be charged, petition signed by a mother, reciting agreement of her children to convey to her their interests in their father's estate, her agreement thereupon to convey to them equal interests in the combined properties of herself and of the deceased father, conveyances to her pursuant thereto by the children, other than a minor, and asking approval by the court of a conveyance to her of the interests of the minor, which was thereupon granted, is a sufficient memorandum relative to her liability to make conveyance to one of the other children in accordance with her agreement.

Appeal from Superior Court, Sampson County; Lyon, Judge.

Action by Samuel Horace McCall, Jr. (who before adoption was Eugene Scott Lee), by his next friend, and others, against C. M.

Lee, administratrix, and others. Judgment for plaintiffs, and defendants appeal. No error.

Lovett Lee died intestate in Duplin county, in March, 1916, leaving him surviving his widow, the defendant C. M. Lee, and seven children. The widow qualified as administratrix. She proposed to said children that, if they would convey to her the entire real and personal estate which they had inherited from their father, she would combine the same with her estate, and, putting the whole in hotchpotch, she would divide the whole of their father's estate combined with the greater part of her own estate (most of which had been conveyed to her by her husband by deeds of gift), and would make an equal division of both estates among the seven children. They accepted the offer, and all the children made her such conveyances by deed of gift for their shares in the real and personal estate of their father, except James Lovett Lee, who was a minor. As to him, she instituted a special proceeding in which she recited all the above facts in a petition signed and sworn to by her, and a commissioner was appointed, who made a conveyance upon these terms to his mother, upon the promise and agreement that she would in turn combine her husband's estate with the greater part of her own estate (acquired largely from her husband) and make an equal division of both estates among her said children, and make deeds to each of them for one-seventh thereof.

Thereupon C. M. Lee, the mother, in accordance with said contract, made a deed to each of her said children except her son Harry B. Lee (who was the first one to convey to her his interest in his father's estate, in pursuance of her proposition) for an equal share, and thereby carried out in good faith her agreement with all her children except with Harry B. Lee.

After her son Harry B. Lee made his deed to his mother on May 28, 1918, he married on June 10, 1918, and died in October, 1918, leaving the plaintiff Clara E. Lee, his widow, and an infant son, Eugene Scott Lee, who is represented in this action by his next friend, his grandfather, Horace McCall. C. M. Lee refused to execute a deed to said Harry before his death, or to his widow and son after his death (it is alleged because she was displeased with his marriage), but, in violation of the contract with Harry, she retained all his share in the real and personal estate of his father, and has deprived Harry and his widow and son of the share in his father's estate, which he conveyed to her, and also of any share in hers.

The jury found on the issue submitted to them in accordance with the above statements of fact. All the brothers and sisters were made parties defendant, and the administrator of Harry B. Lee was also a party

plaintiff. Judgment accordingly, and the defendants appeal.

Stevens, Beasley & Stevens, of Warsaw, and Fowler & Crumpler, of Clinton, for appellants.

Butler & Herring, of Clinton, for appellees.

CLARK, C. J. The following issue was submitted to the jury:

"Was the deed dated August 28, 1918, from Harry B. Lee to C. M. Lee made in pursuance of a contract and agreement that, when the children of her deceased husband, Lovett Lee, should convey to her their respective interests in the real and personal estate of her deceased husband, thereby combining her estate with her husband's estate, she would then in turn make deed to her children and each of them for a one-seventh of her husband's estate, together with the greater portion of her own individual estate?"

To which the jury responded "Yes."

The judgment, reciting the uncontradicted evidence and admissions in the pleadings, adjudged that—

"the plaintiffs recover of the defendants, as their interest may appear, one-seventh undivided interest in the real estate of Lovett Lee, deceased, at the time of his death, and that the plaintiffs also recover of the defendant such share or portion of the estate of the defendant C. M. Lee as of the date of the contract and agreement, entered into between the said C. M. Lee and her children, as will give to the plaintiffs, as the real and personal representatives of Harry B. Lee, deceased, one-seventh interest in her said estate, or a share equal in value in real and personal property, or cash, to that heretofore conveyed by her to each of her other children, as shown by the several deeds executed by her to them on April 1, 1919, as fully set out in the complaint in this action."

The judgment further provides that—

"The deeds made by and between C. M. Lee and the other defendants, her children, in parceling out said estate, in so far as they may conflict with the provisions of this judgment, shall be set aside and declared inoperative and void as between the parties to this action."

The decree further recites:

"It having been, in the trial of this action, agreed between the parties plaintiffs and defendants that this trial should be limited to ascertaining only the liability and rights of the parties, and not the specific amount and character of the plaintiffs' recovery, * * * this cause shall be retained upon the docket for the purpose of ascertaining the value of plaintiffs' recovery against the defendants and the method of ascertaining the amount and kind of such recovery and investing the plaintiffs with the title and possession of same."

The chief defense, and indeed the only one that requires consideration, is the plea of the statute of frauds; the defendants contending that the above agreement was oral and therefore invalid. We pass by as unnecessary to consider, in view of the other evi-

dence, the question whether by the conveyance by Harry B. Lee to his mother upon the terms ascertained by the verdict she did not receive the property conveyed by Harry B. Lee on a verbal trust to be held by her according to said agreement. The plaintiffs put in evidence the petition filed by C. M. Lee in the superior court for the conveyance of the property of said James Lovett Lee, her minor son, which petition was duly subscribed and sworn to by her and filed in said cause and contains as a recital the facts above stated, and particularly the following:

"(4) That the said C. M. Lee, petitioner, is owner in her own right of a very valuable landed estate, located in both Duplin and Sampson counties, and since the death of her said husband she has proposed to her children, all of whom are of full age except the said James Lovett Lee, that, if they would make over to her a conveyance and bill of sale for their entire interests in the real and personal estate of the said husband so as to combine the estate of her husband with her own, she would then in turn make deeds to her children for the greater part of her individual estate as well as all of the landed estate of her said husband, and with the view of effectuating this division and disposition of the estate of her said intestate husband all of his said heirs and distributees who are of full age have already conveyed and set over to the said C. M. Lee their entire interests in the real and personal estate of the said Lovett Lee, deceased, and in further pursuance of said proposed plan for said division the said C. M. Lee and the heirs of said Lovett Lee have procured an appraisal to be made of all the lands of the said Lovett Lee, deceased, and all the lands of said C. M. Lee owned by her individually, said appraisal having been made by one O. M. Lee a brother of Lovett Lee, deceased, and L. A. Byrd, of Mt. Olive, both of whom are men of ripe experience in the buying and selling of real estate and the present market value thereof."

The petition further recites the valuation of aforesaid real and personal property and adds:

"The said C. M. Lee now proposes to make a deed of conveyance to the said James Lovett Lee, however, reserving the life estate therein to herself of the land appraised by the said O. M. Lee and L. A. Byrd, upon condition that the court will approve a conveyance to the said C. M. Lee of all the interests of said minor son in the estate of his deceased father," describing the property and asking that a commissioner be appointed to execute said deed for her minor son to herself.

Thereupon the decree of the court was made in accordance with the petition, reciting the above agreement for the conveyance by the children to their mother of their interest in their father's estate, and directing the commissioner to make a deed for the interest of said minor son upon condition that she will convey to him a good and sufficient deed for one-seventh of the combined property in pursuance of said agreement.

This, omitting unnecessary details in the petition and the decree in conformity thereto, is a complete statement of the transaction. The statute of frauds which is relied upon to defeat the very just claim of the plaintiffs is to be found in C. S. § 988, and so much thereof as bears upon this controversy reads as follows:

"All contracts to sell or convey any lands, tenements or hereditaments, or any interest in or concerning them, * * * shall be void unless said contract, or some memorandum or note thereof, be put in writing and signed by the party to be charged therewith, or by some other person by him thereto lawfully authorized."

The above petition, duly signed, is also sworn to, and is solemnly filed in a petition by C. M. Lee, and there is judgment upon it entered of record, which judgment was procured at her instance. It is not possible for a "memorandum" to be more complete and explicit than is made in this case, or more solemnly, having been signed and sworn to and made a record of the court, and a judgment at the instance and by the procurement of the said C. M. Lee having been entered thereon.

It would be difficult to add anything in support of this very clear instance of compliance with the memorandum required by said statute. We have many cases in this state, among them Mizell v. Burnett, 49 N. C. 249, 69 Am. Dec. 744, which says that it has always been held that letters addressed to third parties stating and affirming a contract may be used against the writer as sufficient memorandum of it, and that such writings are sufficient evidence of the contract to warrant the court in giving effect to it. This is also held in Nicholson v. Dover, 145 N. C. 18, 58 S. E. 444, 18 L. R. A. (N. S.) 167.

The written memorandum may be made subsequent to the time of making the contract. Magee v. Blankenship, 95 N. C. 563; Winslow v. White 163 N. C. 29, 79 S. E. 258. In 2 Elliott on Contract, 546, 547, § 312, it is said:

"The form of the memorandum is not material so long as it is sufficient to comply with the requirements of the statute. * * * Any document signed by the party to be charged containing the terms of the contract will suffice, as a letter to a third party, a will, or an affidavit in a different matter."

Neither the defendant C. M. Lee nor any of the other defendants denied or introduced any evidence to explain the execution of the deeds made to her and by her to her children, nor to contradict the terms of the contract between her and her children as set out in the petition signed and sworn to and filed by her in the aforesaid petition, and recited in the judgment procured by her upon said state-

ment, and filed of record in said county. The marriage of said Harry B. Lee and the birth of issue in no wise contradicted or modified the terms of said agreement. His widow and son and his administrator, the son appearing by his next friend, stand in his shoes and are entitled to all the benefits in the performance of said contract which he would have been entitled to claim and enforce if he were still living.

No error.

(182 N. C. 97)

GODWIN v. GARDNER. (No. 101.)

(Supreme Court of North Carolina. Oct. 5, 1921.)

Pleading \Leftarrow 216(2)—Matters of defense or is bar not considered on dismissal.

Matters set up in defense or as a bar to the plaintiff's suit and requiring proof may not be considered upon a demurrer to the complaint.

Appeal from Superior Court, Hertford County; Cranmer, Judge.

Action by J. W. Godwin against J. D. Gardner. Judgment of nonsuit, and plaintiff appeals. Reversed.

Civil action founded on contract and growing out of a certain promissory note and mortgage executed by the defendant and delivered to the plaintiff on June, 19, 1915. As an ancillary remedy, plaintiff seized the mortgaged property and took same into his possession under a writ of claim and delivery at the time of issuing summons. Jenkins & Boyette subsequently intervened and claimed title to said property by virtue of a prior mortgage, antedating that of the plaintiff. Upon the execution of a bond the property was turned over to the interveners.

The defendant filed no answer, but the interveners replied and set up, as an affirmative defense, that since the institution of this action the defendant had been adjudged a bankrupt and, upon order of the federal court, the mortgaged property had been turned over to the trustee in bankruptcy. It was further alleged, in bar of the plaintiff's right to recover, that all the assets of the defendant, J. D. Gardner, had been administered in said court—the plaintiff and other creditors being paid their pro rata part, according to their respective priorities—and that the defendant had been duly granted his full discharge by the bankrupt court.

Upon motion, there was a judgment as of nonsuit entered on the pleadings. Plaintiff appealed.

Roswell C. Bridger, of Winton, and S. Brown Shepherd and N. G. Fonville, both of Raleigh, for appellant.

STACY, J. While it is stated in the record that a judgment of nonsuit was entered on the pleadings, we will assume that the action was dismissed on a demurrer *ore tenus*. But, in either view, the judgment was erroneous.

Matters set up in defense, or as a bar to the plaintiff's suit, and requiring proof, may not be considered upon a demurrer. *Wood v. Kincaid*, 144 N. C. 393, 57 S. E. 4.

A good cause of action is stated in the complaint; hence, the judgment of the superior court must be set aside and the parties will proceed as they may be advised. The other questions, discussed in plaintiff's brief, are not before us for decision.

Reversed.

(182 N. C. 764)

KERR et al. v. DRAKE et al. (No. 230.)

(Supreme Court of North Carolina. Oct. 5, 1921.)

1. Appeal and error \S 798—Failure of appellees' counsel to inform appellants' counsel of intention to move for dismissal not waiver of right to dismissal.

The failure of appellees' attorney to inform appellants' counsel, while discussing the case following appellants' failure to file transcript of record within the required time, that appellees would move to dismiss the appeal under Supreme Court Rule 17 (66 S. E. vii), was not a waiver of the right to move for such dismissal.

2. Appeal and error \S 798—Appellants not entitled to notice of motion to dismiss for failure to file transcript of record within time.

Appellees, entitled under Supreme Court Rule 17 (66 S. E. vii) to move for dismissal of appeal because of appellants' failure to file transcript of record within the required time, was not required to give appellants notice of such motion.

3. Appeal and error \S 564(3)—Statutory requirements as to making up case must be strictly complied with.

The statutory requirements as to making up cases on appeal must be strictly complied with, except when there is an agreement to extend the time, in which case the proceeding must be taken within the time so extended.

4. Appeal and error \S 784—Appeal dismissed for noncompliance with statutory requirements.

The right to appeal is not an absolute right, but is only given upon the compliance with the requirements of the statute, and when requirements are not observed the appeal will be dismissed unless sufficient cause is shown that there was no negligence on the part of appellants.

5. Appeal and error \S 629—Appeal dismissed for appellants' noncompliance with statute as to filing of case, where available transcript was not filed and certiorari requested.

Under Supreme Court Rule 17 (66 S. E. vii), an appeal will be dismissed because of ap-

pellants' failure to file complete transcript within time, even if there is a sufficient excuse for noncompliance with statutory requirements as to service of case within time as extended, unless in the first term after the trial below and at, or before the time when the appeal should be docketed, the appellant shall file a transcript of all the record that is available and ask for a certiorari to complete the transcript or to have a case settled.

6. Appeal and error \S 628(1)—Negligence of appellant's counsel is the negligence of appellant himself.

The negligence of appellant's counsel in sending up, docketing, and printing the transcript, is the negligence of the appellant and will not excuse failure to do so.

Appeal from Superior Court, Sampson County; Lyon, Judge.

Action by J. K. Kerr and another against W. B. Drake, Jr., and another. Judgment for plaintiffs, and defendants appeal. Appeal dismissed because of defendants' failure to file transcript of the record within a required time under Supreme Court Rule 17 (66 S. E. vii), and defendants move to reinstate appeal. Motion denied.

This is a motion by defendants to reinstate the appeal in this case which had been docketed and dismissed under rule 17 (66 S. E. vii) on motion of plaintiffs.

B. H. Crumpler, of Clinton, and A. L. Cox, of Raleigh, for appellants.

Butler & Herring and Grady & Graham, all of Clinton, for appellees.

PER CURIAM. This case was tried at June special term, 1921, of Sampson, before Lyon, J. Seven days before the docket from that district was reached, the appellee filed the certificate required by rule 17 (174 N. C. 831, 66 S. E. vii) and his motion to docket and dismiss under said rule, which was allowed when the call of the district began. Thereafter, on the same day, the appellants filed an affidavit and moved to reinstate.

There was a verdict against the defendants and judgment from which they appealed. By consent the defendants obtained 30 days from the adjournment of said term of court to serve case on appeal, and plaintiffs were allowed 30 days thereafter to serve counter case. No case on appeal was served by defendants within the time agreed upon, but, on the contrary, it was not served until September 2, 1921, i. e., 61 days after adjournment of said June special term.

On September 27 the appellants filed an affidavit and motion to reinstate the case on appeal which sets forth the above agreement of 30 days after July 2 to serve counter case, and alleged that on July 29, 1921, the resident counsel in Sampson having received transcript of the evidence from the court

stenographer, forwarded the same to their associate counsel in the city of Raleigh. It appears from the affidavit of the stenographer that she furnished the evidence complete to defendants' counsel in Clinton on July 16, 1921. It does not appear on what date the defendants' counsel forwarded the papers to counsel in Raleigh. There is no evidence of any delay in the mail. The counsel in Raleigh filed his affidavit that he was absent from his office in Raleigh from July 30 to August 15, and that after receiving the papers on August 15, he was unable to see his client, one of the codefendants in this case, until on the following week, owing to his client's absence from the city and his being busy, and further that after seeing his client he himself was again called from the city and did not return till August 29, and upon his return he completed the preparation of the case on appeal and forwarded it to the counsel in Clinton on September 1, who delivered it the next day to counsel for the plaintiff, who on September 12 notified the counsel for the defendants that they would not accept the case on appeal but would move to dismiss, under rule 17, which was done in apt time and the motion was allowed.

[1, 2] The only other allegation the appellants make is that between September 2 when the case was served, and September 12, and prior to the receipt of this notice one of the counsel for the appellants met one of the counsel for the defendants, who did not then state to the defendants that he would move to dismiss the appeal, but said he had not fully examined appellants' statement of the case on appeal. This was not a waiver of the motion to dismiss. Besides, it was not necessary that the appellee should give any notice of the motion to dismiss.

The other matters set forth show in every particular a disregard of the statutory requirements as to the time of service of case on appeal and in every respect ignored the statute as to making up a case on appeal.

[3] The agreement for 30 days in which to serve the case on appeal was merely a substitute for the 15 days allowed by statute. The statutory requirements as to making up cases on appeal must be strictly complied with except when there is an agreement to extend the time and then only to the extent of such agreement.

In *Hardee v. Timberlake*, 159 N. C. 552, 75 S. E. 799, where, by consent, the appellant was allowed 30 days in which to serve the case on appeal but it was not served till the thirty-second day, the appeal was dismissed. In *Guano Co. v. Hicks*, 120 N. C. 29, 26 S. E. 650, where there was a like agreement allowing 30 days but the appeal was not served till the thirty-first day, it was dismissed.

[4, 5] The right to appeal is not an absolute right, but is only given upon compliance

with the requirements of the statute, and when these are not observed the appeal will be dismissed unless sufficient cause is shown that there was no negligence on the part of the appellant. The appellee has his rights, and it is no excuse that it was not convenient for the appellant or his counsel to observe the requirements of the statute. The appeal will be dismissed, even when there has been sufficient ground to excuse compliance with the statute, unless at the first term after the trial below and at or before the time when the appeal should be docketed the appellant shall file a transcript of all the record that is available and ask for a certiorari to complete the transcript or to have the case settled. *Burrell v. Hughes*, 120 N. C. 277, 26 S. E. 782, and numerous cases there cited, and cases cited to that case in the *Anno. Ed.*

[6] The negligence of counsel in sending up, docketing, and printing the transcript is that of the client, and will not excuse failure to do so. *Truelove v. Norris*, 152 N. C. 755, 67 S. E. 487; *Vivian v. Mitchell*, 144 N. C. 477, 57 S. E. 167, citing numerous cases. See, also, citations to that case in *Anno. Ed.*

In this case the appellants' affidavit disproves any allegation of reasonable ground for not complying with the statute. But if there had been any grounds to excuse the failure to serve the case on appeal within proper time, they have failed to file a transcript of the record and move for certiorari. More than this, they did not even file a transcript of the record proper with this motion to reinstate.

Motion denied.

(182 N. C. 112)

WILLIAMS v. HICKS et al. (No. 220.)

(Supreme Court of North Carolina. Oct. 5, 1921.)

Wills §602, 603(3)—"Or" read as "and" in gift over in case first taker dies during minority "or" childless.

A gift over to a church in case the first taker, testator's son, dies "during his minority, or childless," in the absence of anything else in the will to show a different intention, is to be read as though "or" were "and," so that the son becomes absolutely owner on attaining majority.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, And; Or.]

Appeal from Superior Court, Lenoir County; Allen, Judge.

Action by Roscoe B. Williams against Starr Hicks and others, Trustees of St. John's Free Will Baptist Church. Demurrer to the complaint was sustained, and plaintiff appeals. Reversed.

The action is to remove a cloud from plaintiff's title to certain real property held by plaintiff, Roscoe Williams, under the will of his father, John W. Williams, deceased, and more particularly under the third item of the will, as follows:

"In the event that my said son, Roscoe B. Williams should die during his minority, or childless, it is my will and desire that the remainder of the several properties herein named that would revert to him shall go to the Trustees of St. Johns Free Will Baptist Church and their successors and assigns forever for the sole use and benefit of said Church. Said St. John's Free Will Baptist Church being in the town of Kinston, N. C."

The proof showed that the property belonged to the testator and passed under this item of said will; that Roscoe B. Williams, plaintiff and devisee named in this item of said will, had become 21 years of age and insisted that the property became vested in him in absolute ownership on his majority.

Defendants claimed and insisted that said estate on death of Roscoe B. Williams without issue or children surviving would belong to the said church. The court, being of opinion with defendants, gave judgment for defendants and sustaining their demurrer filed to plaintiff's complaint. Plaintiff excepted and appealed.

Dawson & Greene, of Kinston, for appellant.

Rouse & Rouse, of Kinston, for appellees.

HOKE, J. In 40 Cyc. at page 1506, it is laid down as a rule of interpretation which very generally obtains in a devise of this character that—

"Where a gift over in case of death without issue is accompanied by a gift over in case of death before arriving at a certain age, the dying without issue will generally be restricted to the period before arrival at the age specified, to aid which the word 'or' will be construed as 'and.'"

This position was held to be controlling in *Dickinson et al. v. Jordan and Blount*, 5 N. C. 380, a case not dissimilar to the one presented here, and in the opinion Taylor, Judge, says that on examination of the cases on the subject, the point will be found completely settled and the estate was held absolute in the first taker on arrival at full age. And unless in contravention of the clear purpose of the testator as otherwise expressed in his will, the principle stated has been recognized and approved as the correct position in many of our decisions on the subject and more especially when the first taker, as in this case, usually considered as the primary object of the testator's bounty, is his child and heir at law. *Bell v. Keesler*, 175 N. C. p. 526, 95 S. E. 881; *Bank v. Murray*, 175 N. C. p. 62, 94 S. E. 665; *Ham v. Ham*,

168 N. C. p. 486, 84 S. E. 840; *Dunn v. Hines*, 164 N. C. p. 113, 80 S. E. 410; *Burton v. Congigland*, 82 N. C. p. 100; *Turner v. Whitted*, etc., 9 N. C. p. 613; *Parker v. Parker*, 5 Metc. (46 Mass.) 134-137. In *Bell v. Keesler* the above quotation from Cyc. is approved and the opinion quotes further from the Massachusetts case of *Parker v. Parker*, where the rule of construction and in part the reason for it is stated as follows:

"The manifest object of the testator was, we think, that if the son who was the first object of his bounty should die without leaving children to take after him, and whilst he was under age, so that he could not make any disposition of the property on account of the incapacity of nonage, then the testator intended to make disposition of it himself. But if the son should leave no children, but still if he should arrive at an age at which the law would allow him to dispose of real estate by his own act by deed or will, then it was intended that the gift to him should be absolute, and the devise over would fail."

And in *Ham v. Ham*, supra, where the subject is discussed with ability and learning, the court held, among other things, that on a devise of land to four sons but should either of them die before arriving at the age of 21 or without children surviving, the word "or" "should be read as 'and' so as to require both contingencies to occur before the limitation over should take effect," and thus "save the inheritance to the child or children of any son who should die under age."

It was earnestly insisted before us that there were certain expressions in the will, and attendant facts relevant to its construction, which showed a manifest intention on the part of the testator that either or both contingencies should affect the estate till the son's death; but, without special reference to these suggestions, we think that they are entirely insufficient to displace this, a settled rule of interpretation, on the facts presented and where in aid of such rule it appears that to uphold the position contended for by appellees would be to deprive the son and heir of any absolute ownership in his deceased father's property until his death. Under a proper application of the decisions referred to, and the principles they approve and illustrate, we must hold that on the record, the estate of plaintiff, the son and heir at law of the testator, became vested in absolute ownership on his becoming of age, that the demurrer be overruled, and defendant's claim be declared invalid.

Our decision in no way conflicts with *Patterson v. McCormick*, 177 N. C. p. 448, 99 S. E. 401, to which we were referred by counsel. In that well-considered case the court was passing on a devise over on a death of the first taker without issue as controlled by our statute on the subject, and entirely unaffected by the presence of a double contingency.

cy and which on the facts of this record require as we have seen a different rule of construction. There is error, and this will be certified that judgment be entered for plaintiff.

Reversed.

(117 S. C. 157)

WERBER v. MOSES et al. (No. 10711.)

(Supreme Court of South Carolina. Sept. 26, 1921.)

1. Wills \Leftarrow 184(3)—If codicil reasonably reconcilable, court will give effect to such presumed intention.

If there is an irreconcilable conflict between a will and a codicil, the latter must prevail, but, especially in view of Civ. Code 1912, § 3569, providing that no will or any clause thereof shall be revocable but by some other will or codicil in writing "declaring the same," etc., if the codicil can reasonably be reconciled with the will, it must be presumed that the testator so intended, and the court will give effect to such intention.

2. Wills \Leftarrow 614(5)—Codicil held not to vest estates in fee in beneficiaries of life estates.

Under a will directing that testator's land be kept for the use and benefit of his wife, children, and children of deceased children until the death of all of them, and then distributed among the grandchildren, life estates only vested in the children, with fee-simple estates in remainder in the grandchildren, despite a supplementary codicil giving the children power to divide the land among themselves in a stipulated manner if dissatisfied with the arrangement for yearly division of the rents, the codicil being intended not to divest the estates devised by the will, but to devise a method of assuring a harmonious and equitable division of the income, which might or might not be adopted.

Appeal from Common Pleas Circuit Court of Newberry County; R. W. Memminger, Judge.

Action by Frederick Werber, Jr., against Andrena Moses and others. From the decree, defendants Werber and Case appeal. Modified and remanded.

Mower & Bynum, of Newberry, Frederick Werber, Jr., of Washington, D. C., and Dudley C. Outcalt, of Cincinnati, Ohio, for appellants.

Lee & Moise, of Sumter, W. Huger Fitzsimons, of Charleston, Grier, Park & Nicholson, of Greenwood, Hunt, Hunt & Hunter, of Newberry, and O. S. Monteith, of Columbia, for respondent.

COTHRAN, J. Action for a construction of the will and codicil of Frederick Werber, Sr., a citizen of Newberry county, who died September 29, 1891, leaving of force a will dated April 28, 1894, and a codicil thereto, dated six years later, April 28, 1890, of which

his widow, M. Louise Werber, duly qualified as executrix on October 19, 1891. The testator was survived by his widow, M. Louise Werber, and five children; Frederick Werber, Jr., Andrena Werber (now Moses), Alma Werber (now Bruce), Gustavus Werber, and Mary L. Werber.

Before any division of the estate was attempted, the daughter, Mary L. Werber, died without issue February 13, 1912, leaving a will making the defendant Grace Virginia Clark her sole devisee, legatee, and executrix. The widow, M. Louise Werber, died March 10, 1913; the defendants Waldemar Werber and Erwin W. Case are the only living children of the plaintiff Frederick Werber, Jr.; the defendants Arabella Moran, Louise Van Deventer, Minnie L. Moses, Kate Bryant, and Claremont Moses are the only living children of the defendant Andrena Moses; the defendants Alma W. Bruce and Gustavus Werber have no children.

It will thus be seen that all of the living children and grandchildren of Frederick Werber, Sr., the testator, and Mary Virginia Clark, devisee of Mary L. Werber, the deceased daughter, have been made parties to this action, which has been instituted for the purpose of obtaining a judicial construction of the will and codicil referred to, the point of controversy being whether the children of the testator take under said will and codicil fee-simple estates in the real estate, or life estates, with remainders to the grandchildren.

The testator owned at the time of his death three parcels of real estate: (1) The Saluda Old Town plantation, containing nearly 1,000 acres; (2) the Bush River plantation, containing about 1,200 acres; and (3) a house and lot in the city of Newberry, the lot containing about 4 acres.

The original will provides as follows:

Article 1. The testator directs that the whole of his real and personal estate be kept together for the purpose of paying his debts, they to be paid out of the net income derived from the Saluda River plantation; this article contains certain directions as to the payment of his debts which are not material to the present controversy.

Article 2 is as follows:

"It is my desire that my two plantations be kept as my estate during the life of my wife, and the lives of my children, and until the death of my last surviving child, for the use and benefit of my said wife, and my children, and their issue per stirpes, of my deceased children; after the death of my wife and all my children, it is my will that then my said real estate be partitioned and distributed amongst the issue of my children per stirpes."

The other provisions of the will do not immediately affect the matter under review and will only be referred to as occasion may arise.

The codicil opens with this statement: "I, Frederick Werber, of the county and state aforesaid, by way of codicil, do supplement this my last will and testament"—indicating that the original will accompanied physically the codicil, and was not intended to be revoked except in such particulars as it might be in irreconcilable conflict with the codicil. The first article contains this statement:

"Whereas by my aforesaid will I have directed that the two plantations I possess should remain as my estate, my children yearly equally dividing the rents of said plantations, and whereas they may be dissatisfied with such arrangement, and might not be able to agree upon an equal division of said rents, therefore in order to provide against any such contingency arising I hereby give my children power and authority to divide the said land among themselves, providing it is done in the following manner."

The "manner" referred to is quite peculiar. He directs that—

"To the one who first desires his or her share of the land, he or she shall have the following tract of land, provided he or she shall give notice in writing to my other heirs of his or her intention to take the tract of land herein described as his or her share of the two plantations I now possess, on the first day of January succeeding the time such notice was given."

This is followed by a description of the subdivision, a part of the Bush River plantation, and a statement that the testator was then receiving a yearly rental of 12 bales of cotton therefrom. A similar provision follows in favor of the one who should next give notice; the subdivision, also a part of the same plantation, containing 329 acres, the yearly rental stated to be 11 bales, which might be increased by clearing. A similar provision follows in favor of the one who should next give notice; the subdivision also a part of the same plantation, containing 71 acres, and the yearly rental stated to be 12 bales.

The Saluda River plantation, not included in the foregoing provisions, was then directed to be divided equally between the two children who had not given the notices as before indicated; the rental value of this plantation was stated to be 24 bales. Then follows a direction that any other property, the division of which may not have been provided for, shall be divided equally among his children.

The sixth article is as follows:

"In case of the demise of any of my children without issue, before this division can be made then their share or shares shall be divided equally between my surviving children."

The seventh:

"None of my children can claim any of the property under the provisions of this codicil until all my debts are paid, until after the death of my wife Louise M. Werber."

In December, 1915, after the death of the widow in 1913, and after the payment of all debts owing by the testator, the Bush River plantation was divided between the defendants Andrena Moses, Alma Bruce, and Gustavus Werber, they taking, in conformity with the directions of the codicil, respectively tracts 1, 2, and 3 as described therein. Subsequently, on March 6, 1916, Andrena Moses and Gustavus Werber by reciprocal deeds exchanged the tracts severally allotted to them. The other plantation, the Saluda River place, has not been actually divided. The questions for decision are:

(1) Do the children of the testator own the several tracts allotted to them in fee simple, or have they only a life estate therein, with remainders to the grandchildren of the testator?

(2) What interest, if any, does Grace Virginia Clark, the devisee under the will of the deceased daughter Mary L. Werber, take in the estate of the testator?

It is conceded on all sides, as well it might be, that under the original will the children of the testator are jointly entitled only to the income of the estate during their respective lives; that, if any one of them should die before the period of division arrived, leaving issue, such issue should represent the parent, per stirpes, in the distribution of the yearly income, pending the arrival of the period of distribution; that, if any one of them should die before that period leaving no issue, that interest should devolve upon the survivors; that the period of distribution was fixed at the death of the last surviving child of the testator; and that then the two plantations should "be partitioned and distributed amongst the issue of my children per stirpes."

It is contended by the three children, Andrena Moses, Alma Bruce, and Gustavus Werber, who received respectively allotments of parcels 1, 2, and 3 of the Bush River plantation, in conformity with the codicil, that the effect of the codicil was to vest in them fee-simple titles to the said parcels respectively, and that they are entitled also to a distributive share in fee simple of the Saluda River plantation and of the house and lot in Newberry. The case turns upon the legal effect of the provisions of the codicil.

[1] To sustain the contention of the defendants, it is apparent that we must hold that there is an irreconcilable conflict between the original will and the codicil; the original will devising the fee-simple estate in remainder to the grandchildren, and the codicil destroying all semblance of a remainder, and devising the fee simple immediately to the children of the testator. Of course, if that should appear—that is, that there is such irreconcilable conflict—the provisions of the codicil must prevail.

In *Logan v. Cassidy*, 71 S. C. 175, 50 S. E. 794, after a full and careful statement of

the comparison of a will and a codicil, the court says:

"A codicil likewise, if inconsistent with the preceding will, is, in law, a revocation of it. That is, so inconsistent that both cannot stand."

In *Anderson v. Butler*, 31 S. C. 183, 9 S. E. 797, 5 L. R. A. 166, it is declared:

"The rule as to the construction of wills and codicils is as stated in defendant's (appellant's) argument, to wit: 'Not to disturb the dispositions of the will further than is absolutely necessary for the purpose of giving effect to the codicils.'"

In 28 R. C. L. 199, it is said:

"It is the well-settled general rule that a will and codicil are to be regarded as a single and entire instrument for the purpose of determining the testamentary intention and disposition of the testator, and both instruments together will be construed as if they had been executed at the time of the making of the codicil."

And at page 200:

"The testator's purpose in making the codicil may be found in the codicil itself, and in construing a will and codicil, a disposition made by the will is not to be construed further than absolutely necessary to give effect to the codicil. A codicil will not be allowed to vary or modify the will, unless such is the plain intent of the testator. A revocation by a codicil of a gift in the will extends only so far as the will is consistent with the codicil, and a gift once made by will is not to be cut down by a subsequent codicil unless the intention of the testator to that effect appears clearly or by necessary implication."

In 30 A. & E. 665, it is said:

"In construing a will and codicil, or separate codicils, it is a clear and settled rule that they are to be taken and construed together, in connection with each other, as parts of one and the same instrument, and the codicils shall not be taken to vary or modify the will unless such was the manifest intention of the testator"—citing, among an array of cases, *Vaughan v. Bridges*, 61 S. C. 155, 39 S. E. 347.

In 30 A. & E. 685, it is said:

"If possible, the court will reconcile two apparently inconsistent and repugnant provisions in a will, in order to carry out the testator's intentions as to the disposition of his estate, and in so doing will endeavor not to disturb the first provision further than is absolutely necessary to give effect to the second. But if the provisions are absolutely irreconcilable, the latter will be preferred, and will prevail over the former. Thus, where a will and a codicil are irreconcilable, the codicil, as the last indication of the testator's intention, must prevail."

Section 3569, vol. 1, Code of Laws, 1912, provides:

"No will or testament * * * of any real or personal property or any clause thereof,

shall be revocable but by some other will or codicil in writing, or other writing declaring the same," etc.

Closely allied with this principle is that declared in the following quotations:

In 30 A. & E. 687, it is said:

"It has become a settled rule of construction that, when the words of the will in the first instance distinctly indicate an intent to make a clear gift, such gift is not to be cut down by any subsequent provision which is ambiguous or inferential, and which is not equally as distinct as the former; or, the rule may be stated that a clear gift is not to be cut down by anything which does not, with reasonable certainty, indicate an intention to cut it down."

"Where an estate is once given by words of clear and ascertained legal significance, it will neither be enlarged nor cut down by super-added words in the same or subsequent clauses of the will, unless they raise an irresistible inference that such was the intention of the testator." *Lawrence v. Burnett*, 109 S. C. 416, 96 S. E. 144; *Adams v. Verner*, 102 S. C. 7, 86 S. E. 211; *Howze v. Barber*, 29 S. C. 466, 7 S. E. 817; *Smith v. Smith*, 93 S. C. 213, 76 S. E. 468; *Jennings v. Talbert*, 77 S. C. 454, 58 S. E. 420.

"It is a familiar and well-recognized principle that an interpretation is to be preferred which will give force and effect to all the provisions of an instrument, rather than one which will destroy one or more of its provisions." *Pearson v. Easterling*, 104 S. C. 178, 88 S. E. 376.

In *McClellan v. Mackenzie*, 126 Fed. 701, 61 C. C. A. 619, the court declares:

"If there is anything well settled it is that a court will not cut down an estate once granted absolutely in fee by limitations contained in subsequent parts of a will, unless the intent to limit the devise is manifested clearly and unmistakably. If the expression relied upon to limit a fee once devised be doubtful, the doubt should be resolved in favor of the absolute estate. *Birney v. Richardson*, 5 Dana, 424; *Trabue v. Terry* (Ky.) 9 S. W. 162; *Meacham v. Graham*, 98 Tenn. 190, 205, 39 S. W. 12; *Benson v. Corbin*, 145 N. Y. 353, 40 N. E. 11; *Washbon v. Cope*, 144 N. Y. 287, 297, 39 N. E. 388."

But is there such irreconcilable conflict? The rule is that, if the provisions of the codicil can reasonably be reconciled with the provisions of the will, it must be presumed that the testator so intended, and the court will give effect to such intention.

[2] It is noticeable that there is no fee-simple estate expressly conferred upon the children by the codicil. In order to accomplish that result, resort is had to a rule of law which, in wills, dispenses with the necessity for words of inheritance. But upon the issue whether the testator meant to cut down a previous fee-simple estate in the will by a provision in the codicil, the necessity for a resort to this rule of law presents an exceedingly weak support for the contention; with greater reason it supports the contrary,

for, if he had really intended to destroy an estate conferred by the will, the slightest degree of care would have suggested nonreliance upon the rule of law and a direct expression to that effect.

It is noticeable also, and significant, that the codicil is denominated a supplement to the will. While this, of course, is not controlling, it is a circumstance worth considering in determining the testator's intention. It would be remarkable, if he intended to substitute for a life estate in his children fee-simple titles, and to destroy entirely the fee-simple estates in remainder created for the grandchildren, that, instead of making a new will, he executed a supplement to the former will, without a word indicating that he intended to annul the estates vested in the grandchildren, or that he intended the children to take fee-simple estates, other than the implication created by law, with which he is not shown to have been familiar.

There is no direct devise in the codicil to the children; it confers simply the power upon them to divide the land and go into possession of the several tracts, as a substitute plan for that contained in the will, by which the income from the property should be equitably divided among them, in the event that they should become dissatisfied with the arrangement for that purpose contained in the will. The testator may well have concluded, after the lapse of six years from the making of the will, and from the changes which inevitably occur in the lives of a grown-up family, that the plan of the will might be found cumbersome and unsatisfactory; no one was particularly made the custodian and manager of the property, and it was not improbable that a common holding of all the property, a common management of the farming operations and a division of the income at the end of the year would result in wrangles and unpleasantness. He appears to have been so anxious to preserve harmony in the family that he deprecated even what is now being done—a controversy in the courts concerning the division of his property. This anxiety led him to provide this alternative plan for the division of the income, in case the former arrangement should prove unsatisfactory. Considered upon its merits as an alternative plan for a division of the income, there can be no question but that it would prove more satisfactory for each one to have his life estate set apart to itself, and each to be responsible for and entitled to what he could make out of it. That this was his intention is strongly suggested by the rental valuations he placed upon the several tracts, indicating that the tracts were to be allotted not according to their areas or market values, but according to what was uppermost in his mind—the incomes—to which alone the children were severally entitled.

In addition to the fact adverted to, that

there is no direct devise to the children in the codicil, the further consideration is important that there is no obligation imposed upon them to make the allotment provided for in the codicil. It is a plan proposed by the testator which they may or may not have adopted, their adoption depending upon the failure of the plan for a division of the yearly rents provided for in the will, and this plan, of course, prevailed until their dissatisfaction with it developed. As a matter of fact, it did prevail from the time of the death of Mrs. Werber March 10, 1913, until the first notice of dissatisfaction was given December 15, 1915, nearly three years. The plan of the codicil being optional, it is clear that, if there had been no steps taken to adopt it, the plan of the will would have continued. Both plans affected only the division of the rents, and it is inconceivable that the adoption or the rejection of either plan would or was intended to change the course of the fee-simple title.

It is impossible that the direction which the fee-simple estate should take upon the death of the testator could be a matter of doubt. As soon as the breath left his body the title to his lands left him, and lodged in some one. To adopt the theory of the defendants, the title then vested in them for life, with remainders to the grandchildren, and so remained, until in December, 1915, they expressed themselves dissatisfied with the "arrangement" which had been made by the will, and that then it passed out of the grandchildren and vested in them. The "arrangement," they contend, included not only the estate intended to be passed by the will, but also the method of dividing the income. After providing for them only a life estate, the fee in remainder vesting in the grandchildren, it was hardly in the mind of the testator to make the estate in the grandchildren dependent upon the satisfaction of the children who received only the life estates. This is particularly true of those children of the testator who are without issue, who are now confronted with the contingency of being adjudged to hold only life estates, which upon their deaths will go to the children of their brothers and sisters.

Even if the codicil raised a doubt as to the estate intended to be devised to the children who received the separate allotments, we would be disposed to hold that it has not divested the estate devised by the will. For, in cases of doubt as to a conflict between a will and a codicil, a construction which will be in harmony with both should be adopted. But we have not the slightest doubt that the testator intended the provisions of the will to stand, vesting in the children life estates and in the grandchildren fee-simple estates in remainder, and that the provisions of the codicil were intended simply to devise a more satisfactory method of assuring a harmoni-

ous and equitable division of the income, which might or might not be adopted. The provision in the codicil, article 1, which we repeat with explanatory interpolations, is as follows:

"Whereas by my aforesaid will I have directed that the two plantations I possess should remain as my estate, my children yearly equally dividing the rents of said plantations (as a matter of fact, the will provided more than that; it provided for a partition and distribution of the estate between the grandchildren; the fact that this part of the will was not referred to in this paragraph indicates that it was not intended to be altered), and whereas, they may be dissatisfied with such arrangement (that is, holding the estate together, and the annual division of the income), and might not be able to agree upon an equal division of said rents, therefore in order to provide against any such contingency arising (that is, the contingency of a disagreement in the division of the income, not in order to enlarge the estate in the children from a life estate to a fee simple, to which no reference is made), I hereby give my children (not an estate in the land but) power and authority to divide the said land among themselves (so that each one would know exactly how much income he was entitled to and there could be no dissatisfaction as to an equal division of the rents).
* * *

If the testator had intended to revoke by his codicil the estate in remainder devised in the will to the grandchildren, it would have been a simple matter to have said so. Or if he had intended by implication to do so, it would have been equally as simple to have devised fee-simple estates to the children in express terms, which, of course, would have had the effect of revoking the remainders to the grandchildren; in which event it would have been altogether unnecessary to give as his reason therefor the possibility of disagreement between them in the division of the rents. The fact that he gives this as his reason for the changed "arrangement" is strongly indicative of his purpose that their interest in the estate should be confined to the rents, and that the provision of the will for the grandchildren's estate should stand.

The contention of the defendants makes the will and the codicil so absolutely in conflict that it is impossible to conceive the utility of the testator's allowing the will to stand at all, outside of a few trivial provisions that may readily have been incorporated in the codicil as a new will; the fact that the will was recognized as unrevoked, in the preamble to the codicil, declared to be a supplement thereto, is persuasive that the testator intended that it should remain unrevoked except as to the matter of a division of the yearly rents.

The fact that in the codicil the several allotments were referred to as "his or her share of the land," "his or her share of my two plantations," is not inconsistent with the

intention that life estates, and not fee-simples, should be received by the children, for we find in article 6 of the will that the admitted life estate of a son who might die leaving a wife, without issue, is similarly characterized, "her deceased husband's share in my estate." The result is that the tract allotted to Andrena Moses shall remain in her possession until the last of the testator's children shall die, she receiving the income thereof; if she should not be the last to die, upon her death her issue shall receive the income until the period of distribution shall arrive; at which time it shall become a part of the general estate for partition under article 2 of the will.

The tract allotted to Alma W. Bruce shall remain in her possession during the term of her natural life, she receiving the income thereof. She has no issue now, and if she should die without issue it shall go to the survivor or survivors of the testator's children, to be held by them in common, they receiving the income thereof until the period of distribution shall arrive, at which time it shall become a part of the general estate for partition under article 2 of the will. The children of a child who may predecease Alma W. Bruce shall be entitled per stirpes to share in the income of the Alma W. Bruce allotment between the date of her death and the arrival of the period of distribution.

The tract allotted to Gustavus Werber shall be subject to the same conditions as are above set forth in reference to the tract allotted to Alma W. Bruce.

The Saluda River plantation, as to which no allotment has been made, shall be held in common by the children of the testator or their children per stirpes if any should die prior to the period of distribution, the income to be divided in the following proportions: To Frederick Werber, Jr., one-half plus one-fourth of the other half, five-eighths; to Andrena Moses, one-eighth; to Alma W. Bruce, one-eighth; to Gustavus Werber, one-eighth. When the period of distribution shall arrive it shall become a part of the general estate for partition under article 2 of the will. The children of a child who may die before such period of distribution shall be entitled per stirpes to share in the income of this plantation, between the date of the death of such child and the period for distribution.

In reference to the house and lot at Newberry, the direction in the fourth clause of the original will is that, after the death of the widow, if the house and lot shall not have been sold (under article 1), it shall be appraised and assigned at three-fourths of its appraised value to one or more of the children, in the order named. The implication is that the recipient shall account to the other children for their shares therein. No one has up to this time availed themselves of the op-

tion; and yet we cannot say that they are foreclosed. The first choice was given to the daughter Mary L. Werber, who died before the death of the widow. That choice has devolved by devise upon the defendant Grace Virginia Clark. If neither she nor any of the children desire to avail themselves of the option, the property will be subject to partition or sale and an equal distribution of the proceeds between Grace Virginia Clark and the four children.

The sixth clause of the codicil refers alone to the two plantations, and does not affect the Newberry house and lot, the disposition of which is controlled by the original will.

The judgment of this court is that the decree of the circuit court be modified to conform to the conclusions herein announced, and that the case be remanded to that court for such further orders as may be necessary to carry them into effect.

GARY, C. J., and WATTS and FRASER, JJ., concur.

(117 S. C. 140)

PATTERSON v. ORANGEBURG FERTILIZER CO. et al. (No. 10681.)

(Supreme Court of South Carolina. Aug. 1, 1921. On Petition for Rehearing, Sept. 14, 1921.)

1. Corporations §306 — Agent of fertilizer company held not liable for damages caused by harmful ingredients in fertilizer.

In the absence of evidence connecting the agent of a fertilizer company with the wrongful conduct of the company, he is not liable for damages caused by a harmful ingredient in the fertilizer.

2. Agriculture §7—Statute concerning sale of bad fertilizer held not to abrogate an action at common law.

Civ. Code 1912, §§ 2315-2330, commonly known as the Fertilizer Act, and providing for pro rata reduction in the price for a deficiency in element percentages and consequent commercial value of fertilizer, does not purport to provide a remedy for damages caused to a crop by the introduction into the fertilizer of a noxious ingredient, and a common-law action may be maintained.

3. Action §35—Statute affirming liability at common law and giving a new remedy is cumulative unless contrary appears.

When a liability exists at common law, and is affirmed by a statute which gives a new remedy for its enforcement, unless a contrary intention appears, the new remedy is merely cumulative.

4. Sales §267—In sale of fertilizer provision that vendor does not guarantee results does not destroy an implied warranty against harmful ingredients.

A provision in a contract for the sale of fertilizer that the vendor does not guarantee

results is not an express warranty excluding any implied warranty arising otherwise from the contract, but has no greater effect than to limit to a very innocent degree the implied warranty that a sound price demands a sound commodity, and does not relieve from liability for damage caused by a harmful ingredient in the fertilizer.

5. Agriculture §7—Limitation sale of fertilizer held not to apply to damages caused by injurious ingredients.

Stipulation in contract of sale of fertilizer that damages must be claimed within 10 days after the sale does not include a claim by purchaser of fertilizer for damages caused to crops by a harmful ingredient contained in the fertilizer, since such damages cannot be apparent until the lapse of considerable time.

6. Action §27(2)—Complaint in an action for damages held susceptible to construction as one for breach of warranty.

Although a complaint was capable of being construed either as an action for damages on account of failure of consideration, or for damages for breach of implied warranty, or as one for tort for negligence, where it was clear that the action was for damages by reason of defendant's breach of the warranties implied in a contract of sale of fertilizer, it was sufficient; it not being necessary to denominate specifically the form of action if the facts sufficient to constitute a cause of action are clearly set forth.

7. Sales §445(4)—Breach of implied warranty of fertilizer held for jury.

On evidence that fertilizer sold by defendant contained a harmful ingredient which caused damage to plaintiff's crops, plaintiff was entitled to go to the jury.

8. Sales §273(2) — Manufacturer impliedly warrants fitness for purpose intended of article sold by him.

Where fertilizer is sold by the manufacturer, a stronger warranty is implied than in the ordinary sale of goods that the fertilizer was reasonably adapted to the purposes for which it is purchased, and this implied warranty is independent of the manufacturer's negligence.

9. Action §27(2)—Where plaintiff may sue in either tort or contract, he may waive one and sue on the other.

Where plaintiff has a ground of action either in contract or tort, he may waive the contract and sue on the tort.

10. Agriculture §7—Buyer of fertilizer containing harmful ingredient must prove negligence if he sues in tort.

If a buyer of fertilizer which contains a harmful ingredient waives the warranty of fitness and sues for tort, he must prove the negligence charged.

11. Agriculture §7—In action for negligent sale of fertilizer containing harmful ingredient, evidence held for jury.

In an action by a buyer against the seller of fertilizer for damages to crops caused by a harmful ingredient, evidence held to require

submission to the jury, even if complaint be construed to be one for tort.

On Petition for Rehearing.

12. Bills and notes — Evidence held to show holding in due course.

Evidence held sufficient to show that defendant bank was holder of notes in due course.

13. Bills and notes — Mere suspicions of transferee do not amount to bad faith.

The Negotiable Instruments Act of 1914 has not changed the established rule that mere knowledge of facts sufficient to put a prudent man on inquiry without actual knowledge, or mere suspicion of an infirmity or defect of title, does not preclude the transferee of a note from occupying the position of a holder in due course, unless circumstances or suspicion are so cogent and obvious that to remain passive would amount to bad faith.

Appeal from Common Pleas Circuit Court of Barnwell County; I. W. Bowman, Judge.

Action by J. O. Patterson, Jr., against the Orangeburg Fertilizer Company and others. From judgment for defendants, plaintiff appeals. Affirmed in part; reversed and remanded in part.

Charles Carrall Simms and Thomas M. Boulware, both of Barnwell, for appellant.

Moss & Lide and Wolf & Berry, all of Orangeburg, and Harley & Blatt, of Barnwell, for respondents.

COTHRAN, J. This is a double action against a fertilizer company and its agent, on the one part, and a bank, on the other. The alleged cause of action against the fertilizer company and its agent is for \$27,000 damages growing out of the fact that certain fertilizers sold by the company to the plaintiff, and used by him in the cultivation of his crop in the year 1919, contained a deleterious ingredient, which, instead of being a benefit to the crop, poisoned the vegetation and caused serious loss of production. The character of the action is a matter of controversy and will be considered hereinafter.

The alleged cause of action against the bank is based upon the fact that the notes given by the plaintiff to the fertilizer company for the fertilizer have been assigned by the company to the bank, and that the notes are void, the consideration therefor having failed by reason of the facts which are made the basis of the alleged cause of action against the fertilizer company and its agent; and the prayer for relief against the bank is that the notes be surrendered for cancellation, and that the bank be enjoined from attempting to enforce the collection of them.

At the close of the testimony, the circuit judge, on motion, directed a verdict in favor of the defendants the fertilizer company and its agent upon the cause of action for dam-

ages, and also directed a verdict in favor of the defendant bank against the plaintiff for the amount due upon the several notes.

The plaintiff has appealed from the judgments entered in conformity with the directed verdicts.

We may first dispose of the exceptions assigning error in directing a verdict in favor of the bank upon the notes which the plaintiff gave for the fertilizer, and which were assigned before maturity to the bank. It is questionable whether the bank, not having set up the notes as a counterclaim, and not having demanded judgment thereon, was entitled to a judgment in this action; but no question is raised in reference thereto, and we pass it by. The notes were negotiable promissory notes transferred to the bank for value before maturity in good faith. The bank, so far as the evidence shows, had no notice of any infirmity in the notes, or of any defense thereto which the plaintiff may have had growing out of the facts alleged in the complaint or otherwise. Suspicious circumstances, if they existed, are not sufficient to charge the assignee of such commercial paper with notice. A long line of decisions sustain the action of the circuit judge. They are cited in the case of Merchants' Nat. Bank v. Smith, 110 S. C. 462, 96 S. E. 690, 11 A. L. R. 1274. These exceptions are accordingly overruled.

[1] We may also dispose of the exceptions assigning error in directing a verdict in favor of the defendant Cave, agent of the fertilizer company. There is nothing in the evidence that would connect him with the alleged conduct of the fertilizer company. These exceptions are accordingly overruled.

This leaves for consideration only the alleged cause of action against the fertilizer company, which will require a somewhat extended statement of the facts of this case and of the principles of law applicable thereto.

The facts of the case fairly deducible from the evidence, and with all inferences taken most favorably to the plaintiff, as the rule requires that we take them, in reviewing the direction of a verdict against him, are as follows:

In February, 1919, the Orangeburg Fertilizer Company entered into a contract with the plaintiff, to sell and deliver to him for the 1919 crop 100 tons of ammoniated fertilizer (with the privilege of increasing or decreasing that quantity) at a certain price per ton, the guaranteed elements of which were 8 per cent. phosphoric acid, 3 per cent. ammonia, and 3 per cent. potash, usually designated 8-3-3. Seventy-five tons were delivered under this contract, the price being \$4,858.79, which was closed by three notes of \$1,619.59, \$1,619.60, and \$1,619.60, dated May 22, 1919, and due respectively October 1, 1919, October

15, 1919 and November 1, 1919, with interest from date at 6 per cent. per annum.

On April 25, 1919, before the account was closed by notes, the plaintiff procured samples of the fertilizer to be drawn at his place by a representative of Clemson College for analysis. The analysis was dated June 27, 1919, and showed: Phosphoric acid, 8.45 per cent.; ammonia, 3 per cent.; and potash, 2.82 per cent. A subsequent analysis made on September 30, 1919, showed anhydrous borax, 1.46 per cent., though by more accurate methods developed later this result was shown to have been "much too high" in the opinion of Dr. Brachett, chief chemist of the college, and should be reduced about one-third, leaving it .98 per cent.

During the war with Germany the supply of potash from that country, which was the main source of supply, was not available, and other sources of supply were sought. One of them was Searies Lake, in California. The potash from Germany contained very little, if any, borax, while that from California contained that element in considerable quantity. It was known as Trona potash, and was distributed largely over this section in 1919, and used extensively by all manufacturers of fertilizers. It was the only source of supply, practically, and was used in the manufacture of the fertilizer sold to the plaintiff.

The plaintiff applied the fertilizer to his crops with disastrous results. "A short time after I put down that application, the cotton began to wilt, and it shed off everything in the shape of fruit except that that had developed into bolls, and it continued to do that from then on." On 64 acres of his best land, which usually produced from 100 to 125 bales of cotton, he gathered 24 bales. On 90 acres of land cultivated by share croppers upon which they had gathered 135 bales, they gathered 26.

There was abundant evidence tending to show that anhydrous borax was a poisonous and destructive agency to vegetation; that it was present in an appreciable degree in the fertilizer manufactured by the defendant and sold to the plaintiff; the analysis showed 1.46 per cent., which, possibly reducible by later methods, would amount to nearly 10 pounds per acre in an application of 1,000 pounds of fertilizer; that the maximum amount of this poisonous substance without danger to plant life would be 2 pounds per acre.

The evidence therefore tended to show: (1) That the plaintiff purchased fertilizer guaranteed to conform to the formula 8-3-3; (2) that he applied it to his land in the cultivation of the crop of 1919; (3) that the fertilizer so bought and used contained an appreciable quantity of borax; (4) that fertilizer containing the quantity of borax which an analysis of the fertilizer so bought and

used showed that it contained was deleterious, if not destructive of plant life; (5) that his crops in the year 1919 were seriously injured, resulting in a considerable loss of production.

It cannot be doubted that this evidence was sufficient to raise the issue whether or not the fertilizer sold by the defendant to the plaintiff and used by him upon his crops contained a deleterious ingredient, and actually caused the damage complained of. If so, has the plaintiff a cause of action against the defendant for such damage?

Several barriers are suggested by the defendant to the plaintiff's right to recover damages. It is suggested: (1) That the statute law of the state purporting to regulate the sale of commercial fertilizers prescribes an exclusive remedy for the plaintiff under the circumstances stated; (2) that the warranty of the defendant that it does not guarantee to the plaintiff results from the use of the fertilizer is exclusive of any implied warranty arising otherwise from the contract of sale; (3) that the contract limits the filing of a claim of any nature to 10 days after receipt of goods; (4) that the action is for a negligent and willful tort, resulting in damage to the plaintiff, and that there is no evidence tending to establish either element of the tort complained of.

[2, 3] 1. As to the first suggestion: The sections of volume 1, Code of Laws A. D. 1912, 2315 to 2330, commonly referred to as the Fertilizer Act, do not purport to provide a remedy for one whose crop may have been damaged by the introduction into the fertilizer of a noxious ingredient; but, if they did, such remedy would be cumulative, and not exclusive. The rule is that, when the liability existed at common law, and that liability is affirmed by a statute which gives a new remedy for its enforcement, unless a contrary intention appears, the new remedy is merely cumulative. 1 C. J. 989. In *Kennedy v. Reames*, 15 S. C. 548, cited by respondent, it is declared:

"If an affirmative statute, which is introductory of a new law, direct a thing to be done in a particular manner, that thing shall not, even although there are no negative words, be done in any other manner."

The analysis of the fertilizer made by Clemson College was for the purpose of verifying the guaranteed percentages of the elements phosphoric acid, ammonia, and potash. They reported a deficiency in potash, and upon that basis estimated the commercial value of the fertilizer at 56 cents per ton less than the guaranteed value. They did not analyze it for borax, and in their estimate of its commercial value did not consider the presence of a positively deleterious ingredient.

The provisions of the statute allowing a pro rata reduction in the price for a deficiency in element percentages and consequent commercial value assumes that with that deficiency the fertilizer would have some value, considerable value, certainly enough to form a subtrahend from which the deficiency was to be subtracted. It does not contemplate the presence of a deleterious ingredient to such an extent as not only to render it of no value at all, but positively injurious in its effects.

[4] 2. As to the second suggestion: We find no express warranty in the contract at all. The only reference to that subject is a provision that there is no guaranty of results which has no greater effect than to a very innocent degree limit the implied warranty that a sound price demands a sound commodity. Of course, if the plaintiff received fertilizer which by analysis is shown to contain the elements represented, the defendant, even in the absence of this limitation, could not be held to have guaranteed results in the application of it to the plaintiff's crops; but that would not relieve them from responsibility for incorporating in the mass of available ingredients such injurious elements as would neutralize the results reasonably obtainable from the application of fertilizer containing only the ingredients represented.

[5] 3. As to the third suggestion: The law recognizes the validity of a stipulation limiting the time within which a claim for damages for the breach of a contract shall be presented, only when such stipulation is reasonable in its nature as giving the party damaged a reasonable time for the presentation of a claim. It would hardly be contended that a purchaser of fertilizer which contained poison enough to destroy the crop to which it was applied, and which result could only be ascertained after the crop had at least begun to grow, had a reasonable opportunity in 10 days to ascertain that unascertainable fact and made a claim for damages which had not occurred. The limitation under these circumstances is contrary to the public policy and void.

[6] 4. As to the fourth suggestion: Under the allegations of fact contained in the complaint, the action might have assumed any one of the three aspects: (1) An action for damages on account of a failure of consideration; (2) an action for damages for the breach of the implied warranty of soundness or fitness of the goods sold; (3) an action in tort for negligence in supplying to the plaintiff a fertilizer containing a deleterious ingredient.

It is not entirely clear from the terms of the complaint which one of these actions the plaintiff intended to bring, nor was it necessary for him to have specifically denominated its particular form, so long as the facts which would contribute a valid cause of ac-

tion are clearly set forth. Nor do we attach any importance to the statements of counsel in arguing questions of evidence to the court characterizing the action as one in tort.

The complaint is easily susceptible of the construction that the action is one for damages, by reason of the defendant's breach of the warranties of soundness and fitness implied in the contract, the breach of either of which is supported by abundant evidence to have required the submission of the issue to the jury.

[7] The rule that in a contract of sale a sound price warrants a sound commodity has been recognized in this state ever since the organization of its courts. That there is evidence tending to show that the fertilizer delivered by the defendant under its contract contained an element injurious to vegetable life is apparent. As a matter of law, it is equally apparent that, if this fact be established, the defendant supplied an unsound commodity. Upon this issue the plaintiff was clearly entitled to go to the jury.

[8] A further consideration differentiates this case from the ordinary case of a sale of goods. The defendant was a manufacturer of the goods it proposed to sell to the plaintiff. The contract of sale therefore contained a further implied warranty that the goods sold were reasonably adapted to the purposes for which they were, with the knowledge of the defendant, purchased by the plaintiff. The rule is thus expressed in *Robson v. Miller*, 12 S. C. 536, 32 Am. Rep. 518:

"When one undertakes to manufacture for another an article of known value and use, it is an implied condition of the contract that it shall be fit for the use to which it is commonly put."

And in *Paint Co. v. Bennett-Hedgpath Co.*, 85 S. C. 492, 67 S. E. 740:

"If there had been no testimony of an express warranty, the law would have implied a condition that the articles were merchantable and reasonably fit for the purpose for which they were intended."

In 24 R. C. L. 509, it is declared:

"The manufacturer should be and is held to a higher degree of care than the dealer in putting on the market dangerous compounds, because he knows or should be charged with notice of the quality and contents of the article that he manufactures, and, being the originator of it, should be required to give notice of the danger in its use, if it is dangerous."

"When, however, the buyer does not designate any specific article, but orders goods of a particular quality, or for a particular purpose, and that purpose is known to the seller, the presumption is that the buyer relies upon the judgment of the seller; and the latter, by undertaking to furnish the goods, impliedly undertakes they shall be reasonably fit for the purpose for which they are intended." 24 R. C. L. p. 188.

"If a thing be ordered of the manufacturer for a special purpose, and it be supplied and sold for that purpose, there is an implied warranty that it is fit for that purpose." R. C. L. p. 192.

"The fact that the buyer has not paid the price, when the sale is on credit, does not itself preclude him from suing the seller, and this has been held true where the buyer gave his negotiable note for the price which was transferred by the seller and judgment thereon recovered against the buyer, which on account of his present insolvency was unsatisfied." 24 R. C. L. 234, citing *Volland v. Baker*, 32 Neb. 391, 49 N. W. 881, 13 L. R. A. 140.

"When a buyer confiding in a warranty has suffered consequential loss, the damages should make good the defects in the property sold, and also such additional loss as is the direct consequence of the seller's breach of his warranty." 24 R. C. L. 256.

"It is settled law that, where an article or commodity is to be made or supplied to a purchaser for a particular purpose known to the seller, there is an implied warranty that it shall be reasonably fit and suitable for the purpose intended." *Gold Ridge Co. v. Tallmadge*, 44 Or. 34, 74 Pac. 325, 102 Am. St. Rep. 602, citing *Benjamin on Sales* (7th Ed.) 633, 636; 2 *Schouler, Per. Prop.* § 246; 10 *A. & E. Enc. L.* (1st Ed.) 149; *Poland v. Miller*, 95 Ind. 387, 48 Am. Rep. 730; *McClamrock v. Flint*, 101 Ind. 273; *Bushman v. Taylor*, 2 Ind. App. 12, 28 N. E. 97, 50 Am. St. 228.

"A manufacturer who sells an article of his own making impliedly warrants that it is free from latent defects arising from the process of manufacture or the use of defective material." Note to 102 Am. St. 615, citing *Beers v. Williams*, 16 Ill. 69; *Biernan v. City Mills Co.*, 151 N. Y. 482, 45 N. E. 856, 37 L. R. A. 799, 56 Am. St. Rep. 636; *Rodgers v. Niles*, 11 Ohio St. 48, 78 Am. Dec. 290.

"Where a manufacturer contracts to supply an article of his own make or manufacture, to be applied to a particular purpose, so that the buyer necessarily trusts to the judgment and skill of the manufacturer, the law implies a warranty that it shall be reasonably fit for the purpose to which it is to be applied." Note 102 Am. St. 617.

This implied warranty of fitness or adaptability is entirely independent of the question of the negligence of the manufacturer.

"The effect of an express warranty undoubtedly is to bind the seller absolutely for the existence of the warranted qualities. If an implied warranty is properly called a warranty, the consequences should be similar. It should make no difference, therefore, whether the seller was guilty of any fault in the matter. Such is the well-settled law of England." *Williston, Sales*, § 237.

After stating that the English rule is not followed in some jurisdictions, the author says:

"The English rule may seem somewhat harsh at first sight, but on grounds of policy it is probably superior to any modification of it based upon negligence. If the buyer is compelled to contest the question of negligence with the seller,

he will find it very difficult to recover. In the nature of the case the evidence will be chiefly in the control of the seller, and the expense of endeavoring to make out a case of this sort will be prohibitive in cases involving small amounts. Moreover, if the buyer cannot recover from the seller, he cannot recover from any one for the defective character of the goods which he has bought. The wrong done by the sale of defective material to the manufacturer who later sold the goods cannot form the basis of action by the ultimate buyer. Consequently the real wrongdoer who has caused the ultimate injury escapes. On the other hand, if the manufacturer is held to an absolute liability irrespective of negligence, it will unquestionably increase the degree of care which he will use, and if in any case he is compelled to pay damages for breach of warranty where the real cause of the defect was inferior material which he himself innocently purchased, he will have a remedy over against the persons who sold him this inferior material, and his damages will include whatever he himself has had to pay for breach of warranty. Thus the loss will be borne ultimately by the person who should be responsible."

[§-11] But if we should adopt the contention of the defendant's counsel that this is an action in tort, based upon the alleged negligence of the defendant, the result, so far as the directed verdict is concerned, must be the same. The plaintiff had the right, if he chose to do so, to waive the contract and sue upon the alleged tort. In doing so he assumed the burden of establishing negligence on the part of the defendant. The question thus arises: Has he produced sufficient evidence of this fact to require a submission of the issue to the jury? The defendant, as a manufacturer and seller, held itself out to the world as manufacturing a compound that was not only adapted to the purposes intended, but was free from deleterious elements. It was its active duty to see that the compound answered these implied representations. If an analysis by it of the various ingredients of the compound would have discovered the presence of a deleterious substance, was it its duty to make that analysis? Did it do so? Should it have known that borax was such a deleterious substance? If it did not, should it have known such fact? These questions raise issues of fact for the determination of the jury. The testimony shows that expert chemists are employed by other companies for this very purpose. Did the defendant have such a man? If not, was it not its duty to have done so? That it was the duty of the defendant to see that deleterious elements were not introduced into the compound is clear. The evidence tends to show that a deleterious element was introduced. The prima facie showing, therefore, is that the defendant breached its duty; and from that prima facie showing an instant presumption of negligence arises, as the presumption of negligence follows from the

proof of an injury as the result of a defective appliance.

The judgment of this court is: (1) That the judgment in favor of the defendant bank against the plaintiff be affirmed; (2) that the judgment in favor of the defendant Cave be affirmed; (3) that the judgment in favor of the defendant Orangeburg Fertilizer Company be reversed; (4) that the case be remanded to the circuit court for a new trial upon the alleged cause of action of the plaintiff against Orangeburg Fertilizer Company.

GARY, C. J., and WATTS and FRASER, JJ., concur.

On Petition for Rehearing.

PER CURIAM. The plaintiff has filed a petition for a rehearing as to that portion of the judgment of this court affirming the direction of a verdict in favor of the defendant Planters' Bank upon the grounds:

(1) That there was testimony tending, at least, to show that at the time the notes were negotiated to the Planters' Bank they were in the physical possession of the Home Bank at Barnwell, and that for that reason the Planters' Bank was not entitled to occupy the position of a holder in due course.

(2) That there were such circumstances of suspicion in connection with the transfer as to put the Planters' Bank on notice, which, if pursued with ordinary diligence, would have led to knowledge of the maker's defense to the notes; that the Negotiable Instruments Act of 1914 (Laws 1914, p. 668) has changed the law which prevailed prior thereto, as declared in *Bank v. Smith*, 110 S. C. 462, 96 S. E. 690, 11 A. L. R. 1274.

[12] As to the first ground: The testimony of R. K. Jennings, vice president of the fertilizer company, is to the effect that the notes were payable at the Home Bank of Barnwell; that he forwarded them to that bank for collection prior to maturity; that prior to maturity and prior to negotiation he telephoned for their return; and that he took them to the Planters' Bank and discounted them, the bank requiring the indorsement of himself and Smoak, officers of the fertilizer company, in their individual capacities. He is uncertain as to the date of his recalling the notes, fixing it as September 24th or 25th, and he is evidently mistaken as to the date of the negotiation, fixing it as the 25th (about), the check itself in payment being dated the 24th. In view of the extreme improbability of the bank issuing its check before the actual indorsement of the notes and their delivery, and in view of the personal indorsements of Jennings and Smoak, which were not necessary in the simple process of collection, it does not admit of doubt but that the notes were actually delivered to the bank at the time of negotiation. In support of this fact, the testimony of the

vice president of the bank, who concluded the negotiation, is clear and positive. He testified that the notes themselves were presented for discount; that it was a straight purchase, a business transaction; that he required the signatures of Jennings and Smoak as indorsers; that the notes were returned to the Barnwell bank by his bank for collection on October 22d; that he issued a check for the notes dated September 24th. His records show that on that day the notes were discounted and entries properly made. It is inconceivable that this transaction should have occurred while the notes were in the Barnwell bank and \$4,800 paid out upon the promise of Jennings to get them from the Barnwell bank and have them indorsed by himself and Smoak.

The only shadow of opposition to the bank's positive statement, corroborated by the assignor of the notes, is the discrepancy in Jennings' testimony, to which we have adverted, and the vague and indefinite statement of the cashier of the Barnwell bank that "about September 25th" he received a telephone message from the fertilizer company to return the notes. His statement is not inconsistent with that of Jennings, for the entire transaction occurred on September 24th, "about" the time indicated by the cashier.

[13] As to the second ground: The Negotiable Instruments Act has not changed the well-established rule:

"That mere knowledge of facts sufficient to put a prudent man on inquiry, without actual knowledge, or mere suspicion of an infirmity or defect of title, does not preclude a transferee from occupying the position of a holder in due course, unless the circumstances or suspicion are so cogent and obvious that to remain passive would amount to bad faith." 8 C. J. 501.

At page 504 it is declared also:

"The Negotiable Instruments Law expressly provides that, to constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had 'actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounts to bad faith.' This provision as to bad faith means that suspicion or facts putting a prudent person on inquiry are not sufficient to preclude one from being a holder in due course, and merely reiterates the common-law rule as laid down in nearly all of the states."

The petition attempts to discredit the authority of the case of *Merchants' Bank v. Smith*, 110 S. C. 462, 96 S. E. 690, 11 A. L. R. 1274, by reference to the fact that the decision was by a divided court. An examination of that decision will show that there was no difference of opinion as to the principle under discussion. The point in difference was the effect of there being unpaid

installments of annual interest at the time of the transfer, which in the opinion of two members of the court was notice of an infirmity in the note.

It is therefore ordered that the petition be dismissed, and the stay of remittitur revoked.

GARY, O. J., and WATTS, FRAZER, and COTHRAN, JJ., concur.

(117 S. C. 186)

BROOME et al. v. MORDECAI et al.
(No. 10712.)

(Supreme Court of South Carolina. Sept. 27, 1921.)

1. Trusts §240—Foreign trustee not liable for default of resident trustee.

Where the corpus of a trust was managed by a resident trustee, and had never been in the control of foreign trustees, whose only duty was to forward the income to the cestui que trust after the resident trustee sent it to him, and who, on failure of the resident trustee to send the income, gave prompt notice of the failure, the foreign trustee is not liable for default of the resident trustee.

2. Trusts §380—Surety on bond of trustee held liable for default.

Where surety for trustee did not avail itself of an order of the court allowing it to secure a joint deposit in bank of funds of the trust estate in the joint names of itself and trustees, and where the surety, after being notified of a default of one trustee by another trustee, brought the matter to the attention of the defaulting trustee, and so enabled him to escape, and where it had knowledge of the nature of the investment, which would demand prompt investigation of any default, it is liable on the bond for the default.

Appeal from Common Pleas Circuit Court of Charleston County; R. W. Memminger, Judge.

Action by Clarissa Broome (formerly Murray) and another against T. Moultrie Mordecai and others. From a judgment for plaintiffs, defendants Cyril V. Hawksford and the American Bonding Company appeal. Reversed as to Hawksford, and affirmed as to the American Bonding Company.

The following is the master's report:

On the 11th day of May, 1888, William James Murray, reciting his permanent residence at Saint Aubins, in the island of Jersey, but then temporarily residing at Fournies Nord, in the republic of France, executed and delivered an indenture, or "postnuptial agreement," assigning and setting over \$125,000 of funds or property then held for him by Henry E. Young, as guardian, to the said Henry E. Young, of Charleston, S. C., and Francis Hawksford, of St. Helier, in the island of Jersey, kingdom of Great Britain, as trustees, on the terms and

for the purposes set out in the said agreement, a copy of which is attached to the complaint herein as Exhibit A.

In proceedings in this court entitled James Ancrum Murray, by guardian ad litem, v. Clarissa Murray et al., referred to at length in the pleadings, necessary or expedient changes of trustees were made from time to time as authorized by the said indenture. By decree in said cause dated November 24, 1905, the defendants herein, T. Moultrie Mordecai and Cyril V. Hawksford, were appointed trustees, Mordecai being a resident of Charleston, and Hawksford, a son of the original trustee, Francis Hawksford, a resident of the Isle of Jersey. Mordecai and Francis Hawksford, whose death on the _____ day of _____, 1905, made a new appointment necessary, had been holding as trustees under bond of \$100,000, with American Bonding & Trust Company of Baltimore City, as surety, at this time, by amendment of charter, known as American Bonding & Trust Company of Baltimore.

This decree of November 24, 1905, provides for the release of both trustees, Mordecai and Francis Hawksford, and their bond, upon delivery of the trust estate to the new trustees, Mordecai and Cyril Hawksford, evidenced by exhibit to the clerk of this court of receipt of T. Moultrie Mordecai, resident trustee, for himself and Cyril V. Hawksford, for such assets and property; further orders that the new trustees, before entering upon their duties as such, shall give and keep in force a bond in the sum of \$100,000, with surety to be approved by the said master (then G. H. Sess, Esq.), conditioned for faithful performance by the trustees of their duties as prescribed by the terms of the decree; and further providing: "That as protection for said surety all the securities and properties of the estate shall be placed in the joint name of the trustees and such surety, or its attorney in fact duly authorized," etc. Bond was executed by the trustees, and by the American Bonding Company of Baltimore, as surety, approved by the master, and was delivered to the clerk, the required receipt exhibited by Mordecai, and the bond of Mordecai and Francis Hawksford, as trustees, and the American Bonding & Trust Company of Baltimore City as surety, was thereupon released and delivered up by the said clerk. Mordecai, for himself and Hawksford, vouched the accounts and securities of the estate before the master from time to time, up to the 30th day of December, 1916, the date of the last accounting.

Clarissa Broome (formerly Murray) the life beneficiary, and James Ancrum Murray, remainderman, filed their complaint in the instant action on the 7th day of February, 1919, and thereon an order of default as to the defendant Mordecai was entered, and the cause referred to the undersigned master July 2, 1919.

I have held references, the minutes of which, together with exhibits and affidavits offered, are herewith filed. I find that T. Moultrie Mordecai has absconded, and all efforts to locate the negotiable assets of the trust estate have been unavailing. The extent of the devastation can only be ascertained upon a careful audit of the trustees' accounts, and of certain deeds and mortgages found in his safe, and

turned over to me and now in my possession. The defendant Hawksford alleges in his answer that no part of the assets of the estate have ever been in his possession, and I so find. No further accounting by the trustees can be hoped for. Pending the necessary audit, I am in this report considering the question of liability of the trustees and the surety, and will file a special report of audit hereafter. The last account, December, 1916, shows negotiable assets of \$70,000 in round figures, consisting of city of Charleston bonds.

The defendant American Bonding Company of Baltimore denies all liability under the several defenses set up in its answer, and makes a tender of \$1,000, the amount of premiums received on the bond with interest.

The appointment of Mordecai and Cyril Hawksford as trustees was made by this court, having jurisdiction of the parties and of the subject-matter, and may be said to have been made for, by, and with the consent of Clarissa Murray, if not directly by her, as a strict construction of the terms of the indenture might require. Her failure to appoint did not affect the right and duty of the court. The case of *Tinsley v. Kirby*, 17 S. C. 3, relied on, has no application, inasmuch as the bond there sued on was given for an office to which no appointment could be made.

The contention that the bond is and was void because signed by T. Moultrie Mordecai as attorney in fact cannot avail, specific authority to Mordecai having been shown. The position of this defendant as successor to the American Bonding & Trust Company of Baltimore City is interesting in connection with the record as it appears in the case of *Murray v. Murray*, and the attack on the validity of the bond. The giving of a new bond by Mordecai and Cyril Hawksford was prerequisite to qualification. The bonding company was then surety on bond of Mordecai and Francis Hawksford in the sum of \$100,000, conditioned to account for this fund. Liability ceased under the old bond and attached under the new bond immediately upon compliance by the reappointed trustee, Mordecai, and the new trustee, Cyril Hawksford, with this and other provisions of the decree, and specifically the exhibit to the clerk of receipt of Mordecai, for himself and his newly appointed cotrustee, showing delivery of the assets of the estate to them. There was no change in the premiums regularly paid to the surety company out of the funds of the trust estate. Therefore, if no validity ever attached to the bond so given for the present trustees, there was no release of the prior bond given for Mordecai and Francis Hawksford as trustees, and it would be unnecessary to consider any question of liability of Cyril V. Hawksford for the devastavit of Mordecai, his cotrustee. Mordecai, as surviving trustee, in possession of the assets of the estate, either made the transfer authorized and directed by the decree of November 24, 1906, to Mordecai and Cyril Hawksford as trustees, with American Bonding Company of Baltimore as surety on the bond given as required by said decree, or he is still liable to account as trustee under the bond then in force, continued in force by its own terms and the acceptance of premiums. I am of the opinion that the bond so given was valid, and that liability of the surety thereunder accrued immediately upon the transfer

which was sufficiently evidenced by the receipt of Mordecai for himself and Hawksford exhibited to the clerk of court.

By its allegations in the third and fourth paragraphs of its answer, the bonding company seeks to avoid liability on the ground that failure to deliver any part of the estate to it under the terms of the decree, coupled with the knowledge of plaintiffs as to the custody and manner of handling the estate, constituted a fraud in the procurement of the bond, and that defendant, having received no part of the estate, had no duty to perform, with particular reference to the holding of the assets of the estate in the joint names of the trustees and the surety. This provision was recommended by the master and inserted in the decree "for the protection of the surety," etc. It could be no more than a direction to or requirement of the trustees, the principals on the bond. If not waived by the surety, and the trustees failed to comply with this requirement of the court, it was a failure on their part to well and truly perform their duties as trustees, and for this the bonding company, as surety, is liable.

It is not necessary to discuss in this connection the power delegated to Mordecai as attorney in fact of the bonding company, because I find as matter of fact that, while it may be argued that the bonding company had knowledge of and acquiesced in the holding by Mordecai both as trustee and as their attorney in fact, there never was any holding of the estate in the joint names of the trustees and the bonding company. I find as matter of fact that this "protection" was waived by the surety. That it was not complied with was known to the agent of the bonding company (Mordecai), through whose agency the bond was issued, and by whom, as attorney in fact for the bonding company, the undertaking was assumed. It was known to their traveling auditor or representative, a Mr. Bode, who is shown by the testimony to have checked over at least a portion of the assets of the estate produced by and in the possession and sole control of Mordecai, and to have ascertained their negotiable nature. The fact that Mordecai's possession and sole control of these negotiable assets of the estate was also disclosed from time to time by his accountings for himself and Hawksford, and his exhibit to me on accounting, of the securities so held, when it was obvious from the accounts themselves, showing remittance of income to Cyril Hawksford in England, that Cyril Hawksford was not in a position to exercise with Mordecai joint custody and control of such funds and securities. Mordecai was the agent of the bonding company, resident in Charleston; his knowledge was their knowledge.

The situation between the bonding company and Mordecai was clearly this: The bonding company had implicit confidence in Mordecai, authorized and approved the bond in question, relied upon his stated accounting, and accepted the annual premium. It will be held strictly to that which it undertook to do for a money consideration, viz.: Hold the parties in interest harmless from any default of Mordecai as trustee.

Paragraph 5 of the answer of the bonding company denies liability on the ground that the original indenture was void under section 3872,

S. C. Revision of 1912. This is a portion of the statute 3, Henry VII, c. 4, for the protection of creditors, and it will be presumed to have been enacted by the Legislature of South Carolina for that purpose. I find that in no aspect has this statute any application to the facts in this case. Certainly a surety of trustees appointed by the court, under bond given to the court, cannot avail itself of its provisions for the purpose of avoiding liability after default.

With these points disposed of, the reliance of the bonding company seems to be in its position taken in argument that the defendant, Hawksford, is liable for the devastavit of his cotrustee, Mordecai. I find it to be the general rule that a cotrustee is held to the exercise of prudence, care, and diligence, and is held for such losses only as occur as a result of his acts or omissions. When charged with responsibility for losses, the court will be guided in its conclusion by the attendant circumstances. *Crane-Boylston Co. v. Moses*, 13 S. C. 569; *Mayer v. Mordecai*, 1 S. C. 394, 17 Am. Rep. 26; *Glover v. Glover's Ex'rs*, McMul. Eq. 153.

The indenture creating the trust named Young, of Charleston, and Francis Hawksford, of the island of Jersey, as trustees, with provision for the appointment of new trustees, never less than two; that the trust fund might be invested in either American or English securities, and might be invested jointly in such trustees as appointed, or solely in the new trustee, "as the case may require." The fund was then invested in South Carolina, and so continued. Evident provision was made for convenience in handling and accounting and in remitting the income for the foreign beneficiaries. It appears that these beneficiaries reside abroad, and have never been in this country. The records of this court show that, upon the death of Francis Hawksford, and petition for a new appointment, Mordecai was the controlling and managing trustee, resident, and in possession. Cyril V. Hawksford was appointed to succeed his father, and Mordecai was reappointed. Mordecai was thereafter recognized as resident trustee in possession by authority of the court given him to surrender and to receive solely the proceeds of certain matured bonds held for the estate, and to execute and deliver conveyances of real estate belonging to the estate upon payment of the purchase price to him (Mordecai). The bonding company is chargeable with knowledge of this, and of the very evident fact disclosed by the entire record, that receipt of the corpus of the trust by Cyril Hawksford was never contemplated, and that his sole duties as trustee would and did consist of receiving the income, and such other sums as were allowed by the court, as forwarded to him by Mordecai, paying the same over to the parties entitled thereto. This course was followed under the régime of Mordecai and Francis Hawksford, for whom the defendant bonding company was surety, and was thereafter continued. The bond recites the pending cause of *Murray v. Murray et al.*, and the order therein of November 24, 1905, and is conditioned that the said Mordecai and Hawksford, so appointed, "do and shall well and truly perform their duties as trustees as prescribed by the terms of said decree and of said deed of postnuptial settlement, and shall obey all orders of the court made or to be made

in said cause." Further proceedings of the trustees and further orders in the said cause were under the security of the bond on which the defendant bonding company was surety, and were necessarily within knowledge of their agent, Mordecai.

This obligation of Cyril Hawksford is not, and cannot be, construed to be an undertaking by him to become surety for his cotrustee and coprincipal, Mordecai.

Applying the test of the numerous cases cited by the defendant, I can find no acts of either commission or omission by Hawksford that placed Mordecai in a position to dissipate or appropriate to his own use this fund. Had Hawksford failed to exercise such supervision of the nature of investments as the circumstances required, or approved of questionable and unauthorized investments for the trust fund, and loss thereby resulted, he would unquestionably be liable for that which was made possible by his wrongful conduct. But the facts and circumstances show not only that he relied on the accountings made from time to time by Mordecai for the trustees, but that the accountings so relied on were correct. In 1916, as shown by accounting, Mordecai had in his possession and solely under his control negotiable securities, city of Charleston bonds, of the value of about \$70,000. If he had power of attorney from Cyril Hawksford, it in no way increased the hazard nor the danger of subsequent conversion of these securities to his own use by Mordecai.

The plaintiff beneficiaries cannot recover from Hawksford. They knew that he had none of the assets of the trust estate in possession except the income remitted to him from time to time by Mordecai and paid over to them. Had they acquiesced in this method and handling of the estate without the knowledge of the surety, then they might be estopped from proceeding against the surety for recovery of loss. I find, however, that the surety, in all the circumstances, is chargeable with this knowledge of the beneficiaries through the knowledge of its agent, Mordecai. It follows that the surety knew, or should have known, that this agent, Mordecai, was holding himself out to be its attorney in fact, and in fact exercising power as its attorney in fact not authorized by the written authority with which they now seek to limit their liability.

I repeat that the whole history of this fund, from the time the bonding company became surety for Whaley and Francis Hawksford, as trustees, up to the time the devastavit of Mordecai was disclosed, and the present action brought, shows that the American Bonding Company of Baltimore City, and its successor the present defendant, American Bonding Company of Baltimore, placed implicit faith, trust, and confidence in T. Moultrie Mordecai, and it is a sad duty which now falls upon the master herein, associated with him first in his office and afterwards for many years at this bar, to find and record that Mordecai was unworthy of the trust and shamefully abused it, forfeiting the high position that he had gained in the legal world as a practitioner and a recognized leader of this bar. It was this misplaced confidence, without connivance on the part of the beneficiaries or of the cotrustee, Cyril V. Hawksford, that made the devastavit of Mordecai possible. The bonding company should and will be held

to answer, as surety, for the wrongful acts of its principal, its agent, its attorney in fact with limited power, but less limited in its exercise in fact, and its trusted counsel, ending another chapter in the fall of man, as a surety (and especially a commercial surety) is required and should expect to do when the two necessary things are established, as in this case—its valid undertaking as surety, and the default of its principal.

The basis for settlement will require an intricate accounting, which I ask leave to file, with a separate report thereon, when prepared.

The plaintiffs pray for the removal of the present trustees, and the transfer of the corpus of the estate to trustees in England, when and if appointed by the English courts. The original indenture foresees the possibility of this arrangement. This court would, of course, require a strict showing of the careful selection and appointment of English trustees by a court of competent jurisdiction, but I am of the opinion that upon such showing this court would authorize a transfer and delivery of the fund to such trustees, the beneficiaries, resident in England, being enabled thereby the more conveniently to receive the income and to observe the conduct of the trust. I respectfully recommend that the present trustees be removed, and that the beneficiaries be authorized to institute proceedings before the proper English tribunal for the appointment of new trustees, and to have such proceedings certified to this court when completed.

I further recommend that by decree herein the defendants T. Moultrie Mordecai and American Bonding Company of Baltimore be held jointly and severally liable to the beneficiaries for such sum as may hereafter be found to be devastated committed by T. Moultrie Mordecai by audit to be hereafter filed; that the master herein be authorized to receive and receipt for any and all sums that may be due from any source to the trust estate of William James Murray, and to remit to the life tenant, Clarissa Broome, from time to time so much and such parts thereof as he may find to be due to the said life tenant as income, the balance to be held subject to the further order of the court.

FitzSimons & FitzSimons, of Charleston, for appellant Hawksford.

Nathans & Sinkler, of Charleston, for appellant American Bonding Company.

Miller, Huger, Wilbur & Miller, of Charleston, for respondents.

FRASER, J. The amount involved in this case is large; the record is large, and the arguments are strong and extended; but, in view of the full statement of facts set forth in the master's report (let it be reported), it will be necessary only to write in general terms.

William James Murray, a British subject living abroad, was entitled to a fund of \$125,000 that was under the control of the courts of South Carolina. He made a conveyance of the fund to the two trustees, one a resident of Charleston, S. C., and the other a resident of the United Kingdom of Great Britain and Ireland, living on Jersey Island.

From time to time there was a change of trustees, until T. Moultrie Mordecai, of Charleston, S. C., and Cyril V. Hawksford, of Jersey Island, were appointed, and administered the trust for a while. The funds of the trust estate were invested in South Carolina securities and lands located in Charleston. T. Moultrie Mordecai, the resident trustee, had actual possession of the property. He collected the income and forwarded it to the English trustee for payment to the cestui que trust. Under an order of the court here, the trustees gave bond in the sum of \$100,000 with the American Bonding Company, of Baltimore, as surety. In this matter Mr. Mordecai occupied a threefold position. He was the resident trustee, the attorney in fact, and also the attorney at law for the bonding company. The bonding company put the whole thing in Mr. Mordecai's hands to do with as he pleased. The thing that he did do was to appropriate all the securities to his own use and abscond.

This action is brought for an accounting, for the judgment for any deficiency, and to remove the trustees and to move the fund to England. The case was referred to the master, who found that the foreign trustee was not liable, but that Mr. Mordecai was liable as principal and the bonding company was liable as surety. On appeal to the court of common pleas, the trial judge reversed the master as to the foreign trustee. This appeal is from the circuit decree, and raises two general questions: (1) Is the foreign trustee liable for the default of the resident trustee? (2) Is the bonding company liable?

[1] I. Is the foreign trustee liable for the default of the resident trustee? The answer is, He is not. The rule is laid down in *Miller v. Sligh*, 10 Rich. Eq. 247:

"When there are joint trustees, the general rule is that each is liable for his own acts alone, and not for the acts of his cotrustees, except where he has contributed to them."

The terms of the trust contemplated the use of the fund for the support of the cestui que trust as their respective interests might appear. The fund was to be held in South Carolina, interest collected here, and sent to England for the support of the party entitled. The foreign trustee never had possession of the corpus. The record shows that it was never in the contemplation of any of the parties of the trust deed or any proceeding in court that the foreign trustee should get possession of the corpus. The resident trustee was permitted to receipt to the former trustees for the corpus in his own name and also in the name of the foreign trustee. When the income was past due and unpaid, the foreign trustee began promptly to urge payment of the income, and notified the bonding company of the default, and did all he could to protect the trust estate. The foreign trustee could not have acquired possession of

the fund and taken it out of the jurisdiction of the courts of this state without the proper and well-recognized procedure for the transfer, and this would have taken more time than was allowed by the resident trustee. There is no testimony to show any want of diligence on the part of the foreign trustee, Mr. Hawksford, and there is no basis for finding him liable for the defalcation of the resident trustee.

[2] II. Is the bonding company liable for the default? It is liable. The court gave to the bonding company ample protection. The court allowed the bonding company to secure a joint deposit, in bank, of the funds of the estate in the joint names of itself and the trustees. It did not avail itself of the protection. The bonding company made it possible for Mr. Mordecai to do just what he did do. Even when the foreign trustee notified the bonding company that the resident trustee was not performing his duty, the bonding company notified Mr. Mordecai of the complaint against him; that pressure would be brought to bear on him; and practically notified him to make a clean sweep, if he had not already done so, and get away. A large part of the income was from municipal bonds of the city of Charleston (this the bonding company knew), and a failure to pay over an income so derived demanded prompt investigation. The bonding company could not escape liability even if it were liable only for gross negligence.

The bonding company complains that there was error in holding that the bonding company waived the joint control of the trust fund. This holding is abundantly sustained by the record, and there is no evidence that the cestui que trust waived anything.

The judgment of the circuit court is reversed as to the liability of the foreign trustee, Hawksford, and affirmed as to the liability of the bonding company. Cyril V. Hawksford is not liable, and the American Bonding Company of Baltimore is liable.

GARY, C. J., and WATTS and COTHRAN, JJ., concur.

(117 S. C. 175)

McIVER v. THOMPSON et al. (No. 10710.)

(Supreme Court of South Carolina. Sept. 20, 1921.)

1. Judicial sales §31(2)—Objections may be made until sale is confirmed.

When a judicial sale is ordered by court, it is the duty of the person empowered to execute the deed to file a report of the sale showing compliance with the order, which report must be confirmed by the court in order to make the deed valid, and until that is done parties to the action may object to confirmation.

2. Judicial sales §31(3) — Confirmation relates back and cures irregularities not jurisdictional or based on fraud.

Confirmation of sale gives the sale judicial sanction and relates back to time of sale, and cures all defects and irregularities not jurisdictional or founded on fraud.

3. Infants §85—Guardian ad litem to defend should act as he might act for himself.

A guardian ad litem should look after the infants' interests and act for them in the suit as he might act for himself, and make as vigorous a defense as the nature of the cause permits after acquainting himself with the rights of his wards.

4. Infants §41—Where rights of infants were not protected in manner required by law, sale of their land by judicial decree will not be confirmed.

Where it was not the intention of any of the parties to the sale of land belonging to infants that the infants were to receive any money or benefit, but that the proceeds of the sale were to be used to satisfy indebtedness incurred on mortgage for which the infant remaindermen were in no way liable, and that the rights of the infants were not protected by their guardian ad litem in the manner required by law, a sale of their land by judicial decree in a former action will not be confirmed.

5. Infants §41—Purchaser, examining records not showing confirmation of judicial sale of infants' land is not purchaser for value without notice.

Where purchaser bought land belonging to minors after an examination of the records, which did not show that a sale made under judicial decree by their guardian who was also their guardian ad litem had been confirmed, the purchaser is not entitled to the protection of a purchaser for valuable consideration without notice.

Appeal from Common Pleas Circuit Court of Marlboro County; John S. Wilson, Judge.

Suit by John K. McIver against Fannie M. Thompson and others. From a judgment for plaintiff, certain defendants appeal. Reversed and remanded.

The following is the decree of the circuit judge:

This matter comes before me on the report of the special referee, exceptions thereto by both sides, and a motion made by the Thompson heirs in the original cause of Bridgers & McKeithan Lumber Company, Plaintiff, v. Fannie M. Thompson et al., to open said judgment in such former case. The action here is for partition, and by the pleadings as originally framed presented a two-sided contest between John K. McIver and the Thompson heirs on the one side, and the Thompson heirs and the Scott Lumber Company on the other. During the pendency of this action, and before its decision by the referee, the Thompson heirs abandoned their contest against the plaintiff, John K. McIver, thereby narrowing the issues to those between the defendants, the Thompson heirs and the Scott Lumber Company. As the

referee rightly says, "In justice to the plaintiff, J. K. McIver," it should be said "that the testimony shows that there was no basis for the allegation made in the answer of the Thompson heirs, that there should be an accounting, as no money went into his hand for which he was liable which he did not pay over to them. The testimony further shows that the sale about which this controversy centers was negotiated by Col. H. T. Thompson, the father of the Thompson defendants, while the plaintiff in this case was living in Moultrie, Ga., and that he had nothing to do with the sale, further than to execute a deed to his one-half interest in remainder in the timber in order to pay the mortgage on the place for which he and others were liable." Here I refer to the mortgage to L. M. Davis.

The lands involved consist of about 3,000 acres in Marlboro county, of which 1,200 to 1,500 acres, most of it in swamp, are timber lands; and a tract of ——— acres in the county of Chesterfield. The fee to both these tracts is vested the one half in John K. McIver, and the other half in equal proportions in the Thompson heirs; but the issues between the Thompson heirs and the Scott Lumber Company concern only the Marlboro county tract. In 18—, I. D. Wilson and his wife, then the owners of the Marlboro county lands, conveyed the same by deed to their daughter, Hannah J. McIver, for life, and at her death to her children; the child or children of a deceased child to represent the parent. Hannah J. McIver had two children, to wit, John K. McIver and Fannie McIver. Fannie married Henry T. Thompson, died 18—, leaving four children, to wit, Fannie, Carrie, Eliza, and Lucy—the ones mentioned as defendants in this present action with the other defendant, Scott Lumber Company, against which corporation they file their cross-action. The life tenant, Hannah J. McIver, died A. D. 1916, and John K. McIver, her child, is still living and is the plaintiff in this action. Before the death of Fannie, she, her mother, Hannah J. McIver, her husband, Henry T. Thompson, and her brother, John K. McIver, all joined in the execution of a mortgage to one Mrs. L. M. Davis. Thereafter, the income of the family being small and less than its needs, it was agreed that J. K. McIver should take charge of the place and farm for the purpose and benefits of the family. These farming operations were not successful, and another mortgage was given to one Salinas & Sons to secure the said advance for such operations. In 1902 the Bridgers & McKeithan Lumber Company made a contract with Hannah J. McIver and John K. McIver for the purchase of their rights in the timber on the lands, and received from them a deed to such interest. The contract price for the timber on the entire tract was \$1,650. At the times of this contract and the deed from Hannah J. and Jno. K. McIver, Fannie Thompson was dead, so that it became necessary to obtain an order of court to pass the interest of her children, which children owned a one-half vested interest in remainder in said lands and timber. Jno. K. McIver and his mother made deed as aforesaid, and a suit was brought by the Bridgers & McKeithan Lumber Company, as plaintiff, by their attorney, T. W. Boucher, now deceased, against the four children of Fannie Thompson, who at the time were all minors, alleging the deed from

Jno. K. McIver and his mother, the price to be paid, \$1,650; that such was the fair, market value of the timber; that it was to the benefit of the minors that the proposed sale be made; that the adults interested were satisfied with the price; that there was a mortgage on the lands that must be paid; and ended with the usual prayer for relief. The following is the allegation of the complaint in such former action with which the Thompson heirs find fault: "These plaintiffs are informed that there is a mortgage on said property, the same having been executed by the life tenant and remaindermen to Mrs. L. M. Davis, during the lifetime of Mrs. Fannie McIver Thompson, and that a portion of said purchase money is to be used in liquidating said mortgage. The plaintiff further alleges that the cash paid for the said timber will be of more benefit to the said minors than to leave the said timber in its present condition; that the funds so paid, reinvested, will amount to more than the value of the timber at the time they arrive at full age, should the same increase in value."

The summons and complaint in the original case are now on file, recorded and attached thereto is the usual notice to minors, except that such is not addressed to any particular person, or persons, while the return of service made on a blank form on the back of the summons refers only to the service of the summons and complaint, and is silent as to the service of this notice. Service is accepted on back of original by H. T. Thompson, the father of the children. The oldest child, Fannie, being the only one over 14 years of age, duly petitioned for the appointment of H. T. Thompson, her father, as her guardian ad litem, and the father petitioned himself for his own appointment as guardian ad litem for his other three children. He was accordingly so appointed, and the case was referred to a special referee, who held reference and reported his conclusions of law and facts. The referee held that \$1,650 was the fair market value of the timber; that it was most for the benefit of the minors that the timber be sold; that the plaintiff should have 20 years within which to remove said timber, and recommended that "the guardian ad litem, who is the father of the defendants" (the Thompson heirs), "be authorized and empowered by this court to convey, by way of deed, to the Bridgers & McKeithan Lumber Company, the interest of said remaindermen in the timber on the terms and conditions mentioned in the complaint, and that upon the payment of the said sum of \$1,650 by the Bridgers & McKeithan Lumber Company to the parties in interest that the said deed be delivered." Judge Klugh, in confirming this report, ordered that the said "Henry T. Thompson, Esq., guardian ad litem of the infant defendants, Fannie McIver Thompson, Eliza Cornelia Thompson, Lize Clarkson Thompson, and Lucy McIver Thompson, be, and he is hereby, authorized and directed to execute and convey to the Bridgers & McKeithan Lumber Company, a corporation, the interest of the defendants above mentioned as remaindermen in the timber on all the lands mentioned and described in the complaint designated and known as the Red Hill Plantation, in Marlboro county, upon the said Bridgers & McKeithan Lumber Company paying to the life tenant and the remaindermen the sum of \$1,650."

The complaint in this action could have been better drawn, could have set out that the Thompson heirs had only a one-half interest in remainder and asked for a partition of the \$1,650 and a determination of the correct proportions coming to the said children; but that it did not do so, referred to the trade as a whole, and alleged all facts as if the adults who had given their deed were also before the court—certainly constitutes no vice in the pleadings or judgment and cannot go to the question of jurisdiction as claimed by the Thompsons. The complaint did not ask as contended by the Thompson heirs, nor was it so construed by the court, as shown by its final order, that their money be taken for the payment of the debt of others, but alleged the transaction as a whole, and stated what was a fact that there was a mortgage on the lands to Mrs. L. M. Davis to be paid before a good title could be given. This was true, and Jno. K. McIver swore that he expected to get none of the money, but for his portion to be paid on the amount due. In fact, the referee, and certainly the circuit judge, were careful to protect the interest of the remaindermen and to provide that the money be paid to the parties in interest, or, as the circuit judge decreed, "to the life tenant and the remaindermen." There is nothing in the judgment, or in the record of the case, to show that it was contemplated that the interest of the minors should be taken for the payment of the debts of others, where the order of the circuit judge and the report of the referee is conclusive that the intention was to preserve the interest of the minors in the proceeds of timber sale, and that their interest should be paid to them. As held by the referee, the circuit judge could do nothing else. The court had jurisdiction, all parties were before the court, a final order, from which there was no appeal, was issued, and the case has remained on record for 18 years. This judgment is a verity, and there is no vice therein, and is a judgment forever, conclusive as to all issues therein raised, and res adjudicata as to all parties before the court on all such matters. It has been found by the special referee that the \$1,650 was at the time a full and fair price for the timber. I concur in this finding, but even if such were not so (and I think there can be no two opinions in regard to the same under the testimony), inadequacy of price is not alone sufficient to set aside a judicial sale. I do not see how I, acting as a chancellor in a court of equity, could, under all the facts of this case, agree to reopen the judgment at this time, and this regardless of the fact that this action was begun over 2 years ago when the Thompson heirs stated in their answer to the complaint that the case should be stayed until they could make a motion in the original cause, which motion they failed for 2 years to make, and while the time for cutting was running against the Scott Lumber Company, which had paid its money in good faith; and regardless, also, of the fact that such notice in the original cause, when served, was served only on the Scott Lumber Company a few days before the hearing of this case and no effort was apparently made to bring in the Bridgers & McKeithan Lumber Company, the original purchasers.

I hold the judgment in this case of Bridgers & McKeithan Lumber Company v. Fannie M. Thompson et al. is good, valid, effectual,

and subject to neither direct nor collateral attack.

But this does not dispose of what the referee properly terms the pivotal point in the case, that is, is the deed from H. T. Thompson, as guardian ad litem of the Thompson heirs, to the lumber company valid? On all other questions decided by the referee I concur in his holdings and confirm the same for the reasons given by him. In this I think the special referee is in error, and so hold.

In holding that this deed was not good, the referee bases his conclusions on the undoubted principle of law that where "the court has made an order of sale, of which a notice is to be given by advertising for a given time, such direction as well as the other terms become the law of the case. It becomes the condition on which the authority is to be exercised, the nonperformance of which will destroy the power." I have considered this case as if such principle of law were applicable to this case, and am basing my conclusions herein on such authority, though I cannot but have some doubt whether the failure to advertise for 21 days, or the failure to do some other act, could be proven after 18 years had elapsed against a subsequent innocent purchaser for value by evidence extrinsic of the records under which he purchased. The referee held that the conditions precedent to the making of the deed by the guardian ad litem were not complied with because the money was not paid to the parties in interest in said suit; that is, to the remaindermen, the Thompson heirs, as provided by the order. Was it? I think so, and must so hold. It could only be paid into court or to their general guardian.

Henry T. Thompson was the general guardian of his four children, regularly appointed by the judge of probate for Darlington county in 1898, qualified, gave bond, and has never been discharged. His eldest daughter, the only one who testified in this case, swore that he was their guardian, that she knew it, but had never called on him for an accounting. The records do not show how the money was applied, except for \$774 paid into court and practically all applied to the Davis mortgage, the only one mentioned in the complaint. The deed from Henry T. Thompson, as guardian ad litem, acknowledged receipt of the payment of the full amount, and he was enjoined by the order of the court in this very case not to make the deed until the money had been paid to these minors. Mr. Bouchier is dead. Mr. McKeithan, the president of the Bridgers & McKeithan Lumber Company at the time of the transaction, testified as to how he thought the money had been applied; but his statements are contradictory, though he seems certain that to whomsoever the check might have been made payable it was delivered to Henry T. Thompson, who, with his children, were living at the time in Darlington with Hannah J. McIver, the life tenant. Mr. McKeithan is a resident of Darlington county. Henry T. Thompson, in such county, was appointed and there qualified as the general guardian of his four children. Mr. Bouchier attended to the suit in Marlboro county, and it is doubtful whether the plaintiff ever saw any of the papers in the original suit other than his original complaint, yet the referee holds that because in his application to be appointed the guardian ad litem in this suit he

stated they had no general guardian, that the Bridgers & McKeithan Lumber Company dealt with him as guardian ad litem alone. It seems to me that the facts are the other way. Fannie Thompson also stated in her petition for the appointment of a guardian ad litem that she had no general guardian, but testified that she knew her father was her guardian and her father a lawyer; both the natural and legal guardian of his children, and their guardian ad litem in this case, the man who negotiated the entire trade, closed it up, represented his children, lived with the life tenant, the man who was liable on the Davis mortgage, did not appear as a witness. He who, above all others, would know as to the application of the funds, how he dealt and was dealt with; he who apparently furnished letters to his children to use in their cross-action against Jno. K. McIver, which cross-action they abandoned; he who under his hand and seal acknowledged the receipt of the money and caused such receipt to be spread on the records of Marlboro county after having been directed to do so only after the money had come into his hands, or the hands of others as the guardian of his children—does not appear to testify in the suit of his children when it is only reasonable to believe that he was familiar with every detail of it, must have realized the importance of his testimony and had full opportunity to find out that Mr. McKeithan had testified that the money or check had been turned over to him. Yet, Col. Thompson, who did not testify, is a licensed attorney and living in the state of South Carolina. We are in equity. Persons coming in this court must do so with clean hands. The one person who could set at rest all questions as to who he dealt and was dealt with refuses, or fails, to be sworn as to his relations in a fiduciary capacity with his own children. Even if it were a fact that he stood by and approved the application of this money which was in his hands and under his control, and allowed it to be diverted and paid on the debts of others, I could not escape the conclusion that he, as their father, their natural and legal general guardian, intended to assume, and did thereby assume, the obligation to account to his children for such fund, and perhaps has accounted by expenditures from his own funds for their benefit for all so received. But being satisfied as I am that the purchase price was paid by the purchasers to Henry T. Thompson, the natural guardian, the general guardian, and the guardian ad litem of his children, the Thompson heirs, and that the terms of the order have been complied with, I could not feel justified in refusing to confirm the said sale, and the same is hereby confirmed.

The Scott Lumber Company are subsequent purchasers. They purchased only after an examination of the records. Some faith and credit must be given to the records provided by the Legislature and the judgments of the courts of this state. I hold that the Scott Lumber Company are subsequent purchasers for value, that the money was paid in accordance with the conditions of the former order, and that the deed from Henry T. Thompson to the Scott Lumber Company is good and valid.

But even if I am wrong in this, how can it be said that the judgment in the case of the Bridgers & McKeithan Lumber Company v. Fannie M. Thompson et al. is not good? The

only thing about it and the entire transaction that can be even assailed is the deed. The judgment is *res adjudicata* as to all matters raised, passed on, or determined. The terms of Judge Klugh's order are specific. The guardian was authorized and also directed to execute a proper deed to the Bridgers & McKeithan Lumber Company. Under such order it was the duty of Thompson, as guardian ad litem, to execute and convey the interest contemplated in the order, by a proper deed, and not to deliver the deed before the payment to the proper party. Until this was done the Bridgers & McKeithan Lumber Company could not be forced to pay. If payment was not made properly, it was because of an honest mistake on their part, and as was said in the case of *Tompkins v. Tompkins*, 39 S. C. 537, 18 S. E. 233, relied on by the Thompson heirs:

"Now, if there is one thing over others in our system of jurisprudence that merits the commendation of all, it must be the flexibility of the principles adopted by courts of equity, by which they are made to subserve the needs of each particular case. Ought not those principles to be applied here? It seems so to us. Under our law, William Parks, by being a successful bidder at the sale provided for by a decree in this cause, has, to a certain extent, become a party to this action. His money has been paid into court and used for the purposes of this action, under an honest mistake, it is true. Only one party seeks any relief against him. The circuit judge orders a new sale, without any provision being made for his (Parks') protection. This is error, and must be rectified."

And in this case just cited the Supreme Court went as far as it could possibly go to protect the purchaser. The only reason that the sale was not confirmed without a further sale was that the statute and the order required a notice of 21 days, and the purpose of the sale by such method and at public auction was mandatory to fix the price. Here not only was the statute not mandatory, but \$1,650 was the only price that could be obtained, or that could be paid because that was and is *res adjudicata* as to the parties, and the infants could receive their portion thereof and none other. Under no view of the case could the portion of the Thompson heirs have been more than one-half, or \$825. As stated before, resale cannot be ordered, for the price has been adjudicated as well as the fact that the conveyance must be by private sale and to a particular person, a party to the original action who acquired rights thereof and whose rights were adjudicated. The only thing the Thompson heirs could now do would be to object to the confirmation of the sale—there having been no confirmation thereof to this day. The case of *Tompkins v. Tompkins*, supra, is, indirectly, authority also for this. They are in a court of equity and yet, instead of following this, the proper procedure, they seek to obtain all of the benefits and impose upon the successor in title to the Bridgers & McKeithan Lumber Company all of the hardships of the case. If the matter were now before me on objection of the Thompson heirs to the confirmation of the sale, I do not see how, as a chancellor in a court of equity, even if the terms of the order in this former case had not been complied with, and the money had not been paid because of an honest mistake,

anything could be done other than to require the execution of another deed to the Scott Lumber Company upon the payment of the sum of \$825 with legal interest thereon from the date of the execution of the other deed. But being satisfied as I am that the purchase price was paid by the purchaser to Henry T. Thompson, the natural, the general guardian, and the guardian ad litem of the Thompson heirs, and that the terms of the order have been complied with, I confirm the said sale.

The plaintiff's complaint prays that the partition of the lands be had in such way as to portion both the tracts of land and timber in equal parts between the plaintiff and the defendants Thompson. Under the facts and holdings herein it is clear that the plaintiff is entitled to such partition.

It is therefore ordered, adjudged, and decreed that a writ of partition do issue from this court in the usual form directed to five commissioners to be chosen in the usual way, that is to say, two by the plaintiff, two by the defendants Thompson, and one by the clerk of the court; and that said commissioners do proceed with calling to their assistance a surveyor, if one be necessary, and divide the tract of land in Marlboro county into two equal parts, regard being had to the value of the land without timber, and not as to quantity; and that the tract of land in Chesterfield county be divided into two equal parts in the same mode and manner, and that they set apart and allot to the plaintiff the one half of each of the tracts of land, and to the defendants Thompson the other half of the two tracts of land.

Ordered, further, that in making such partition of the said lands that the partition be made in such way as to divide both the arable and the timbered lands in equal proportions in so far as the same is practicable.

Ordered, further, the fee of the special referee which I fix at \$400, be paid one half by the Scott Lumber Company and the other half by the Thompson heirs; and that all other costs be paid by the three parties in equal proportions, the Thompson heirs being collectively referred to as one party. I tax the two defendants with the referee's costs, inasmuch as they alone are directly concerned in the issues submitted to him.

Exceptions.

(1) The court erred in not opening and setting aside the judgment and sale when it appeared that the purpose of the action was to sell the property of the infant defendants and apply the proceeds to debts of others, and that they were so applied, and when there appeared no adequate reason for the sale, and it appeared to be, and was, detrimental to the interest of the defendants, and the court had no power or jurisdiction to render such decree.

(2) The court erred in not opening and setting aside the judgment and sale when it appeared that the appointment of the guardian ad litem was irregular, and that substantial injustice was done to the infant defendants.

(3) The court erred in holding that the money to be paid was a full and fair price for the infants' property.

(4) The court erred in not setting aside the judgment and sale, when no provision was made for the division of the proceeds nor for the preservation of the property of the infant de-

fendants, and that it was intended that the proceeds were to be, and they were actually devoted to paying obligations which the defendants were not concerned in, and that the infant defendants got no part of the proceeds.

(5) The court erred in not setting aside, but, on the contrary, in confirming the deed, when the conditions precedent to the power to execute it prescribed by the decree, were not complied with, and when it was based on a void judgment and was not executed as required by the judgment.

(6) The Court erred in overruling the finding of the referee that before the deed to the plaintiff, lumber company, could be affirmed, they must have paid the parties in interest, and in setting it aside when it appeared that they had not done so.

(7) His honor erred in holding, if he meant so to hold, that J. K. McIver paid the Baker mortgage.

(8) His honor erred in holding that the Salinas mortgage was incurred for the benefit of the family with the inference that it was for the infant defendants, when there is no testimony on which to base such a holding.

(9) His honor erred in overruling the holding of the referee that the lumber company did not deal with Col. H. T. Thompson as guardian ad litem, and that he was *functus officio*.

(10) His honor erred in holding that the appellants did not come into court with clean hands, because Col. Thompson did not testify in the case.

(11) His honor erred in holding that if Col. Thompson stood by and allowed funds of the infant defendants to be diverted to the debts of others, it must be inferred that he intended to account to the infants, and that therefore they are bound, when such is not the law, and the testimony is that he did not have control of any such funds, and the lumber company was charged with the payment thereof to the parties in interest.

(12) His honor erred in holding that the predecessors of Scott Lumber Company failed to pay the money decreed to be paid as a precedent condition under a mistake when there is no evidence thereof.

(13) His honor erred in holding that it would be equitable to order the conveyance now upon payment to appellants of \$825, when not only was this question not before him, but it would be inequitable—more than a reasonable time having elapsed.

(14) His honor erred in holding, if he meant to hold, that the Scott Lumber Company was a subsequent purchaser without notice, when they knew, or should have known, all the facts, and that the purchase money had not been paid to the infants.

(15) His honor erred in not holding that the granting of railroad privileges at all was void, because it went beyond the scope of the action, and was without consideration.

(16) He further erred in holding that the right to build more than one railroad was in fact allowed in the decree or granted by the deed.

(17) He erred in overruling the referee's recommendation as to partition, and in requiring the Marlboro land to be divided in two parts, without regard to the value of the timber, when, even if appellants' claim that the deed to the lumber company is void is not sustained, still

there is no question that there are five tenants in common in the land, and there is timber on the land owned by all of said tenants, and that as to the Chesterfield land there is no question of the timber belonging to any one else.

McColl & Stevenson, of Bennettsville, for appellants.

Townsend & Rogers and S. S. Tison, all of Bennettsville, and W. P. Pollock, of Cheraw, for respondent.

GARY, C. J. The facts herein are fully stated in the decree of his honor the circuit judge, which, together with the exceptions, will be reported.

The appellants also made a motion in the original cause to open the judgment and set aside the sale, which motion was heard by his honor, Judge Wilson, at the same time he heard the present case, and refused.

The first question we will consider is whether there was error in refusing said motion.

In his decree his honor, the circuit judge, says:

"The only thing the Thompson heirs could now do would be to object to the confirmation of the sale—there having been no confirmation thereof to this day. * * * Being satisfied as I am that the purchase price was paid by the purchasers to Henry T. Thompson, the natural, the general guardian, and the guardian ad litem of the Thompson heirs, and that the terms of the order have been complied with, I confirm the said sale."

[1, 2] His honor, the circuit judge, very properly considered the motion upon the merits. When a sale of land is ordered by the court, it is the duty of the person empowered by it to execute the deed, to file a report of sale, showing that he has complied with the requirements of the order. It is then necessary that there should be an order of the court confirming the report of sale. It is the order of confirmation that gives validity to the deed. Until these several steps are taken, the proceedings do not become *res adjudicata*, so as to prevent parties to the action from interposing objections to the confirmation of the sale. *Kibler v. McIlwain*, 16 S. C. 550. "The order of confirmation gives to the sale the judicial sanction of the court, and when made it relates back to the time of the sale and cures all defects and irregularities, except those founded on one of jurisdiction and fraud." *Connor v. McCoy*, 83 S. C. 165, 65 S. E. 257.

While we recognize the fact that his honor, the circuit judge, had the power and authority, and that it was indeed his duty, to consider the merits of the motion, we, however, are not satisfied with his conclusion that the sale should be confirmed. Col. Henry T. Thompson, the father of the appellants, represented them as their guardian ad litem.

[3, 4] The law as to the duty of a guardian ad litem is thus stated in 22 Cyc. 662:

"The duty of a guardian ad litem or next friend is to look after the infant's interest and to act for him in all matters relating to the suit as he might act for himself if he were of capacity to so do. The guardian ad litem should make a defense of the interests of the infant as vigorous as the nature of the case will admit. His duty requires him to acquaint himself with the rights, both legal and equitable, of his wards, and take all necessary steps to defend and protect them, and to submit to the court for its consideration and decision every question involving the rights of the infant affected by the suit. If in consequence of the culpable omission or neglect of the guardian ad litem the interests of the infant are sacrificed, the guardian may be punished for his neglect, as well as made to respond to the infant for the damage sustained."

This language is quoted with approval in *Cagle v. Schaefer*, 115 S. C. 89, 104 S. E. 821, in which Mr. Justice Hydrick, who delivered the opinion of the court, said:

"In failing to perform their duty to defend the action in behalf of their wards the guardian ad litem of the infant defendants and their testamentary trustee were both guilty of culpable negligence, which would have subjected them to liability to their wards if any damage had resulted. A notion, which is entirely erroneous, seems to be prevalent that a guardian ad litem for infant defendants fully performs his duty when he files a formal answer, submitting their rights to the protection of the court."

Paragraph 5 of the complaint in the former action is as follows:

"That Mrs. Hannah McIver, the life tenant, and her son, John K. McIver, one of the remaindermen, have entered into a contract to sell to the plaintiff all the timber on the tract above described, but these plaintiffs are advised that they are unable to make a good title to said timber, without the aid of this honorable court, as the defendants above named also have an interest, and are minors under the age of 21 years, and cannot execute a title. That these plaintiffs have agreed to pay for said timber \$1,650 in cash, upon the condition that they are given 20 years in which to remove the timber off said land."

Paragraph 7 of that complaint alleges:

"These plaintiffs are informed that there is a mortgage on said property, the same having been executed by the life tenant and remaindermen to Mrs. L. M. Davis during the lifetime of Mrs. Fannie McIver Thompson, and that a portion of said purchase money is to be used in liquidating said mortgage."

We desire to call special attention to this statement of facts in the decree of his honor, Judge Wilson:

"The life tenant, Hannah J. McIver, died A. D. 1916, and John K. McIver, her child, is still living, and is plaintiff in this action. Before the death of Fannie, she, her mother, Hannah J. McIver, her husband, Henry T. Thompson, and her brother, Jno. K. McIver, all joined in the execution of a mortgage to one Mrs. L. M. Davis."

It will be observed that the complaint omitted the fact that Col. Henry T. Thompson also joined in the execution of the mortgage. There was, also, another mortgage on the property, which is mentioned in Judge Wilson's decree.

The testimony satisfies us that the following are the facts in the case:

(1) That it was not the intention of any of the parties to the former action that the infant defendants were to receive any money or benefit whatever from the sale of the timber.

(2) That it was the intention of the parties that the proceeds arising from the sale of the timber was to be used in satisfaction of the indebtedness incurred by the mortgage above named, for which the infant remaindermen were in no wise liable.

(3) That the rights of the infants were not protected in the manner required by law.

[5] We call attention to this statement in the decree of Judge Wilson:

"The Scott Lumber Company are subsequent purchasers. They purchased only after an examination of the records. Some faith and credit must be given to the records provided by the Legislature, and the judgments of the courts of this state. I hold that the Scott Lumber Company are subsequent purchasers for value, that the money was paid in accordance with the conditions of the former order, and that the deed from Henry T. Thompson to the Scott Lumber Company is good and valid."

As the Scott Lumber Company purchased "only after an examination of the records," and as the records did not show that the sale made by Col. Henry T. Thompson had been confirmed, it (the Scott Lumber Company) is not entitled to the protection of a purchaser for valuable consideration without notice. Furthermore, the recitals in the deed to its grantors under which it holds were sufficient, at least, to put the Scott Lumber Company upon inquiry.

This practically disposes of all the exceptions.

The judgment of the circuit court is reversed, and the case remanded to that court for the purpose of carrying into effect the conclusions herein announced.

WATTS and COTHRAN, JJ., concur.

FRASER, J., disqualified on account of relationship to certain of the parties.

(89 W. Va. 41)

JIMERSON v. TINCHER.

(Supreme Court of Appeals of West Virginia.
Sept. 18, 1921.)

(Syllabus by the Court.)

1. Detinue \Leftrightarrow 1.—Appropriate action to recover personal property procured by fraud.

Detinue is an appropriate action to recover personal property from one who has procured it by fraud.

2. Detinue \Leftrightarrow 6.—Owner of personal property may recover it from party procuring it and in possession through fraudulent contract of sale.

An owner of personal property may maintain an action of detinue to recover the same from one who has procured it by means of a fraudulent contract of sale, at least so long as such property remains in the possession of the party guilty of the fraud.

3. Appearance \Leftrightarrow 9(4), 24(1, 11).—Defendant demurring to declaration makes general appearance, and waives defects in summons or return of service.

A defendant, by demurring to a declaration, makes a general appearance thereto, and thereby waives any defects or irregularities in the summons, or the return of service thereof.

Case Certified from Circuit Court, Cabell County.

Action by Deo Jimerson against Ralph Tincher, in detinue, demurrer to declaration, and motion to quash summons overruled, and case certified. Overruling of demurrer and motion to quash affirmed.

Samuel Biern and John M. Biscoe, both of Huntington, for plaintiff.

RITZ, P. The circuit court of Cabell county, having overruled a demurrer to the declaration in this action of detinue, as well as a motion to quash the summons, certified the questions arising upon said demurrer and said motion to this court for its opinion thereon.

The suit has for its purpose the recovery of the possession of an automobile which it is claimed the defendant procured from the plaintiff through fraudulent representations and practices. The declaration alleges that on the 27th of March, 1920, plaintiff delivered to the defendant the automobile in question upon what purported to be a sale by the said plaintiff to one S. R. Chittam, of the city of Charleston; that the defendant represented to the plaintiff that he was authorized by Chittam to purchase the automobile for him for the sum of \$1,700, and delivered to the plaintiff the check of Chittam for that amount in payment therefor, which check was accepted and a bill of sale executed by the plaintiff to the said S. R. Chittam, and the automobile delivered to the defendant; that at the instigation and request of the said defendant plaintiff indorsed the said \$1,700 check of Chittam over to the defendant in order that the defendant might procure for the plaintiff certain mineral leases which the plaintiff desired, and which the defendant undertook to procure; that the said \$1,700 check was immediately redelivered to the said S. R. Chittam, and was not used by the said defendant for the purpose for which it was delivered to him by the plaintiff; that the defendant never procured said mineral leases for the plaintiff; that the automobile

remained in the possession of the defendant, Chittam never having taken possession thereof, and that the defendant had no authority from Chittam to purchase said automobile for him, and that all of his acts and practices above indicated were fraudulent, and for the purpose of securing plaintiff's automobile for his own use without paying therefor.

[1, 2] If, as is averred and necessarily inferred from the allegations of the declaration, the defendant falsely represented himself to be purchasing the automobile for Chittam, and fraudulently procured the return of the purchase price to himself, and made the other representations referred to for the purpose, as alleged, of procuring plaintiff's automobile without paying for it, he was guilty of the commission of a fraud upon the plaintiff's rights, and of course upon the discovery of this fraud plaintiff could rescind the contract and demand the return of his property, and that is what he did. In case of a refusal to deliver the same, detinue is an appropriate action to recover the specific property. It is universally held that detinue will lie to recover specific personal property obtained from the owner by any sort of fraudulent device or misrepresentation, at least so long as it remains in the possession of the party guilty of the fraudulent practice. 18 C. J. pp. 994, 995; 9 R. C. L. tit. "Detinue," § 4; Morrison, Herriman & Co. v. Adoue & Lobit, 76 Tex. 255, 13 S. W. 166; Reid, Murdock & Fisher v. Cowdroy, 79 Iowa, 169, 44 N. W. 351, 18 Am. St. Rep. 359; Blake v. Blackley, 109 N. C. 257, 13 S. E. 786, 26 Am. St. Rep. 566; Myers v. Friend & Scott, 1 Rand. (22 Va.) 12; Southern Hardware & Supply Co. v. Lester, 166 Ala. 86, 52 South. 328; Mansell's Adm'r v. Israel, 3 Bibb (Ky.) 510; Sleeper v. Davis, 64 N. H. 59, 6 Atl. 201, 10 Am. St. Rep. 377. If the defendant procured this property in the manner indicated above, that is, by falsely representing that he was procuring it for another, and then by fraudulently securing to himself the purchase price for a purpose to which he did not intend to apply it, there can be no doubt of the plaintiff's right to rescind the contract and demand and receive back in an action of detinue the specific personal property, it appearing from the declaration that it was in the possession of the defendant at the time of the institution of the suit. The defendant's brief is based entirely upon the assumption that he did not do the things charged against him in the declaration, and of course if that assumption should turn out to be true, an entirely different condition will be presented from that presented by the declaration. At this time we are passing upon a demurrer to the declaration which admits everything stated therein to be the truth, as well as every legitimate and necessary inference arising therefrom.

[3] After the defendant's demurrer to the declaration was overruled he moved to quash the summons upon the ground that the value of the property sued for was not stated therein, which motion was overruled. The action of the circuit court in this regard was correct. The defendant, by demurring to the declaration, entered a general appearance thereto, and the summons became functus officio. The question of the sufficiency thereof was simply a moot question, and the defendant was not entitled to have the judgment of the court thereon at that stage of the proceeding. Having demurred to the declaration, he had entered a general appearance, and the question as to the sufficiency of the summons became entirely immaterial. A general appearance waives any insufficiency in the summons or the return of service thereon. *Danser v. Mallonee*, 77 W. Va. 26, 86 S. E. 895; *Fulton v. Ramsey*, 67 W. Va. 321, 68 S. E. 381, 140 Am. St. Rep. 969; *Frank v. Zeigler*, 46 W. Va. 614, 33 S. E. 761. Any appearance in the suit, except to challenge the jurisdiction of the court, is a general appearance, and confers upon the court the authority to proceed with the controversy, regardless of any defect in the process by which the defendant is brought in. In fact the defendant may appear to the declaration without process at all. The function of the summons is simply to bring him into court, and if he comes upon an irregular summons, or without any summons, and invokes the court's jurisdiction for any purpose, he thereby waives the necessity for a summons, or any irregularity therein.

It follows from what we have said that the action of the court in overruling the demurrer to the declaration, and in overruling the motion to quash the summons was correct, and we answer the questions certified accordingly.

(89 W. Va. 31)

STATE ex rel. TRAVIS v. MAXWELL,
Judge, et al. (No. 4428.)

(Supreme Court of Appeals of West Virginia.
Sept. 13, 1921.)

(Syllabus by the Court.)

Husband and wife \S 295—Mandamus \S 4(3)
—Wife, suing for separate maintenance and support, entitled to allowance for suit money, and on refusal mandamus to compel allowance will lie.

In a suit by the wife against her husband for separate maintenance and support, not involving divorce, she is entitled to reasonable allowances for suit money and for her support pendente lite, and upon the refusal of the trial court to make such allowances against the defendant, she may have a writ of mandamus to compel such allowances as are reasonable and proper in the case.

Original application by the State, on the relation of Lavina T. Travis, for a writ of mandamus against Haymond Maxwell, Judge, and others, to require the court to make a reasonable allowance for expenses while prosecuting a suit against petitioner's husband, R. A. Travis, for separate support and maintenance. Writ awarded.

McCamie & Clarke, of Wheeling, and Albert L. Lohm, of Clarksburg, for relator.

Hofthelmer & Templeman, of Clarksburg, for respondent.

MILLER, J. The petitioner seeks by original process of mandamus from this court to require the respondent to make her a reasonable allowance for expenses and for her support while prosecuting her suit in his court against Robert A. Travis for separate support and maintenance, on the ground of his desertion of her without cause.

According to the return of respondent he was constrained to deny the petitioner suit money and money for her separate maintenance pendente lite on the ground that she had no suit pending for divorce, and that he felt bound by the ruling of this court in *Chapman v. Parsons*, 66 W. Va. 307, 66 S. E. 461, 24 L. R. A. (N. S.) 1015, 135 Am. St. Rep. 1033, 19 Ann. Cas. 453, in which it was said, point one of the syllabus, that "in no suit but one seeking a divorce of some character is there jurisdiction to award alimony pendente lite." That was not a suit for divorce, but an original suit to set aside a decree of divorce previously obtained by the husband against his wife. The marital relation between them had by that decree been dissolved and the relationship destroyed thereby, and the real question there involved was whether the plaintiff in that kind of a suit was entitled to suit money and maintenance pending the suit. The point may have been too broadly stated, therefore, and must be interpreted as applicable only to like cases. Strictly speaking, alimony, temporary or permanent, is an incident to a suit for divorce.

In the later case of *Lang v. Lang*, 70 W. Va. 205, 73 S. E. 716, 38 L. R. A. (N. S.) 950, Ann. Cas. 1913D, 1129, however, we decided that courts of equity have jurisdiction, upon the ground of inadequate remedy at law, independently of any proceedings for divorce, to decree maintenance to a wife who has been deserted by her husband. So the question presented here is whether, pending a suit of the latter character, in no way involving divorce, and when the marital relation still exists, the wife, as incident thereto, is entitled to reasonable allowance for separate maintenance and to carry on her suit. Clearly, she is entitled to be supported by her husband while the marital relation exists, and to enforce her rights by suit, no other remedy being provided. The

exact point now presented has, we believe, never been decided here; but we find numerous decisions in other states holding that a court may in an action for separate maintenance require the defendant to provide counsel fees and temporary support for plaintiff, though provision is made therefor by statute only in case absolute divorce is sought. It was so held in *Milliron v. Milliron*, 9 S. D. 181, 68 N. W. 286, 62 Am. St. Rep. 863; *Dye v. Dye*, 9 Colo. App. 320, 48 Pac. 313; *Harding v. Harding*, 144 Ill. 588, 32 N. E. 206, 21 L. R. A. 310; *McFarland v. McFarland*, 64 Miss. 449, 1 South. 508; *Finn v. Finn*, 62 Iowa, 482, 17 N. W. 739; *Glover v. Glover*, 16 Ala. 440; *Purcell v. Purcell*, 4 H. & M. 507. In *Cupples v. Cupples*, 31 Colo. 443, 72 Pac. 1056, it was held in an action by the wife for separate maintenance, that "the fact that the husband sets forth facts in a cross-complaint which if true would entitle him to a divorce is not a reason for disallowance of temporary alimony." In *Finn v. Finn*, supra, the Iowa court says that the right of the wife to suit money and maintenance seems to be a mere corollary of her right to maintenance in a suit for separate maintenance, "for it would be but mockery to allow the wife the right to maintain an action for separate maintenance, and, at the same time, deny her the means of prosecuting it." In England a different rule prevailed. There the remedy was to permit any person supplying the wife to sue the husband for maintenance furnished. Mr. Story (3 Equity Jurisprudence [14th Ed.] § 1858), commenting on the question says:

"In America a broader jurisdiction in cases of alimony has been asserted in some of our courts of equity; and it has been held that if a husband abandons his wife and separates himself from her without any reasonable support, a court of equity in all cases may decree her a suitable maintenance and support out of his estate, upon the very ground that there is no adequate or sufficient remedy at law in such a case. And there is so much good sense and reason in this doctrine, that it might be wished it were generally adopted."

From these authorities the plaintiff's right to such reasonable allowance seems clear.

The only remaining question is whether mandamus is available to compel the trial court to make the allowances. The refusal of the right would of course become cognizable by appeal; but as we said in *People's Bank v. Burdett*, Judge, 69 W. Va. 369, 372, 71 S. E. 399, 401:

"We do not deny an extraordinary remedy in a proper case, merely because the party may avail himself of another remedy. * * * The slow process of appellate review is not adequate to the vindication or enforcement of absolute rights such as the one involved here."

In Alabama the exact point was decided in favor of plaintiff's right to mandamus in

such cases as this. *Ex parte King*, 27 Ala. 387. The doctrine of this and other Alabama cases has been questioned by Mr. High. *Extraordinary Legal Remedies* (3d Ed.) § 186. But we put our decision in this case on the broad ground of want of adequate remedy by any other process, appellate or otherwise. How could a married woman so circumstanced carry on her suit in the lower court or appellate court without money? To deny her allowance of suit money and money for support pending suit would be in most cases to deny her the relief to which she is entitled. As in suits for divorce, the merits of the case have nothing to do with her right to money to maintain her suit and for support pending the suit.

We are of opinion to award the writ.

(89 W. Va. 35)

CARTER v. MONTEITH et al.

(Supreme Court of Appeals of West Virginia.
Sept. 18, 1921.)

(Syllabus by the Court.)

Appeal and error \Leftrightarrow 308—Interlocutory decision, based in part on return of process and in part on bill, not reviewable upon certificate.

An interlocutory decision upon a motion in a chancery cause, based in part upon the return on the process and in part upon the bill and not solely upon either the process, the return or any pleading, is not reviewable upon a certificate.

Case Certified from Circuit Court, Tyler County.

Suit by W. H. Carter against George B. Monteith and others. Motion of named defendant to dismiss was overruled, demurrers of certain defendants for misjoinder were sustained, and suit dismissed as to them and the case certified. Order entered, declining to review the decision upon the three questions certified, for lack of jurisdiction, and certified to court below.

Olin C. Carter, of Middlebourne, and Hogg & Hogg, of Point Pleasant, for plaintiff.

Underwood & Moore, of Middlebourne, for defendant.

POFFENBARGER, J. A preliminary inquiry arising upon this certificate is that of the remedy invoked for relief from the alleged error, the overruling of a motion to dismiss a suit brought to subject the real estate of a decedent to the payment of his general debts, on the theory of insufficiency of the personal estate.

The summons issued is regular, and the bill, considered independently of the state of facts

disclosed by it and the process, discloses the usual case of indebtedness, insufficiency of personal property, and the existence of real assets within the county in which the cause of action arose and in which the suit was brought.

Lack of service of the process upon the administrator and the heir, both being the same person, due to his residence outside of the state, is the circumstance from which the question of jurisdiction emanates. There was a return of no inhabitant as to him, an affidavit of his nonresidence, and a matured order of publication as to him. He entered a special appearance, and moved to dismiss the suit. His motion having been overruled, he made no further appearance.

Demurrers interposed by other parties, on the ground of misjoinder because of lack of interest in the cause, on their part, were sustained, and the suit dismissed as to them. Of the rulings upon the demurrers, there seems to be no complaint. The questions certified all pertain to jurisdiction respecting the administrator and heir and the estate, the person of the principal defendant and the subject-matter, not any of the parties as to whom the cause has been dismissed. The inquiries propounded are, in substance: (1) Whether execution of process, personal or substituted, upon the administrator and heir, is essential to jurisdiction; (2) whether there must be either personal service upon him or a lien upon the land, to confer jurisdiction; and (3) whether the suit abated as to him, upon the return of no inhabitant and the filing of the affidavit of nonresidence. The decree by which the motion and demurrers were disposed of recites the raising of a question as to the sufficiency of the bill on its face; but, obviously, that is not the subject-matter of the doubt in the mind of the court. No defect in it is pointed out, nor is any perceived.

Manifestly none of the other questions, those actually and formally certified, arise or depend solely upon either the process or the bill. Arising upon both, they are all clearly composite. Nowhere in the bill is the nonresidence of the principal defendant disclosed in any way. It is shown only by the return and the affidavit, and neither of these instruments reveals the cause of action. It is useless here to repeat the demonstration, set forth in *Tyler v. Wetzel*, 85 W. Va. 378, 101 S. E. 726, of lack of jurisdiction in this court, to review the order disposing of the motion. The question certified in that case and in this cannot be differentiated in principle. In all substantial respects, they are identical.

An order will be entered here, declining to review the decision upon the three questions certified, for lack of jurisdiction, and certified to the court below.

(80 W. Va. 15)

ROBERTS v. CROUSE et al. (No. 4251.)

(Supreme Court of Appeals of West Virginia.
Sept. 13, 1921.)*(Syllabus by the Court.)*

1. Curtesy §11(1)—A tenant by curtesy not made a party to summary sale of ward's lands through special commissioner, but joining in deed after confirmation not knowing of his curtesy may assert such interest in guardianship funds.

In statutory summary proceedings to sell, first the mineral in, and, afterwards the surface of, lands belonging to infants, in which it is stated that the wards are the sole owners and that the rights of no other person will be affected by the sales, and the mineral and surface are so sold for full value agreed upon by the guardian and purchaser before the proceedings are begun, and so ascertained and decreed by the court, and the father of the infants, who is tenant by the curtesy in the lands, is not made a party to said summary proceeding, but after sale is made and confirmed, and deed through special commissioner is directed, he joins in the deed to the purchaser, he is not thereby precluded from asserting and receiving his curtesy interest in the funds in the hands of the guardian, although when he joined in the deed he believed that he had no curtesy or other interest in the land.

2. Curtesy §12(8)—Tenant's right in funds of which he was guardian held not barred by limitation and laches.

In such case, the guardian and tenant by the curtesy being one and the same person, the tenant by the curtesy is not estopped from asserting his curtesy interest in the funds in his hands as guardian, upon settlement of his guardianship accounts with one of his children when she has become 21 years old, under the doctrine of limitation and laches, it appearing that no loss of evidence, no changed conditions, and the rights of no other person have intervened.

3. Curtesy §11(1)—Father and guardian of children not precluded from asserting right of curtesy against fund from sale of land.

Ignorance of the father and guardian of his right of curtesy at the time of the sales and his consequent failure to then assert and have the same judicially determined, being a mistake of fact, will not preclude him from asserting his right against the fund upon final settlement, there being no judicial admission nor judicial finding in the summary proceedings that he does not have such curtesy.

Ritz, P., dissenting.

Appeal from Circuit Court, Fayette County.

Action by Jessie Roberts against J. T. Crouse and others. Decree for plaintiff, and the named defendant appeals. Reversed and remanded.

Dillon & Nuckolls, of Fayetteville, for appellant.

Hubard & Bacon, of Fayetteville, for appellee.

LIVELY, J. J. T. Crouse conveyed 79½ acres of land in Fayette county to his wife in March, 1898, and on November 2, 1898, she died intestate, leaving 5 infant children, the youngest of which, Jessie, then of very tender years, and who afterwards married Roberts, is the plaintiff in this case. Crouse qualified as guardian for his children, and in 1901 E. B. Hawkins, who was buying or taking options on coal lands in that vicinity, offered him \$20 per acre for the coal and minerals under the 79½-acre tract. Crouse, as guardian, filed a petition in the circuit court, asking for the sale of the coal and mineral, and made the 5 children, his wards, the only parties defendant thereto, alleging the death of his wife, intestate, her ownership of the land, the names and ages of the infants, his appointment and qualification as guardian, the offer by Hawkins to purchase the coal and other mineral at \$20 per acre; that the offer was a fair and adequate price, equal with, and in some cases more than, the sale price of adjacent coal lands, and alleging that the sale of the interests of the infants therein would promote their material welfare; and that the rights of no one other than petitioner and his wards would be affected by a sale. The petition prayed for a sale of the entire interests of the infants in the coal and other minerals. Notice was duly served on each of the infants, and to the effect that the petition would be filed at a special term of the court—

"asking for a sale of the coal and mineral under the tract of land of which Sarah J. Crouse died seized, and the title to which was acquired by you as heirs at law of your mother."

Regular proceedings were had on the petition, and witnesses were examined from which the court determined that the welfare of the infants would be promoted by a sale of their interests in the coal and other minerals, and that the Hawkins offer of \$20 per acre was a fair and adequate price for the coal and minerals; and decreed a sale of the entire interests of the infants therein, and that the said coal and mineral be sold at that price or at a greater price if obtainable by the guardian either at public or private sale. The guardian reported that he "sold the coal and other minerals at private sale to Hawkins at \$20 per acre," and that he deemed the sum derived a fair and adequate price for the same. The sale was confirmed, and a special commissioner was appointed and directed to make a deed to Hawkins for the "coal and other minerals underlying the said 79½ acres of land as described in these proceedings."

Similar proceeding was had in 1902 for a sale of the surface of said tract, except 13.2 acres around the Crouse residence, in which the petition states that an offer has been made by the Stuart Colliery Company at \$75

an acre cash, a price in excess of the value. The court, upon hearing, ascertained that it would promote the welfare of the infants to sell their interests in the surface, and that the offer of \$75 cash was a fair and adequate price, and would be a fair and adequate one for the infant defendants, and decreed that the surface be sold at that price. The guardian reported that he sold the surface, excepting 13.2 acres, at the price of \$75 to the Colliery Company, and advised confirmation, stating that the price was more than he had ever hoped to realize for his wards for same. The court confirmed the sale and directed a special commissioner to convey the entire surface, excepting 13.2 acres to the purchaser.

In 1908 another petition was filed by the guardian asking for sale of .81 acre surface, part of the 13.2 acres remaining, to Smiley at the price of \$500, in which it is alleged that the children own the same, each having a one-fifth interest therein (one child having at that time become of age), and that no other person's rights would be violated by a sale thereof; and stating that the infants owned personal estate at that time amounting to about \$3,000, and asking for a sale of the .81 acre. This proposed sale was not consummated.

Crouse, the guardian and father, never made any settlement of his accounts as such. The four older children, when they became of age, executed deeds to their father conveying all their interests in their mother's estate to him. In the year 1919 the plaintiff, Jessie Roberts (née Crouse), having become of age, instituted this suit against her father and former guardian and his bondsmen to obtain her interest in the money derived from the sale of the coal and other minerals, and from the sale of the surface hereinbefore set out, claiming one-fifth of \$1,590 (sale price of coal), with compound interest thereon from January 22, 1901, and one-fifth of \$3,545.76 (sale price of surface), with compound interest thereon from December 4, 1902. Crouse avers in his answer that he sold the mineral and surface by the acre, and for full value, and that he did not know at the time that he had any interest in the land as tenant by curtesy, and was not before the court in his individual capacity, either as plaintiff or defendant, and was ignorant of his rights, and was not advised thereof until, about the year 1910, when he was preparing to make settlement of his guardianship accounts, he was so informed by A. J. Horan, attorney, with whom he then consulted; that he joined in the deeds by the special commissioners, but was paid nothing, and did so at the request of the purchaser, but in ignorance of his rights; that he used \$4,000 of the money he received in placing improvements upon the 13.2 acres which belonged to the children, and as his wards (with the exception of plaintiff) became of age he settled with them, and they conveyed to him their interests in the

13.2 acres; and he denies that plaintiff is entitled to one-fifth of the money derived from said sales, but that he is entitled to deduct therefrom his curtesy interest, and then pay her the one-fifth of the remainder. A master commissioner reported that the plaintiff was entitled to receive from defendant \$3,705.58, if no deduction was made for his curtesy interest; but that, if defendant was allowed curtesy, the amount he was entitled to retain was \$1,530.92, which would leave the amount for which she was entitled to recover at \$2,174.66, as of February 14, 1920. The decree was for the full amount claimed by the plaintiff. From this decree Crouse appeals.

The deed made to Sarah Crouse from J. T. Crouse conveying the 79½ acres was for the consideration of love and affection, and was made by Crouse at the suggestion of some neighbor to delay the payment of a debt of about \$80, which he then owed, and which he afterwards within a few months paid. There was a balance of purchase money, about \$200 owing on the land, which he paid after the deed was made to his wife. She owned no personal estate at the time of her death, and the funeral expenses, nurse's and doctor's bills were paid by defendant, amounting to a considerable sum, the allowance of which was refused by the lower court, and these bills are not insisted upon here; also about \$200 expenses connected with the sale of the mineral and surface, which Crouse paid, and for which he received no credit. The disallowance of all these items is not insisted upon as error, and will receive no consideration. The only question is whether or not Crouse is barred from curtesy in the proceeds of the sale of his wife's land under the facts detailed.

Plaintiff contends (1) that defendant's curtesy was not sold in the two summary proceedings to sell the interests of the infants, and that he conveyed his interest as tenant by the curtesy when he joined in the deeds, although he received nothing therefor, and is now estopped from taking it out of the moneys paid in by the purchasers; (2) that, although he was ignorant of his curtesy interest at the time of these sales, his ignorance of the law is no excuse, and cannot now inure to his benefit; (3) that he waived his curtesy interest in favor of his children; (4) that having given bond and received the money as guardian, he cannot now claim any part of it as his own; (5) and that he is barred by the statute of limitations and laches.

[1] All of the contentions of the defendant are based upon the claim that he was ignorant of his curtesy in the land he had deeded to his wife. A study of the record leads to the conclusion with reasonable certainty that he did not know that he had any interest therein. The two summary proceedings for sale of the coal and surface proceeded upon

the assumption and theory that the land was owned entirely by the infants. In the first proceedings the coal and other minerals are alleged to be "owned by his wards," and that the rights of no other person will be affected by a sale; and in the second, the averment is made that, after the mineral underlying the land had been sold, the children and wards were but the owners of the surface only. The mineral was sold by the acre at \$20 per acre, which the court ascertained from the evidence was its entire worth; the surface was also sold by the acre at \$75 per acre, likewise ascertained to be the entire worth. The reports and decrees so state. The petitions alleged offers from the purchasers for the coal and surface by the acre at stated prices found to be the full, true, and actual value.

Militating against the claim of defendant that he did not know that he had any personal or private interest in the land is the fact that he joined in the deeds to the mineral and surface in his individual capacity with the commissioners appointed by the court. Asked why he did so, he replied that the lawyer told him it was necessary, and, asked why he, the witness, thought it was necessary for him to sign, he replied, "From the fact that when people convey property they make deed to it." He was one of the principals in the transactions. The price and terms were agreed upon by him, and it was but natural for him to conclude that he should make or join in the title papers. The trained lawyer does not always comprehend the intricacies of inheritances and the laws governing infants' estates. Can better results be expected from the layman who has had no experience and has given the subject no thought? Indicative that he did not know of his personal interest even after being called upon to sign these deeds in his individual capacity in 1901 and 1902, he again filed a petition, sworn to, in the year 1908, asking for a sale to Smiley of .81 acre of the land at \$500, in which he stated that his five children were the sole owners, each having a one-fifth interest therein, "and that the rights of no person will be violated by a sale of said interests of said infants in said real estate." We conclude that defendant was ignorant of his curtesy interest. The record and his actions sustain his sworn declaration to that effect. He swears that his first knowledge of his right of curtesy came to him through Hon. A. J. Horan, an attorney then at Fayetteville, whom he consulted about the year 1910, when Horan made a rough calculation of his interest in the fund in his hands, based on his age at the time the sales were made. At that time he was making a settlement with one of the older boys who had become of legal age. Horan does not contradict this evidence.

But it is argued that the court directed a sale of the interests of the children in the coal and surface, and did not direct a sale of the curtesy interest of defendant, and could not have done so, and the purchasers purchased nothing but the interest of the infants, for which they agreed to pay and did pay \$20 and \$75 per acre. That is true, but these purchasers offered and agreed to pay these fixed sums per acre for the coal and surface as the full value thereof, and they did receive for the sums paid the entire interests. It was immaterial to them whether the court's decree and deed conveyed the entire value purchased by them, or whether their complete title was conveyed to them by the joint deed of the commissioners and the tenant for life. It is safe to say that there would have been no sale at \$20 per acre for coal and \$75 per acre for surface without the full title being assured to them. The purchasers did not want the coal or surface at some indefinite period, dependent upon the death of the life tenant. They were not purchasing the reversionary interest. They were buying the entire property, with an intention of immediate occupation and use. The full value of the property could be easily ascertained; but the value of the life estate and that of the remainder would be uncertain, dependent upon the uncertainty of life and death. Property thus owned is not usually sold in piecemeal. The sales were private, and by agreement of all the parties and the court. The evidence, both at the time of the sales and now, is conclusive that full value was realized for the property.

There is a statement by Joe Huddleston, the uncle by marriage of the plaintiff, and at whose home she was reared, that defendant told him, after the mineral and surface were sold, that he knew of his curtesy right in the land, but wanted it to go to the children. This is denied by defendant, who says that he intended all of his property to go to his children eventually. But the time of the alleged declaration is hazy and uncertain, and even if made would not operate as a transfer of his title, or a gift of the money. A parol gift must be accompanied by delivery. He still has the money in his possession and control. It is unquestionable that Crouse had curtesy in the land. What became of it? The answer will be that he conveyed it to the purchasers when he joined in the deeds. What consideration did he receive? Can we say that he intended to give it to the purchasers? We suspect that common sense will answer, "No." The record is replete with proof that they paid full value. It is clear that his curtesy was converted into money, and became a part of the funds in his hands. In the summary proceedings no provision was made for his curtesy interest; no ascertainment thereof. Is he estopped from claim-

ing it now after all these years? This is the crucial question.

It will be noted that he was not a party, in his individual capacity, to either of the summary sale proceedings. The allegations were, and the court proceeded upon the theory, that the infants owned the entire title, and that the rights of no other person would be affected by a sale thereof. Crouse was the moving cause, it is true, but he acted as guardian, and not in his individual capacity. He asserts that he did not know that he had a personal interest, and the record bears out his assertion. The offer was for the title to the coal at a specific price per acre, and for the title to the surface at a fixed price per acre. The court ascertained and adjudicated the value of both coal and surface, and not for an undivided interest therein. The reports of sale were that all of the coal and surface had been sold at these prices; and the decrees directed that the commissioner make a deed conveying to the purchaser "the coal and other minerals underlying the 79½ acres of land described in these proceedings"; and make a deed conveying to the purchaser, "with covenants of special warranty, of the surface of the 78.55 acres of land described in the petition in this cause."

[2] Had Crouse asserted his claim in these proceedings, then there could have been no doubt of the result. But the plaintiff vigorously insists that he is now barred by limitation and laches. The defense of laches implies injury to the person pleading it, brought about by loss of evidence, death of some of the parties to the original transaction, changed situation, or the intervention of the rights of other persons. *Cranmer v. McSwords*, 24 W. Va. 594. Lapse of time is not sufficient alone. It must be accompanied by some injury or disadvantage to the opposite party, or by some conduct indicating abandonment of the claim, the reassertion of which will inure to the benefit of the claimant by reason of changed conditions. *Lillian Mitchell v. John Cornell*, 106 S. E. 866, and cases cited. Courts show the utmost leniency for laches and lapse of time where intimate personal relations exist, or where family relationship exists between the parties. 10 R. C. L. p. 402.

"Laches cannot be imputed to one who is ignorant of his rights. Nor is mere delay always to be considered as laches. The relations of the parties, their degree of kindred, the inability of the debtor to pay, and other circumstances, may be taken into consideration, and where it is clearly shown that the delay has worked no injury and can be satisfactorily accounted for, courts of equity will not allow it to defeat the recovery of a debt shown to be due and unpaid." *Jameson v. Rixey*, 94 Va. 342, 26 S. E. 861, 64 Am. St. Rep. 726.

Mere lapse of time unaccompanied by evidence that the right has been abandoned does

not constitute laches in equity. *Cranmer v. McSwords*, supra; *Tidbale v. Shenandoah Nat. Bank*, 100 Va. 741, 42 S. E. 867. Where a transaction has not become obscure, and does not depend upon frail memory or the imagination of witnesses, as will likely produce injustice, and the sum in controversy is certain, lapse of time alone is not sufficient to move equity and good conscience to refuse relief. In what particular has the right of the plaintiff been prejudiced by failure of the father to claim his curtesy interest? The data for ascertaining his interest is fixed by the decrees, by documentary evidence. It is as easily ascertained now as at the time of the sales. It does not depend on the memory of witnesses. The parties are all living, and there has been no intervention of the rights of third parties and no change of circumstances that would affect the claim. Defendant did not discover his right to curtesy, or that he ever had any such right, until about 1910, when he was making settlement with the oldest boy, who had reached his majority. As the children became of age he accounted with them and settlements were effected. The plaintiff was yet under age, and no settlement could be made with her. Her money was in his hands, drawing compound interest. Against whom could he make his demand? How could he assert his curtesy claim against the minor? What advantage has he taken by waiting until she was sui juris? As soon as she became of age and desired settlement, he promptly asserted his claim, and offered to pay her her money with compound interest, after taking out of the funds in his hands his curtesy interest. Moreover, it must be remembered that this land was partly inherited by defendant from his father's estate, and full title obtained by purchases from his coheirs, and part of the purchase money paid after the deed was made to his wife in 1898. It was by virtue of this deed of gift to his wife for "love and affection" that plaintiff obtained inheritance therein. Besides, the money which came into the hands of her father was expended in the erection of permanent improvements upon the remaining 13.2 acres in which she has a one-fifth interest in remainder. We do not think the doctrine of limitation or laches can apply to defeat defendant's claim.

It is reasonably clear, and we so decide, that defendant was ignorant of his curtesy in the land at the times when he instituted the summary proceedings as guardian, and did not know of his interest until about 1910. Does the fact of his ignorance of the law and fact create an estoppel? The often quoted rule that "ignorance of the law excuses no one" is subject to many exceptions and modifications as firmly established as the rule itself. 10 R. C. L. p. 306.

"Ignorance of the law excuses no one," is a maxim of public policy, and wise, and yet often operates to shield injustice and operates harshly on the innocent and ignorant; and hence the rule is guardedly laid down by the courts, leaving an open door that courts of equity may, in particular cases, not be shut out from the capacity to prevent real injustice." *Schuttler v. Brandfass*, 41 W. Va. 204, 23 S. E. 809.

The doctrine is discussed in *Pomeroy's Equity Jurisprudence*, vol. 2, § 849, and the author lays down the following general rule:

"Wherever a person is ignorant or mistaken with respect to his own antecedent and existing private legal rights, interests, estates, duties, liabilities, or other relation, either of property or contract or personal status, and enters into some transaction the legal scope and operation of which he correctly apprehends and understands, for the purpose of affecting such assumed rights, interests, or relations, or of carrying out such assumed duties or liabilities, equity will grant its relief, defensive or affirmative, treating the mistake as analogous to, if not identical with, a mistake of fact."

Mistakes respecting the title or interest in real estate most frequently illustrate an exception to the general rule that ignorance of the law excuses no one. 10 R. C. L. 311; *Irick et ux v. Fulton's Ex'rs*, 3 Grat. (Va.) 183; *Burton v. Haden*, 108 Va. 51, 60 S. E. 736, 15 L. R. A. (N. S.) 1038.

It is asserted that because defendant gave a bond for the money which came into his hands by virtue of the sales in a penalty double the amount, he is thereby estopped from denying that the money so received by him belongs to the infants, and therefore he must account to the plaintiff without any diminution on account of his claim for curtesy. It is a basic element in equitable estoppel that the act relied upon must be injurious, and prejudicial to him that asserts it as an estoppel; his position must be changed for the worse by relying upon or acting upon the act or conduct of the person against whom he claims estoppel. *Bates v. Swiger*, 40 W. Va. 420, 21 S. E. 874; *Bettman v. Harness*, 42 W. Va. 451, 26 S. E. 271, 36 L. R. A. 566; *C. & O. Ry. v. Walker*, 100 Va. 69, 40 S. E. 633, 914.

"Equitable estoppels only arise when the conduct of the party estopped is fraudulent in purpose or unjust in result. * * * The fundamental principle upon which this doctrine is based is the equitable one—the suppression of fraud and the enforcement of fair dealing." *Herm. Estop.* 862-865.

We fail to see where defendant has acted fraudulently in giving this bond or wherein the plaintiff has acted or been misled to her injury. That defendant may have been under a misapprehension as to his relationship

to this fund, or under the impression and belief that he had no personal interest therein, does not estop him from showing the true facts afterwards ascertained. No one has been prejudiced by the giving of this bond, and the doctrine of estoppel does not apply. *Davis Trust Co. v. Price*, 77 W. Va. 681, 88 S. E. 111. The giving of the bond conditioned for the faithful accounting of the fund would not operate to change the true character or ownership of the money. The guardian, unlike an administrator or an executor, has not legal title to the ward's property. He is a trustee, but his powers are limited to mere custody and control of the property as property to which the ward has full and complete title. 21 Cyc. pp. 77 and 78. Possession by the guardian, therefore, of a fund in which both he and his ward have interests or titles, is not inconsistent with assertion of his title; at least not conclusively so. Legally, the fund in question was an inseparable one until settlement. The guardian had a life estate in it, and the ward an estate in remainder. Hence, it signifies little whether he held it in possession as guardian or in his individual name. He had a clear right to hold the entire fund in his own name. The interest of the wards was ground or reason for his holding as a fiduciary, although he was not bound to do so. A liquidated debt, or an incumbrance on the ward's estate, if clearly proved, may be credited against the funds held by the guardian. 15 Am. & Eng. Ency. Law, p. 111; *Wallis v. Neale*, 43 W. Va. 529, 27 S. E. 227; *Snowhill v. Executor of Snowhill*, 2 N. J. Eq. 38; *Mathes v. Bennett*, 21 N. H. 204.

[3] This leaves nothing in the way except the admissions in the summary proceeding, and they are not conclusive. That proceeding was not one between the guardian on the one hand and himself on the other. In his individual capacity he was no party to it. His deed does not bind him as between himself and his ward, because it was not made to the ward. It conveyed his estate to a third party. Are the statements, in the summary proceedings, to the effect that the wards owned the entire interests in the mineral and surface, and that the rights of no other person would be affected by a sale thereof, conclusive judicial admissions, whether made by Crouse as guardian or as an individual? The petitions on their face controvert the assertion of whole title and interest in the children and wards. It is stated therein that Sarah J. Crouse, the wife of petitioner, died intestate, seized and possessed of the tract of land. The curtesy of the husband therein, while not alleged in terms, is a conclusion of law from the statement of fact.

"Statements or admissions relating to a question of law are not admissible in evidence, for

the reason that a party should not be affected by statements which may be attributed to a misapprehension of his legal right." 22 C. J. p. 298, § 325.

While judicial admissions are strictly construed and are usually binding in the case where made, they do not have the same force of conclusiveness in another case, but are regarded as being in the nature of extrajudicial admissions. 22 C. J. p. 329, § 370, title "Judicial Admissions."

"A party to an action is not concluded by an admission made by him or by one whose admission affects him, in the course of another action, but such admission may be explained or contradicted." 22 C. J. p. 423, § 506; 1 R. C. L. p. 499, § 40.

This is a case which strongly appeals to equity and good conscience. The land originally came to the defendant by inheritance from his father and purchase from his brothers and sisters. Without consideration other than "love and affection" he transferred it to his wife, who died leaving the legal title vested in the five children, subject to his curtesy. An advantageous offer of purchase is made to him, and under a mistake of fact the land is sold for full value without ascertaining or making provision for his curtesy, in proceedings to sell the remainder interests of the children, to which he was not a party. What has become of his life estate, and, if sold from him, where is the consideration? Where are the equities? Plaintiff stated in her cross-examination that she was willing to take the part of the purchase money her father was entitled to by reason of his curtesy, together with compound interest thereon, even if a mistake had been made by him in not setting up his claim in the summary proceedings. It cannot be questioned that he was entitled to his curtesy interest, and that it would have been allowed in those proceedings if it had been asserted. She would not have been prejudiced then if he had. She would have received what she was justly entitled to take. Now she wants more—the pound of flesh and the blood. Her inheritance has been enriched by the expenditure of the money received from the sale in permanent improvements on the 13.2 acres remaining. Under our interpretation of the decrees and proceedings had in the summary proceedings we do not think it was the intention or design that the father should lose, or that he has lost, his curtesy, and we hold that he is entitled to receive the same out of the money in his hands. The decree is reversed, and the cause remanded for that purpose.

Reversed and remanded.

RITZ, P., dissents.

(89 W. Va. 37)

CONAWAY v. OVERHOLT et al.

(Supreme Court of Appeals of West Virginia.
Sept. 13, 1921.)

(Syllabus by the Court.)

1. Trusts \S 366(3)—Where a bill to enforce vendor's lien omits necessary trust beneficiaries, a demurrer thereto should be sustained.

A bill for enforcement of a vendor's lien against the land constituting part of the estate of a deceased vendee of the vendee, or subpurchaser, to which only the executor of his will and the trustees under the will are made parties defendant, and which fails to disclose the nature and extent of the interest or estate of the trustees in the land, omits the beneficiaries of the trust and does not in any way excuse or justify their omission, is defective as to parties, and a demurrer thereto should be sustained on that ground.

2. Equity \S 117—On demurrer to bill for enforcement of vendor's lien, for want of necessary parties, the merits considered only to see if case falls within equity jurisdiction.

In such case, the merits of the cause of action will be considered only to the extent of determining that it is such as falls within the jurisdiction of a court of equity.

Certified from Circuit Court, Wetzel County.

Bill by Waltman H. Conaway against Raymond D. Overholt, executor, and others, for enforcement of vendor's lien. Demurrer to bill overruled, and case certified for review. Demurrer ordered sustained, and review of questions on merits refused for lack of necessary parties.

Waltman H. Conaway, of Fairmont, and T. M. McIntire, of New Martinsville, for plaintiff.

Thos. H. Cornett, of New Martinsville, for defendants.

POFFENBARGER, J. Having overruled a demurrer to a bill filed for enforcement of an alleged vendor's lien, and possibly for relief upon other grounds, the trial court has certified its decision to this court for review.

The inquiry turns upon the language of the clause in a contract or deed, relied upon as having reserved such a lien. W. H. Conaway, one of the plaintiffs, owning an undivided half of the equitable title to certain coal and mining privileges, sold and conveyed the same to his cotenant, Charles E. Conaway, for and in consideration of the sum of \$8,100, of which \$1,100 was paid in cash. Of the residue, \$2,000 was to be paid in a short time, without interest, and the residue of the purchase money in two interest-bearing installments of \$2,500 each, one on or before December 1, 1907, and the other on or before

December 1, 1908. As to security of payment, the contract contained this stipulation:

"It is also understood, covenanted, and agreed that said Waitman H. Conaway is to have a vendor's lien upon said coal to the extent of said \$7,000 remaining unpaid in any sale and conveyance thereof by said Charles E. Conaway. If said sum of \$2,000 is paid on or before December, 1906, the said vendor's lien shall only be for \$5,000, instead of \$7,000."

Soon after this agreement or conveyance was made B. F. Overholt, with full notice thereof, and of the stipulation aforesaid, purchased of Charles E. Conaway an undivided one-half of said coal, and paid Waitman H. Conaway \$1,000, one-half of the \$2,000 aforesaid, by way of credit on what he was to pay Charles E. Conaway as purchase money. At the same time and as part of the same transaction he joined Charles E. Conaway in the execution of two \$2,500 notes payable to Waitman H. Conaway, which represented the two \$2,500 payments due from Charles E. to W. H. Conaway. He did not join in a note for \$1,000 representing the other half of the \$2,000 installment, because it had been assigned by W. H. Conaway to W. A. Weidebush, and by Weidebush to the Grafton Banking & Trust Company, after endorsement by John F. Phillips; but the bill alleges he assumed it and became personally liable therefor.

In February, 1907, David H. Cox, in whom the legal title to the coal still remained, and to whom only a small fraction of the original purchase money had been paid, conveyed it to Overholt and Charles E. Conaway, reserving a vendor's lien thereon for more than \$44,000. Later, and on a date not disclosed, Overholt died and Raymond D. Overholt qualified as the executor of his will. At a date not disclosed, Chas. E. Conaway also died. The estate of B. F. Overholt paid all the purchase money due Cox, and took an assignment of his vendor's lien.

In a creditors' suit against the estate of Chas. E. Conaway the Overholt estate set up this lien, and claimed the benefit thereof by subrogation, to the extent of the payment of Conaway's half of the purchase money. On the sale of the Conaway half of the coal, under a decree entered in said cause, the trustees of the Overholt estate purchased it for the sum of \$35,000 which sum was not more than sufficient for reimbursement of said estate, after payment of costs, etc.

In that suit the three notes above described were also set up and asserted as liens on the Chas. E. Conaway half of the coal, and were decreed to be liens thereon next after the lien for the Cox debt. Cox, B. F. Overholt, W. H. Conaway, Weidebush, the Grafton Banking & Trust Company, and Phillips were all parties defendant in that suit.

The two \$2,500 notes were assigned by W. H. Conaway to B. F. Blackshire, and

later paid by B. F. Overholt or his executor. The bank above mentioned obtained a judgment on the \$1,000 note against W. H. Conaway, Weidebush, and Phillips which has been paid by Phillips.

[1, 2] In said creditor's suit, the bank, W. H. Conaway, Weidebush, and Phillips filed a petition by which they sought to charge the Overholt half of the coal with said \$1,000 debt, as being secured by the stipulation in the contract between W. H. Conaway and Chas. E. Conaway, but their petition was rejected by an order saving to them any right they might have to charge that interest in the coal by a proper proceeding. This suit, in which all of them have joined as plaintiffs, is the means they have adopted for enforcement of their alleged right.

A ground of demurrer respecting sufficiency of the bill as to parties may preclude review of the decree as to the sufficiency of the bill in respect of other matters. In other words, it may not be possible, in the present state of the record, to say whether there is a vendor's lien, or whether there is right to charge the real estate, or obtain a personal decree for the debt in question, upon any other ground. In the absence of necessary parties, the inquiry cannot go beyond the question of equity jurisdiction of the cause of action indicated by the bill. *Beckwith v. Laing*, 66 W. Va. 246, 66 S. E. 354.

The only defendants to the bill are Raymond D. Overholt, West Virginia executor of the will of B. F. Overholt, deceased, and Helen Abigail Overholt and Raymond D. Overholt, trustees of the estate of B. F. Overholt. There is not an allegation in the bill, indicating the nature or extent of the interest the executor or the trustees have in the estate. The trustees may be the beneficiaries of the will and the trust created by it, but the bill does not say so. The trust is probably an active one, but as to that the bill is silent. The legal title to the real estate may be in the executor or the trustees, and it may not be in either. As to this, no information is furnished by any allegation of the bill. Likely the will makes one or more persons other than the trustees beneficiaries of trust, but, if so, they are not named. The trustees may have interests in the the trust, in their individual capacities, but they are not made parties in their own rights. As they are described in the body of the bill as trustees of the estate, sufficient interest on their part to make them proper parties is no doubt shown; but, presumptively, the trust was created for the benefit of somebody. The trustees of the estate may not have powers sufficiently broad to make them representatives of the beneficiaries of the will or the trust in respect of the coal in question, for all purposes. Their interest or title should be disclosed. If the nature of the cause of action, enforcement of a vendor's

lien, does not constitute an exception to the general rule as to parties, the bill is clearly defective in that respect. Under it, all persons directly interested in the subject-matter are necessary parties, and cestuis que trustent are such persons. *Beckwith v. Laing*, cited; *Pyle v. Henderson*, 55 W. Va. 122, 46 S. E. 791. The nature of this cause of action constitutes no exception to the general rule, especially when the lien is asserted against land of the vendee or subpurchaser, as it is here. *Clark v. Harpers Ferry Timber Co.*, 70 W. Va. 312, 73 S. E. 919; *Elkins National Bank v. Reger*, 70 W. Va. 113, 73 S. E. 244; *Gebhart v. Shrader*, 75 W. Va. 159, 83 S. E. 925; *Morris' Adm'r v. Peyton's Adm'r*, 10 W. Va. 1, 9.

That enforcement of a vendor's lien is an equitable cause of action needs neither demonstration nor citation of authority. It is an elementary proposition.

For the omission of allegations showing the nature and extent of the interest or estate of the trustees in the coal and excusing in some way omission of the beneficiaries of the trust, the bill is manifestly insufficient as to parties, and, on that ground, the demurrer should have been sustained, and will be by an order entered here. It is hardly necessary to observe that lack of apparently necessary parties precludes review of the decision upon any question pertaining to the merits of the demand set up by the bill.

The conclusion here stated will be recorded by a proper order and certified to the court below

(88 W. Va. 712)

Ex parte LAVINDER. Ex parte WOOLFORD. Ex parte INGRAM.
(Nos. 4358-4360.)

(Supreme Court of Appeals of West Virginia.
Sept. 13, 1921.)

(Syllabus by the Court.)

1. **Insurrection and sedition** §5—**Martial law cannot obtain in the absence of military operations and occupation of the territory.**

Martial law operating, in the government of territory, as a substitute for the civil law, or as an addition thereto, so as to restrict the liberties of citizens and augment the powers of officers, is an incident of military operations and of actual military occupation of the territory so governed; wherefore it cannot obtain in the absence of such operations and occupation.

2. **Insurrection and sedition** §5—**Existence of insurrection and Governor's proclamation do not put martial law in operation nor justify it before military occupation.**

The existence of war between a state and citizens of a portion of its territory, arising out of an insurrection, does not of itself inaugurate martial law in such territory, nor does the proclamation thereof by the Governor put it in operation. Nor does the fact, nor the

proclamation, nor both, afford any constitutional basis for a proclamation of martial law in such territory, unless nor until a military force is put into the field for administration and enforcement thereof.

3. **Insurrection and sedition** §5—**Governor cannot inaugurate and enforce martial law by means of civil authorities acting under military officer.**

In such case, it is not within the constitutional power of the Governor to inaugurate and enforce martial law within such territory by means of the civil authorities acting under the direction of himself and a military officer sent into it by him for the purpose. A mere military coloring of administration is insufficient.

4. **Habeas corpus** §16—**Insurrection and sedition** §5—**Parties arrested under Code provisions authorizing arrest "in time of war" may be released by habeas corpus where arrest was not during time of war.**

Sections 5 to 9, inclusive, of chapter 14 (sections 351-355) of the Code, are operative only in a time of actual war, and under them citizens cannot be arrested and detained, except in the time of such war, for acts not constituting offenses under the civil law, though prescribed and forbidden by executive regulations, rules, and orders set forth in proclamations of war and martial law.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, In Time of War.]

Miller, J., dissenting.

Proceedings in habeas corpus by A. D. Lavinder, by Mount Woolford, and by Frank Ingram. Returns to writs held insufficient, and prisoners discharged.

H. W. Houston, of Charleston, for petitioners.

E. T. England, Atty. Gen., Chas. Ritchie and R. Dennis Steed, Asst. Atty. Gen., and S. B. Avis, of Charleston, for respondent.

POFFENBARGER, J. Alleging illegal restraint and deprivation of his liberty by the sheriff of McDowell county, proceeding under orders of the acting adjutant general of West Virginia, A. D. Lavinder obtained from two of the judges of this court, acting in vacation, a writ of habeas corpus ad subjiciendum, requiring the production of his body in court, at the city of Charleston, at a special term, for judicial inquiry and determination as to the validity of his imprisonment. Upon similar complaints, Mount Woolford and Frank Ingram obtained such writs, returnable at the same time and place, and requiring the sheriff of Mingo county to produce their bodies before the court for like inquiry and determination.

Each of said parties was held as a military prisoner for infraction of a rule or order contained in a proclamation issued by the Governor of the state, declaring the existence of a state of war, insurrection, and riot in

the county of Mingo, and purporting to inaugurate martial law throughout the whole of said county, and to require from all of its inhabitants and other persons within its limits obedience to certain orders, rules, and regulations prescribed in said proclamation, exceeding in their requirements those of the common and statute laws, some of which, unless made exceptional on the ground of necessity, and thus brought within the Constitution, contravene provisions of that instrument.

Under authority conferred by law, Lavinder had carried a pistol in Mingo county, he having been duly licensed so to do by an order of a competent court of Kanawha county, and the license so granted him being state-wide in its operation. His carriage of the pistol under such circumstances was treated as an infraction of one of the martial law regulations inhibiting the possession and carrying of arms in the county, and therefore as sufficient ground for his arrest and detention pending suppression of the insurrection. Immediately upon his arrest he was committed to the custody of the sheriff of Mingo county by an order of the acting adjutant general, and then, by a like order, transferred to the custody of the sheriff of McDowell county, on account of the crowded condition of the Mingo county jail. Woolford was seized and likewise detained in the Mingo county jail for having had pistol cartridges in his possession; and Ingram, for passing up and down through a tent colony of striking coal miners, contrary to orders given under said proclamation. None of these acts constituted a violation of any civil law, but all were prohibited by the Governor's rules and regulations, as interpreted and applied by his agent in the alleged military district, the acting adjutant general.

[1] Admittedly, there was no actual military organization or force representing the state government, in Mingo county, at the time of the arrests. The acting adjutant general, holding a military commission, was on the ground, and was directing the civil authorities of the county, the sheriff, constables, justices, policemen, and the posse comitatus, but they were not enrolled, enlisted nor organized as a military force. Under the law, the Governor had a potential military force in the state and county, the unorganized militia; but, being unenrolled, uncalled, and unorganized, it could not have been deemed to be an actual military force, nor treated as such. Although officially declared to be in a state of war, the county was not occupied by any military force of the state. The enterprise was an attempt to put into effect and enforce military or martial law by merely civil agencies. The presence of a military officer and action of the civil authorities, under his direction, constituted no more than mere military color in the situation and procedure.

The substitution of military for the civil law in any community is an extreme measure. Socially, economically, and politically, it is deplorable and calamitous. Its sole justification is the failure of the civil law fully to operate and function, for the time being, by reason of the paralysis or overthrow of its agencies, in consequence of an insurrection, invasion, or other enterprise hostile to the state, and resulting in actual warfare. And then such substitution at any place within the state cannot extend beyond the limits of the theater of actual war. *Nance v. Brown*, 71 W. Va. 519, 77 S. E. 243, 45 L. R. A. (N. S.) 996, Ann. Cas. 1914C, 1; *In re Jones et al.*, 71 W. Va. 567, 77 S. E. 1029, 45 L. R. A. (N. S.) 1030, Ann. Cas. 1914C, 31. Martial Law within the territory of a country at war with another, or with rebellious citizens or subjects in possession of a part of its own territory, is not a necessary incident or consequence of the existing state of war. A concrete illustration of this proposition is found in the late World War. Though there were millions of men under arms in the United States, not a foot of its territory was subjected to martial law on the ground of the existence of the state of war between this country and certain European governments; nor, under principles declared in *Ex parte Milligan*, 4 Wall. (U. S.) 2, 18 L. Ed. 281, could it have been, because there was no actual warfare in this country—no fighting, no battle lines, no area in which troops were assembled or moved to and fro, in the conduct of or preparation for immediate or probable combat. In the great Civil War, portions of the country lying without the theater of actual war, as here indicated, were constitutionally immune from martial law. *Ex parte Milligan*, cited.

[2] It is perfectly manifest that the proclamation of war did not, ipso facto, nor ex proprio vigore, inaugurate martial law in Mingo county. The Governor's attempt to inaugurate it and put it into effect in that county, in the manner hereinbefore described, was clearly futile and inoperative. The irresistible logic of the precedents already cited, and of all others bearing upon the subject, is that martial law is an incident of military operations within the area of actual, not merely theoretical, warfare. Being only an incident of actual warfare, such warfare is essential to its existence; and, being also a mere incident of actual military occupation of territory, an army in the field is equally essential and indispensable. No precedent, text, nor judicial opinion found in the books accords to martial law of the kind now under consideration a wider scope or larger function than that just indicated. Upon the theory of the procedure under which these arrests were made, a citizen of revolting or enemy territory might be guilty of many infractions of martial law long before accrual of the power to make it effective. As an

incident of the Civil War, that theory, if applied, might have piled up against a citizen of Georgia a three or four years' accumulation of offenses under federal military regulations of which he had had no knowledge, and required him to suffer imprisonment or other punishment for them on the arrival of federal troops within the state. There could have been no American martial law in Cuba, Porto Rico, the Philippine Islands, or Germany until the American troops actually occupied those countries, and then it was limited to the territories in actual occupation. It is a purely military measure, and its administration a strictly military function. To say the military chief may prescribe it and then devolve its enforcement upon the civil officers of the territory involves a serious departure from logic, as well as a contradiction in terms. It is as truly military in its administration as in its origin, nature, and institution or proclamation.

[3] The authority of the Governor to institute and enforce it, under circumstances warranting such action, accorded to him by certain decisions of this court, to which reference has been made, is found in section 12 of article 7 of the Constitution, only by construction of the terms used therein, in connection with other provisions of the organic law. That section makes him commander in chief of the military forces of the state, and expressly empowers him to call out the same to execute the laws, suppress insurrection, and repel invasion. Power to suppress insurrection and repel invasion by the use of the military forces of the state impliedly carries power to accomplish those purposes in the recognized modes of warfare, which include martial rule within the area of actual hostilities. In other words, the Governor, being expressly authorized to conduct military operations for suppression of insurrection and in resistance of invasion, is impliedly authorized to conduct such operations in accordance with the usages and customs of war, and so has all the powers recognized as being incident to the office of commander in chief of any army engaged in such enterprises. This is a reasonable and fair interpretation of the terms of the section above referred to. Administration and enforcement of martial law by civil agencies could not be brought within the terms of that section in any way. Moreover, specification of one method of effecting a result is regarded, in constitutional construction, as an implied exclusion of all others, even though they may be deemed to be more convenient or efficacious than the one designated.

"The rule, that when an instrument gives a power it also gives, by implication, the means necessary to its exercise, is intended to render available those grants of power, which, without its application, would be inoperative and nugatory, by reason of the means necessary to their exercise not being also provided. But, when the means of enforcing a given power

are furnished by law, the rule does not apply." *Field v. People*, 2 Scam. (Ill.) 79, 85.

Of course, this holding is limited to suppression of insurrection and repulsion of invasion, terms necessarily implying the use of force. If insurrectionists or foreign enemies can be dissuaded from their purposes by persuasion or other peaceable methods, the Governor may employ them and need not resort to force. But, when the application of military force is necessary, he is limited to the use of a military organization in the effectuation of his purpose. He cannot enlarge the powers of the civil officers nor restrict the legal rights of citizens by way of exercise of his power to achieve certain purposes by the use of a military force. In other words, he cannot by a mere order convert the civil officers into an army and clothe them with military powers for the purpose of suppressing an insurrection or repelling an invasion. He can raise an army only in the manner prescribed by law, and his military authority can be exerted in respect of things authorized to be done with the military forces only by means of an army.

This somewhat technical view of the subject is sustained by broader and more practical considerations. Martial law is a drastic and oppressive system. Under it the rights, privileges, and liberties ordinarily possessed and enjoyed by citizens are greatly restricted and abridged, and the powers of the military officers are infinitely larger than those conferred upon the civil officers. Hence, it ought not to be put into effect except upon occasions of dire and inexorable necessity. Limitation of the power of the Governor to invoke and apply it only on occasions of actual warfare and within the area of actual hostilities renders it impossible for him to set aside the civil laws and rule by his practically unrestrained will, under any other circumstances. Such a construction is not unreasonable, and it is highly necessary in the legal sense of the term. If he could proclaim martial law and enforce it by employment of the civil authorities, he would be often importuned to do so upon facts and circumstances wholly insufficient in reason to warrant such procedure; and, in some such instances, he might be induced by misapprehension or misrepresentation to yield to such importunities. The necessity and application of actual military force, as prerequisites, afford a reasonably certain basis, standard, or test by which he can always determine the propriety of resort to this high power, as well as obtain immunity from the embarrassment of groundless appeals for abridgement of the legal rights of citizens and enlargement of the powers of the civil officers.

Power in a chief magistrate, to effect such results under ordinary circumstances, would be suggestive of the despotism of unrestrained-

ed monarchical government, complete abolition, inhibition, or preclusion of which is one of the chief aims or purposes of constitutional popular government. The framers of the federal Constitution were particularly careful to provide against it by many of the provisions of that instrument. Both the federal and the state Constitutions withhold it from the Legislature, as well as the executive. The war power only was excepted. For an occasion of such gravity, it was deemed inadvisable to attempt to define the powers of government, by any constitutional provision; wherefore the usages and customs of war constitute its limitations. Enlargement of that exception would amount to an undermining of a cornerstone of constitutional government. It is so high, mighty, and dangerous in character that it must be rigidly and strictly kept within clearly defined limits, even though they may seem to be arbitrary and technical.

[4] In the light of the same general principles, we interpret sections 5 to 9, inclusive, of chapter 14 (sections 351-355) of the Code, authorizing arrest in time of war of persons giving aid, support, or information to the enemy or insurgents, or combining or conspiring together to aid or support any hostile action against the United States or this state. Such high and extraordinary power was not intended to be conferred, unless nor until actual warfare is made manifest by the presence of an army in the field. The power is given by way of aid in the actual suppression of insurrection or resistance of invasion. It cannot be wielded except "in time of war." That does not mean theoretical or technical war. It means actual war. Ordinarily, a declaration of war is followed immediately by the movement of troops for attack or defense. The statute must operate according to the plain and ordinary meaning of its terms—not an obscure, exceptional, or strained interpretation. Besides, until the declaration of war is carried into effect by actual military or naval operations, there is no such an emergency as justifies the possession or exercise of such extraordinary powers as the statute confers in time of war. Lack of such a limitation, as we recognize and here state, would open the door to the possibility of abuses thereof, well calculated to impair and weaken the very foundations of constitutional government. Though we cannot assume that any chief magistrate would ever set up a merely pretextual state of war, as color or ground for seizure of extraordinary powers inconsistent with and subversive of liberty, the bare possibility of such action, under a loose interpretation of the statute, amply suffices for adoption of the strict construction we give it. Besides, as has been stated, it harmonizes with the general principles above adverted to, and carries them into effect.

Upon these principles and conclusions, the returns to the writs were held insufficient, and the prisoners discharged.

MILLER, J., dissents.

(89 W. Va. 46)

BARTLETT et al. v. JOHNSON.

(Supreme Court of Appeals of West Virginia.
Sept. 13, 1921.)

(Syllabus by the Court.)

1. Vendor and purchaser \S 81—Presumption that vendor owning but one house and lot in a town intended to sell only that which he owned.

There is a presumption that a vendor of real estate intends to sell that which he owns, and where a contract for the sale of real estate describes the subject-matter of the sale as a house and lot situate in a certain town, and the vendor owns but one house and lot situate in the town mentioned, the contract will be construed as referring thereto.

2. Specific performance \S 105(3) — Laches will not prevail where purchaser holds possession from date of sale until suit.

The defense of laches will not prevail in a suit for specific performance of a contract for the sale of real estate, where the vendee holds the possession thereof from the date of the sale until the institution of the suit by him for the extraction of the legal title, even though many years may have elapsed between the making of the contract and the institution of the suit.

Case Certified from Circuit Court, Barbour County.

Bill for specific performance by Florence Bartlett and others against Elizabeth Johnson. Demurrer to bill overruled, and case certified. Overruling of demurrer affirmed.

George & Wilcox, of Philippi, for plaintiffs.
J. Blackburn Ware, of Philippi, for defendant.

RITZ, P. The circuit court of Barbour county having overruled a demurrer to the plaintiffs' bill for specific performance of a contract for the sale of real estate, certifies to this court the questions arising upon said demurrer.

On the 15th of June, 1907, the plaintiffs' ancestor W. J. Bartlett purchased from Simon Johnson a house and lot in North Philippi, and on that date said Simon Johnson executed and delivered to the ancestor of the plaintiffs a contract or memorandum of the sale in the following words and figures:

"This contract maid this 15 day of June, 1907, by & beetween Simon Johnson of the first part & W. J. Bartlette of the second part sole a lot and house in North Philippi for One thousand dollars paid in hand retains this property as long as I live. Simon Johnson."

The bill alleges that W. J. Bartlett was at the time of the sale in possession of the house and lot purchased from said Johnson, and that he remained in the possession thereof until his death, and that since his death his widow and heirs at law, the plaintiffs in this suit, have remained in the possession of the house upon said premises; that the said Simon Johnson at the time of said sale owned no other house and lot in North Philippi than the one which this suit seeks to have conveyed to the plaintiffs; and that the defendant Elizabeth Johnson is the widow and sole devisee of the said Simon Johnson, he having departed this life.

The demurrer to the bill is based upon two grounds: the first being that the contract of sale is too indefinite to be enforced, there being no sufficient designation therein of the property sold by Johnson to Bartlett; and, second, that the plaintiffs are barred from maintaining this suit by laches.

[1] It is true the contract of sale is rather indefinite so far as the subject-matter is concerned. It purports to sell a lot and house in North Philippi, and recites the consideration, and that the same has been paid. Can resort be had to extraneous evidence in order to identify the subject-matter of the contract? It is averred in the bill that the vendor had but one house and lot in North Philippi, and it is insisted that there is a presumption that he intended to sell that which he owned. If it is true that it may be presumed that the vendor intended to sell his own property, then there existed but one subject-matter to which the contract could be applied, and that is the house and lot in North Philippi claimed by the plaintiffs. There is no doubt but that resort may be had to evidence outside of the contract itself in order to establish the identity of the subject-matter of the contract. In other words, if there is anything in the contract which directs inquiry in a particular way for the purpose of identifying the subject, this direction will be followed. Now it is quite clear that if the contract had said "my house in North Philippi" there would have been no trouble in ascertaining the subject-matter of the contract, provided the vendor had but one house in North Philippi. Of course, if upon investigation it is found that he owned two houses and lots, or a half dozen houses and lots in North Philippi, then it might be impossible to apply the contract to any particular house and lot, but if such an inquiry had developed the fact that he was the owner of but one such house and lot, by the uniform trend of authorities the contract would be applied to that house and lot. In this case, however, the contract does not designate it as "my house and lot," but simply "a house and lot in North Philippi." It must be borne in mind in construing this contract, as well as all other contracts, that

the purpose of the courts is to give them effect, if that may be done. There is no doubt but that Johnson intended to sell a house and lot in North Philippi to Bartlett, and we see no difficulty in reaching the conclusion that this intention to sell applied to the house and lot that he owned. It surely could not be assumed that he intended to sell a house and lot that he did not own and had no interest in. The presumption is that people are honest and intend to give value for what they get. Indulging this presumption, the contract then stands just as if written "my house and lot in North Philippi." and if by going to North Philippi it is found, as alleged in the bill, that the vendor owned but one house and lot there, then this is the house and lot intended. Of course, if there were more than one house and lot in North Philippi belonging to the vendor, this would render the description ambiguous, and might render the contract invalid, but in this case we have the allegation that Johnson owned but one house and lot in North Philippi, and, this being true, we are constrained to hold that this was the property referred to in the contract aforesaid. The doctrine that there is a presumption that the vendor of real estate intends to sell property owned by him is but another way of stating that there is a presumption that parties will deal honestly with each other, and that one who purports to sell property is the owner of it, and this presumption is resorted to in order that effect may be given to their contracts rather than to deprive them of the force which the parties intended them to have. 1 Jones on Law of Real Property in Conveyancing, § 347; Hurley v. Brown, 98 Mass. 545, 98 Am. Dec. 671; Mead v. Parker, 115 Mass. 413, 20 Am. Rep. 110; Fish v. Hubbard's Adm'rs, 21 Wend. (N. Y.) 651. If the allegation of the bill that Johnson owned but one house and lot in North Philippi is true, and on this demurrer we must concede the truth of it, then there was but one subject-matter to which this contract could be applied after indulging the presumption that he intended to sell that of which he was the owner.

[2] The contention that plaintiffs are barred from maintaining this suit by laches is not tenable. It is averred that they are in possession of the property, and that they and their ancestor have had such possession ever since the contract of sale sought to be enforced. They were under no obligation to take any action so long as their possession was undisturbed, and their rights unquestioned. This doctrine is fully sustained by the case of *Mills v. McLanahan*, 70 W. Va. 288, 73 S. E. 927, and the authorities there cited.

The demurrer to the bill was properly overruled, and the questions certified are answered accordingly.

(182 N. C. 108)

(108 S.E.)

CLAYPOOLE v. McINTOSH et al.
(No. 177.)

(Supreme Court of North Carolina. Oct. 5, 1921.)

1. Corporations \S 228—Stockholders liable for unpaid subscriptions to amount necessary to liquidate debts.

Under C. S. \S 1160, stockholders of an insolvent corporation are liable pro rata for their unpaid subscriptions to amount necessary to liquidate the corporate debts.

2. Bankruptcy \S 145(1)—Corporate officers, who paid dividends when debts exceeded two-thirds of assets, liable to trustees for debts.

Under C. S. \S 1179, officers of corporation, who paid out of the funds of the corporation dividends when debts of the corporation exceeded two-thirds of its assets, held liable to trustee in bankruptcy of the corporation for the amount of such debts and the proper costs and charges of the bankruptcy proceeding.

3. Appeal and error \S 901—Presumption against error.

The presumption is against error.

Appeal from Superior Court, Craven County; Devin, Judge.

Action by J. S. Claypoole, trustee of the estate of the Willis Grocery Company, against W. A. McIntosh and others. Judgment for plaintiff, and defendants except and appeal. Affirmed. No error.

The action is instituted by plaintiff, trustee in bankruptcy of Willis Grocery Company, an insolvent corporation; the same being by order of bankruptcy court to collect assets to pay creditors from stockholders on their unpaid subscriptions, under section 1160, Consolidated Statutes, and against defendants, directors and officers in control of said corporation and its affairs, by reason of dividends paid out to themselves contrary to law as contained in section 1179, etc. On denial of liability, the jury rendered the following verdict:

"1. What amount of stock in the Willis Grocery was held by the defendants McKeel, McIntosh, and Weeks at the time the said company became insolvent?

"Answer: McKeel, \$2,000.00; McIntosh, \$2,000.00; Weeks, \$1,000.00.

"2. What amount, if any, is due by each of said defendants on the stock held by them?

"Answer: \$2,000.00; Weeks, \$1,000.00.

"3. Were the defendants officers of the Willis Grocery Company?

"Answer: Yes.

"4. Did the defendants pay out of the funds of said Willis Grocery Company dividends when debts of said company were more than two-thirds of its assets, and, if so, in what amount?

"Answer: \$6,644.00.

"5. Did the defendants pay to or for themselves, any part of the capital stock of Willis

Grocery Company, and if so, in what amount?

"Answer: \$5,308.00.

"6. What amount will be refunded to pay the debts of Willis Grocery Company, over and above the assets of the bankrupt estate of the Willis Grocery Company?

"Answer: \$3,234.00."

Judgment on verdict for plaintiffs for \$3,234, amount required to pay the corporate debts, and defendants excepted and appealed.

Whitehurst & Barden and Ward & Ward, of New Bern, for appellants.

H. P. Whitehurst and R. A. Nunn, both of New Bern, for appellee.

HOKE, J. [1] Both under general principles of corporate law, appertaining to the subject, and with us by express enactment, stockholders of an insolvent corporation are liable pro rata for their unpaid subscriptions to an amount necessary to liquidate the corporate debts. *Whitlock v. Alexander*, 160 N. C. 465, 76 S. E. 538; *McIver v. Hardware Co.*, 144 N. C. 478, 57 S. E. 169, 119 Am. St. Rep. 970; Consolidated Statutes, chapter 22, \S 1160. In the same statute (section 1179) it is also provided as follows:

"No corporation may declare and pay dividends except from the surplus or net profits arising from its business, or when its debts, whether due or not, exceed two-thirds of its assets, nor may it reduce, divide, withdraw, or in any way pay to any stockholder any part of its capital stock except according to this chapter. In case of a violation of any provision of this section, the directors under whose administration the same occurs are jointly and severally liable, at any time within six years after paying such dividend, to the corporation and its creditors, in the event of its dissolution or insolvency, to the full amount of the dividend paid, or capital stock reduced, divided, withdrawn, or paid out, with interest on the same from the time such liability accrued. Any director who was absent when the violation occurred, or who dissented from the act or resolution by which it was effected, may exonerate himself from such liability by causing his dissent to be entered at large on the minutes of the directors at the time the action was taken or immediately after he has had notice of it."

[2] The verdict of the jury on the fourth issue brings case of defendants directly within the provisions of this section 1179, to an amount more than sufficient to pay the corporate debts, and the judgment for the amount of such debts and proper costs and charges has been properly entered against them.

The only objection to the judgment insisted upon in the argument before us was to the allowance of \$500 for costs and expenses of the bankruptcy court. It appeared that plaintiff, as trustee in bankruptcy, had on hand from other sources \$636 available to creditors, subject to costs and fees of the

bankruptcy proceedings, and the court merely instructed the jury that they should deduct the amount of \$500 for such costs from this \$636, and credit the amount of indebtedness with the difference, which would leave the balance due from defendants the amount found by the jury in response to the sixth issue. This was clearly permissible, and the objection made was, not to the allowance of the fees, but that the evidence on the subject is not as full and satisfactory as could be desired. We think the testimony of the trustee, made without objection on the cross-examination, is sufficient to uphold the amount allowed.

[3] The presumption is against error. *Bernhardt v. Dutton*, 146 N. C. 206-209, 59 S. E. 651. And we are of opinion that the objection is not sufficiently supported to justify the court in disturbing the results of the trial.

Judgment affirmed.

No error.

(182 N. C. 106)

AYCOCK v. BOGUE. (No. 113.)

(Supreme Court of North Carolina. Oct. 5, 1921.)

Brokers' Commissions (3)—Evidence held to make a prima facie case entitling a broker to commissions so that it was error to grant nonsuit.

In an action for broker's commissions for the sale of real estate where the evidence tended to show that the broker had produced a purchaser, or contract of sale, in accordance with his agreement, a prima facie case for commissions was made and a judgment of nonsuit was erroneous.

Appeal from Superior Court, Wayne County; Lyon, Judge.

Action by F. B. Aycock against Ella W. Bogue, executrix of the estate of H. G. Bogue, deceased. From judgment for defendant, plaintiff appeals. Reversed.

Civil action to recover broker's commissions alleged to be due under a contract of agency; said agreement being in words and figures as follows, to wit:

"Authorization to Sell Land.

"North Carolina, Wayne County:

"In consideration of the sum of one dollar and other valuable considerations, to A. G. Bogue, the undersigned, paid by F. B. Aycock, the receipt of which is hereby acknowledged, I hereby authorize F. B. Aycock, of Fremont, N. C., to sell, or contract to sell, to any person for me on or before the 1st day of December, 1919, at the price of \$30,000.00, upon the following terms: \$10,000.00 cash, \$2,000.00 January 1, 1921, \$2,000.00 January 1, 1922, \$2,000.00 January 1, 1923, \$2,000.00 January 1, 1924, \$12,000.00 January 1, 1925. Secured by

mortgage on land and interest annually at 6 per cent. the lot or tract of land belonging to A. G. Bogue situated and described as follows: Adjoining the lands of E. L. Pippin, Simon Aycock and others, containing 100 acres, more or less, and being land bought of Kennedy-Moye Realty Company, and known as Wyatt M. Barnes land.

"It is agreed that A. G. Bogue may rent out all crops for the year 1920.

"I agree and bind myself to pay said F. B. Aycock all over the price above mentioned, if he makes said sale, or contract of sale, for me on or before the time above specified.

"And I do hereby bind myself that I will make a good and indefeasible title in fee, free from all incumbrances, by warranty deed, to any person or persons whom the said F. B. Aycock may sell said land to, on or before the date above specified.

"This the 2d day of October, 1919.

"[Signed] A. G. Bogue. [Seal.]"

On the afternoon of December 1, 1919, the plaintiff produced one W. R. Ballance who was ready, able, and willing to buy in accordance with the terms of the above agreement and in keeping with his written contract to purchase. It appears that the signing of the deed by Bogue and his wife, by common consent and mutual acquiescence, was delayed until the next morning, December 2d, as it was desirable not to disturb Mrs. Bogue and her baby that night.

On the following day, and thereafter, Ballance declined to accept the deed on the ground that, under his contract of purchase, he was not bound to take the property unless the deal was consummated on, or before the 1st day of December. His written agreement is as follows:

"Agreement to Purchase Land.

"North Carolina, Wayne County:

"In consideration of one (\$1.00) dollar and other valuable considerations to me in hand paid by F. B. Aycock, the receipt of which is hereby acknowledged, I do hereby agree and bind myself, my heirs and assigns, to purchase from the said F. B. Aycock, at the price of \$31,500.00, upon the terms of \$11,500.00 cash, \$2,000.00 January 1, 1921, \$2,000.00 January 1, 1922, \$2,000.00 January 1, 1923, \$2,000.00 January 1, 1924, \$12,000.00 January 1, 1925, on or before the 1st day of December, 1919, the following described land adjoining the lands of E. L. Pippin, Simon Aycock and others, containing 100 acres, more or less, and being land purchased from G. A. Norwood and Kennedy-Moye Realty Company, and known as Wyatt Barnes land, owned by A. G. Bogue and under contract to be sold by F. B. Aycock.

"Said land to be conveyed to me in fee, free from incumbrances when said sale is made.

"Witness my hand and seal this the 21st day of November, 1919.

"[Signed] W. R. Ballance. [Seal.]

"Witness: J. H. Best."

At the close of plaintiff's evidence and upon motion of counsel for defendant, his honor

entered judgment as of nonsuit. Plaintiff appealed.

Dickinson & Freeman and E. M. Land, all of Goldsboro, for appellant.

Langston, Allen & Taylor, of Goldsboro, for appellee.

STACY, J. There is evidence on the record tending to show that the plaintiff produced a purchaser, or a contract of sale, in accordance with his agreement, which prima facie entitles him to his commissions. Therefore the judgment of nonsuit was erroneous.

As to whether there has been any release or abandonment of the contract, so participated in by the plaintiff as to bar his right of recovery, can only be determined by a jury upon a full hearing and under proper instructions from the court. In the absence of all the evidence, we refrain from discussing the case, as it goes back for a new trial; and, in all probability, if Balance is required to live up to his contract of purchase, which apparently is enforceable, the plaintiff will have no further cause for complaint.

Reversed.

(182 N. C. 158)

KELLEY v. McLAMB et al. (No. 218.)

(Supreme Court of North Carolina. Oct. 5, 1921.)

1. Receivers §19 — Receiver held property appointed in view of debtor's disappearance leaving property uncared for.

Where proprietor of cotton gin and planing machine was indebted to a large number of creditors, was hopelessly insolvent, and had disappeared to avoid service of process leaving his property uncared for and idle, the court, in action by creditors to adjust liens of creditors on the property of such debtor, properly appointed a receiver before rendition of judgment, under C. S. §§ 860, 861.

2. Receivers §200—Compensation properly apportioned between creditors.

Compensation of receiver appointed to care of property which debtor, on his disappearance to avoid service of process, left idle and uncared for, with the consent of and for the benefit of the creditors, was properly apportioned among the creditors.

Appeal from Superior Court, Sampson County; Bond, Judge.

Action by W. D. Kelley, in behalf of himself and all other creditors of E. C. McLamb, against E. C. McLamb, the Hyman Supply Company, and others, in which a receiver was appointed for defendant E. C. McLamb. To review judgment directing the Hyman Supply Company to pay a portion of the costs and expenses of the receiver, the Hyman Supply Company excepts and appeals. Affirmed.

This action was brought to adjust certain liens of creditors on the property of their debtor E. C. McLamb. It will give a clear idea of the case to set forth the allegations of the amended complaint supplemented by certain facts not definitely stated therein. The complaint is as follows:

"The plaintiff, Walter D. Kelley, under leave of court first had and obtained, for his amended complaint and petition in the cause alleges:

(1) He does hereby reiterate and reaffirm each and every allegation contained in his former complaint an petition in the cause, in the same manner and of like effect as if herein specifically set forth and declared.

(2) That this action was commenced on November 24, 1920, the petition being filed on the same date in which the appointment of a receiver was prayed for; and the plaintiff does further allege that at the time of the commencement of this action the defendant E. C. McLamb had fled the county, and, since said date, has kept himself concealed at some point unknown to the plaintiff, in order to avoid the service of process; that various summonses have been issued against McLamb, and the sheriff of Sampson county has been unable to serve any of them or locate him.

(3) That heretofore on November 26, 1920, at 9 o'clock in the morning, after this action had commenced, and after the receiver, M. E. Britt, had entered upon the discharge of his duties as such, and while the said E. C. McLamb was hopelessly insolvent, which fact was well known to the defendant the Bank of Warsaw, said bank caused to be filed and recorded in the office of the register of deeds of Sampson county a certain mortgage deed, under the terms of which the defendant E. C. McLamb undertook to convey to the Bank of Warsaw all of the landed property belonging to him in the county of Sampson, the same consisting of eleven tracts of land, and forming practically his entire landed estate; which mortgage deed recites that the same is made for the purpose of securing several notes aggregating \$150,000, loaned to the said E. C. McLamb by the Bank of Warsaw. The mortgage deed, dated November 19, 1920, was duly probated and filed for registration on the date above named, and now appears of record in Book 358, p. 416, of the Register's Office of Sampson county.

(4) The plaintiff is informed and believes, and upon such information and belief alleges, that, at the time of the execution of the mortgage, E. C. McLamb was indebted to the bank in a sum not exceeding \$14,000, and having taken and accepted notes, secured by a mortgage deed, which it had recorded, for \$150,000, the Bank of Warsaw thereby now holds the proceeds of the notes and mortgage amounting to \$136,000, the property of the defendant E. C. McLamb, and now belonging to the receiver, M. E. Britt, to be administered by him for the benefit of the other creditors.

(5) The plaintiff further alleges that the defendant E. C. McLamb is the owner of \$5,000, par value, of the capital stock of the Bank of Warsaw, which is now in possession of the bank, and that the stock is now a part of the assets of E. C. McLamb, and should be turned

over to the receiver to be administered by him, together with the other property of McLamb, for the benefit of his creditors.

(6) The plaintiff further alleges that, at the time of the execution of the mortgage deed, or immediately prior thereto, there was an agreement between McLamb and the Bank of Warsaw that in consideration of the execution and delivery of the mortgage deed the bank would assume and pay off all of the debts and liabilities of E. C. McLamb and save his creditors harmless; and that the mortgage deed and notes secured thereby were executed by E. C. McLamb and his wife pursuant to that understanding and agreement; and the plaintiff therefore alleges that in consequence of that agreement, followed by the acceptance and registration of the mortgage deed above referred to, the Bank of Warsaw is now justly indebted to M. E. Britt, the receiver appointed in this cause, in the sum of \$136,000, which amount should be paid in order that it may be prorated among the various creditors of E. C. McLamb.

Wherefore, the plaintiff demands judgment against the Bank of Warsaw in conformity with the foregoing allegations.

Upon the pleading, that is, the complaint and answer, and upon affidavits, Judge Geo. W. Connor, on December 3, 1920, entered an order, not excepted to, in which is the following clause:

"It further appearing to the court that the defendant E. C. McLamb was the owner of a valuable gin and planer mill in the town of Clinton, which property is now lying idle and is subject to fire, and upon which there are various recorded liens, it is further ordered and adjudged that the receiver be and he is hereby directed to insure said property in some standard insurance company for such amount as he may deem proper, in order that the rights of creditors may be safeguarded and protected; and the receiver will pay out the first moneys coming into his hands, it being understood that the costs of said insurance is to be hereafter placed against such creditors of the said E. C. McLamb as the court may deem just and proper; and the receiver, if he shall be so advised by counsel, is hereby authorized and empowered to employ a night watchman to guard said property during the continuance of this receivership, or until the property shall be sold under the future orders of the court."

Additional Facts.

E. C. McLamb, one of the defendants, purchased a lot in the town of Clinton, and during the early part of the year 1920 he set up on the lot a cotton gin and planing mill. Certain parts of the machinery, including boilers, engines, planers, etc., were purchased from the defendant Hyman Supply Company, under conditional sale contracts, all of which are admitted to have been properly recorded in Sampson county, prior to the institution of this action, and at the date of the issuance of the summons in this cause E. C. McLamb was indebted to the Hyman Supply Company in the sum of \$7,471.76. The defendant Mc-

Lamb became indebted to various and sundry parties in amounts aggregating about \$150,000, some of the debts being secured and others being in the shape of notes and open accounts. Upon the petition of the plaintiff, an order was entered by Judge Geo. W. Connor, on November 23, 1920, appointing M. E. Britt as temporary receiver of the mill property above referred to, and the receiver thereupon took into his custody and possession all of the machinery, etc., upon which the defendant Hyman Supply Company held a lien.

On January 28, 1921, the Hyman Supply Company moved the court for an order requiring the receiver to surrender to it all of the property referred to in the conditional sale contracts, or that the receiver be directed to sell the same and permit the Hyman Supply Company to bid in the property; its bid to be credited on its account against E. C. McLamb. The receiver filed an answer to the motion, and at Kenansville, N. C., on December 30, 1920, Judge Connor entered an order making the receivership permanent, and ordering the receiver to sell all of the property, including the property upon which the Hyman Supply Company had a lien, and in the order it was expressly provided as follows:

"Any of the lien creditors may bid on said property, the lien creditors having the right to bid in the property covered by their respective liens, and apply such bid on the debts due them, and the balance, if any, shall be paid over to the receiver, to be held subject to the further orders of the court."

In the order of Hon. Geo. W. Connor, Judge, dated December, 3, 1920, the court having before it the pleadings, including the answer of the appellant, directed the receiver to insure the property, if possible, and if no insurance could be secured, to employ a night watchman to guard and protect the same, and this item of expense, together with the taxes upon the property as shown on the expense account of the receiver, is claimed by plaintiffs to be clearly such a liability as should be charged against the appellant the Hyman Supply Company, whose property was protected thereby and which was asked for by the attorneys representing the appellant.

M. E. Britt was also appointed a referee and directed to ascertain the amount of the various debts, the priority of liens, etc., and at the same time it was adjudged that the lien of Hyman Supply Company was prior to all other claims. The receiver made sale of the property, after legal notice, on March 26, 1921, at which time Hyman Supply Company, acting under the authority of the order of sale as made by Judge Connor, purchased all of the property covered by its conditional sales contract, for the sum of \$7,400. Said sale was reported to the court and duly con-

firmed, and a bill of sale made to Hyman Supply Company by said receiver.

At May term, 1921, the receiver and referee made a report, showing that at the time of said sale E. C. McLamb was indebted to Hyman Supply Company in the sum of \$7,471.76, that the bid of the Hyman Supply Company on the property was \$7,400, so that there is still a balance due said company by the defendant McLamb. The receiver also reported that other lien creditors had bid in certain property covered by their respective liens; that the total bids amounted to \$26,500, all of the bids being made by creditors who held liens and who were acting under the order of Judge Connor, made at Kenansville, N. C., on December 30, 1920.

The receiver presented to the court an itemized expense account, covering the costs of night watchman, commissions, etc., amounting in the aggregate to \$1,164.14, and requested the court to charge the sum against the several purchasers at the sale in the proportion of their respective bids. The Hyman Supply Company filed exceptions to this report, and resisted the payment of any part of the costs and expenses of the receivership, because there was still a balance due it under its recorded contracts. The exceptions were overruled and judgment entered, directing the Hyman Supply Company to pay into the clerk's office a sum of money equivalent to $\frac{1}{4}$ of said costs and expenses, amounting by actual calculation to the sum of \$325.08. To this judgment the defendant Hyman Supply Company excepted and appealed.

All of the material facts necessary for a proper determination of the question at issue are practically admitted in the case on appeal.

Grady & Graham, of Clinton, for appellant.

Henry E. Faison and Fowler & Crumpler, all of Clinton, for appellees.

WALKER, J. (after stating the facts as above. [1] This, it seems to us, was a typical case for the appointment of a receiver, and the order of Judge Connor was eminently proper, and there appears to have been no serious objection to it, if any at all. We have held that a receiver will be appointed before judgment where plaintiff shows imminent danger of loss by defendant's insolvency (*Bank v. Bridgers*, 114 N. C. 381, 19 S. E. 642; *Mahoney v. Stewart*, 123 N. C. 106, 31 S. E. 384), or where there is reason to apprehend that the subject of the controversy will be destroyed, or removed, or otherwise disposed of by defendant pending the action (*Eliett v. Newman*, 92 N. C. 519; *Thompson v. Silverthorne*, 142 N. C. 12, 54 S. E. 782, 115 Am. St. Rep. 727), or where defendant is insolvent and all property must be sold to pay debts (*Machine Co. v. Lumber Co.*, 109 N.

C. 576, 13 S. E. 869), or where it is alleged that defendant is attempting to defraud plaintiff (*Stern v. Austern*, 120 N. C. 107, 27 S. E. 31; *Pearce v. Elwell*, 116 N. C. 593, 21 S. E. 305). There are, of course, other cases where a receiver may, and will be, appointed by the court, as in the case of a trust, to completely execute or to facilitate its execution (*Rousseau v. Call*, 169 N. C. 173, 85 S. E. 414), or where a foreign corporation is insolvent, the court may appoint a receiver to protect resident creditors and for other purposes (*Holshouser v. Copper Co.*, 138 N. C. 248, 50 S. E. 650, 70 L. R. A. 188; *Silk Co. v. Spinning Co.*, 154 N. C. 421, 70 S. E. 820, Ann. Cas. 1912A, 897), and there are still other instances where the power will be exercised, but those above enumerated will suffice here. The statute provides:

"A receiver may be appointed: (1) Before judgment, on the application of either party, when he establishes an apparent right to property which is the subject of the action and in the possession of an adverse party, and the property or its rents and profits are in danger of being lost, or materially injured or impaired; except in cases where judgment upon failure to answer may be had on application to the court. (2) After judgment, to carry the judgment into effect. (3) After judgment, to dispose of the property according to the judgment, or to preserve it during the pendency of an appeal, or when an execution has been returned unsatisfied, and the judgment debtor refuses to apply his property in satisfaction of the judgment. (4) In cases provided in chapter entitled Corporations in the article Receivers; and in like cases, of the property within this state of foreign corporations. The article Receivers, in the chapter entitled Corporations, is applicable as far as may be, to receivers appointed hereunder." *Consol. Statutes*, vol. 1, § 860, and the cases applicable will be found well arranged in the notes to that section.

In certain cases, the court, in its discretion, may allow a bond to be given by any party who deems that he may be prejudiced by the appointment of a receiver, in lieu of such appointment. *Consol. Statutes*, § 861.

The very ground upon which this appointment was made was the danger of the loss or destruction of the property, and all of the parties were surely interested in its preservation and equally, or at least proportionately, benefited by it. Can it be that in either law, or surely in equity, the party who reaps the benefit should not bear his just share of the burden? We clearly think not. The general subject of costs and expenses allowable to a receiver by court of chancery is fully discussed in *High on Receivers* (Ed. of 1894) §§ 796-810. It is said there, in section 796:

"The appropriate method of procedure is to have his compensation fixed by the court, to be allowed out of the assets in his hands, and the amount thus determined to be due him may be taxed as costs in the action."

And again in the same section, at page 729:

"If, however, the appointment of the receiver was proper in the first instance, even though plaintiffs do not intimately prevail in the suit, it is within the discretion of the court to allow the receiver payment for his services and expenses out of the proceeds of the litigation, and an appellate court will not interfere with the exercise of such discretion when it has not been abused."

In *French v. Gifford*, 81 Iowa, 428, Judge Miller states the rule in such cases very lucidly, as follows:

"It is insisted by plaintiff's counsel that the compensation of the receiver should be paid out of the fund of which he had the custody and charge, and that he should be permitted to retain the same therefrom. Numerous cases have been cited to show that such is the uniform practice. Upon an examination of these cases it will be found that in every case there was no question made as to the legality or propriety of the appointment of the receiver; that in each case the receiver closed up the business and settled his accounts in pursuance of his appointment. The receivership in each case was for the benefit of those interested in the fund, and he was paid therefrom, which is only another method of apportioning the costs upon those entitled to the fund. The only case which has been brought to our attention, in which the order appointing the receiver was set aside, is the case of *Verplank v. Mercantile Insurance Co.*, 2 Paige, 438, and in that case the chancellor ordered the receiver to turn over all the property, without allowing him any commissions therefrom. We think it would be an unjust and inequitable rule, if in all cases the receiver should be entitled to his compensation from the fund in his hands, without reference to the legality of his appointment. Under the operation of such a rule, innocent persons might be made to suffer great loss.

"The general rule as to costs, both at law and in equity, is that they shall be adjudged to the successful, and against the unsuccessful, party. Rev. § 3449. And they will be so adjudged, unless there exists some equitable consideration to justify a different disposition, or the case is otherwise provided for by law. In cases like the one under consideration, we may adjudge the costs to one or either of the parties, or apportion them."

[2] The court accordingly directed that the fund be charged with one-third of the receiver's compensation, and the plaintiff with the remaining two-thirds; and this accords with our law. The appellant, Hyman Supply Company, unfortunately misunderstands, or misconstrues, the nature of the essential facts which clearly impose upon it the duty of supplying its share to the general fund for the payment or satisfaction of the costs and expenses. It has received a clear benefit by having the property protected to which it looked for the payment of its claims. The

receiver insured the same, or kept a watchman to guard it, so as to prevent its destruction by fire, or depredations upon it by evil-minded persons. The receiver has, besides, sold the property by agreement of the parties and the proceeds have been applied to the payment of the debts, the plaintiff receiving the major part, having a prior lien. The receiver was required to give bond for the faithful discharge of his official duties, and to keep his accounts, making proper entries from time to time. There is no suggestion that he has not been energetic in the performance of his trust and faithful in all things, and there is not the slightest impeachment of him in respect to his dealings and transactions as receiver. Why then should he not be compensated by the parties? It is certainly just and equitable that he should be, and the law usually follows equity in this respect and adjudges that the laborer is worthy of his hire. There is no objection to the amount of the costs and expenses or to any item of the account. The objection goes entirely to the right to recover anything of the appellant. We conclude that it is not only liable to contribute to paying the receiver, but that Judge Bond (acting in furtherance and final execution of Judge Connor's order to which no exception was taken) has properly and equitably apportioned the total amount of costs and expenses to be paid among the respective parties, and appellant should be content therewith.

The case of *Humphrey v. Lumber Co.*, 174 N. C. 514, 93 S. E. 971, is not applicable to this case, where the facts are different. The receiver here was appointed with the consent of the Hyman Supply Company and for the protection of its property, if he was not appointed at its request, and for its benefit, which benefit it received, and of which the supply company availed itself as appears in the record. If it voluntarily receives the benefit, it must bear the burden. In this respect, if not in others, our case essentially differs from the *Humphrey Case*, supra. Not only should the supply company pay its fair proportion of the costs and expenses because it consented to the receivership and took benefit therefrom, but because the property on which it had a lien was exposed to great danger; E. C. McLamb having taken refuge in flight, leaving the property without any keeper, and in the throes of hotly contested litigation, thereby enhancing the danger of destruction by fire and idle intruders, and increasing the temptation to injure or destroy it. A receivership was needed more by the supply company, and it derived greater advantage therefrom, than any one else.

There being no error, we decline to reverse, or modify, the judgment.

Affirmed.

(182 N. C. 98)

(108 S.E.)

BIZZELL v. AUTO TIRE & EQUIPMENT CO. (No. 112.)

(Supreme Court of North Carolina. Oct. 5, 1921.)

1. Attorney and client ⇨86—Attorney may make stipulations and agreements.

An attorney has the control and management of a suit in all matters of procedure, and in the absence of fraud and collusion can make such stipulations and agreements as to procedure as may commend themselves to his judgment.

2. Attorney and client ⇨101(1)—Attorney cannot compromise client's cause of action or impair his rights.

An attorney, by virtue of his office and ordinary employment in a case, has no implied power to compromise his client's cause of action, or to enter into stipulations or agreements which sensibly impair such client's substantial rights and interests presented and involved in the litigation.

3. Judgment ⇨90—Court may, on motion of plaintiff, set aside compromise judgment contrary to client's instruction.

Where plaintiff's attorney consented to a reduction of the verdict on the court's intimation that the verdict would be set aside as against the evidence, and after entry of the judgment in the reduced amount it was made to appear, on plaintiff's motion, that the consent was contrary to plaintiff's instruction, the court had authority to entertain the motion and set aside the judgment.

4. Estoppel ⇨68(2)—Plaintiff, repudiating his attorney's act in consenting to reduction of verdict, cannot insist that the verdict as rendered shall stand.

Where plaintiff's attorney consents to the reduction of a verdict on intimation by the court that the verdict will be set aside as contrary to the evidence, and, on motion by plaintiff, it appears that the consent was unauthorized and contrary to plaintiff's instructions, it was improper to permit the verdict as rendered to stand; but the entire verdict should be set aside, under the doctrine of estoppel as to assuming inconsistent positions to another's prejudice.

5. Estoppel ⇨68(2)—Judgment declared, but not entered by agreement, may be entered nunc pro tunc on repudiation of agreement.

C. S. § 591, which requires that a motion to set aside a verdict be made before the judge who tried the cause and only at the trial term, does not interfere with the application of equitable principles; and where a judge has decided to set aside an entire verdict at the trial term, and is only prevented from doing so by reason of an agreement which has been repudiated by one of the parties, the party repudiating is estopped from resisting entry of the judgment nunc pro tunc.

6. Landlord and tenant ⇨309—Tenant holding over after term held not bound as a matter of law to pay rent at increased rate.

Though a lease provides that the landlord may increase the rent at any time on notice, it

cannot be held as matter of law, in summary proceedings in ejectment under the Landlord and Tenant Act, that plaintiff is entitled to judgment for an increased rental in accordance with notice, where defendant contends and shows by evidence that there was a contract, subsequent to the lease, whereby defendant, in consideration of the making of improvements, was not to be disturbed in his possession for the term of one year, which term had not expired.

Appeal from Superior Court, Wayne County; Lyon, Judge.

Action by K. E. Bizzell against the Auto Tire & Equipment Company. Judgment for plaintiff for an amount less than the verdict was set aside, and the original verdict restored, and both parties appeal. Modified on defendant's appeal, and affirmed on plaintiff's appeal.

Summary proceedings in ejectment under the Landlord and Tenant Act (C. S. §§ 2341-2376), instituted before a justice of the peace, carried by appeal to the county court of Wayne county, and thence to superior court of said county, where it was tried before his honor, W. A. Devin, judge, and a jury, at November term, 1920. On the trial, plaintiff offered in evidence a contract of rental of the property to defendant at \$57.50, for month beginning January 19, 1920; said contract containing, among others, the following provision:

"The party of the first part hereby reserves the right to raise the rent at any time, and it is further agreed that, if any part of the rent hereinbefore mentioned shall not be paid at the time agreed upon, although no demand shall have been made for same, the parties of the second party hereby contract and agree that this agreement shall serve as notice to vacate the premises within three days of such failure."

Defendants occupied under said lease, paying the stipulated rent till June 9, 1920, when plaintiff caused to be served on defendants a written notice to the effect that, if defendants should hold over "for one day after June 18, they would be held legally responsible for rent at \$150 per month." Defendant alleged, and offered evidence tending to show, that subsequent to the written lease above referred to, plaintiff and defendant had mutually entered into a further agreement to the effect that if defendant should put certain specified improvements on the premises amounting to near \$2,000, and which had been done, defendants would be allowed to keep the premises for at least one year, and that the rental should at no time be raised higher than \$75 per month. The witnesses all testified that a fair monthly rental for the property would not exceed \$60.

The jury rendered the following verdict:

"(1) Is plaintiff entitled to recover possession of the store building described in plaintiff's affidavit?

"Answer: Yes.

"(2) In what amount is defendant indebted to plaintiff for rent of said building?

"Answer: \$111.66% per month."

His honor ruled, and so instructed the jury, on the second issue that, if first issue was answered for plaintiff, she was entitled to recover a fair monthly rental for the property. On the rendition of verdict and motion by defendant to set same aside, the court as against the weight of the evidence intimated that he would set aside the entire verdict as against the weight of the evidence, unless the plaintiff would consent to reduce the amount of the verdict to \$60 per month. Thereupon, in open court, plaintiff's attorney consented, without being authorized to do so by his client, that the monthly value of the building as found by the second issue, be reduced from \$111.66% to \$60, and judgment was thereupon entered for \$60 per month for the time building was occupied after notice, etc., said judgment reciting that plaintiff consented to same.

Defendant insisted on his position, and excepted and appealed from judgment as rendered, but same was not perfected. Plaintiff did not appeal, and made no motion in the case at November or at the January term of the court, but at April term, 1921, before his honor, Lyon, Judge presiding, moved to set aside the judgment on the ground that the attorney acted without authority and contrary to their express instructions in consenting to a reduction of the verdict. On affidavits submitted, the court finds that said consent was given without authority; that but for said consent the judge presiding would have set aside the entire verdict. The court on his findings adjudged that the former judgment of Judge Devin be set aside, but, being of opinion that he was without authority to disturb the verdict of \$111.66%, this being at a term subsequent to term when same was rendered, entered judgment for plaintiff for the amount of the original verdict and both plaintiff and defendants appealed.

Hood & Hood, of Goldsboro, and Rouse & Rouse, of Kinston, for plaintiff.

E. M. Land and Dickinson & Freeman, all of Goldsboro, for defendant.

Defendant's Appeal.

HOKE, J. (after stating the facts as above). [1] It is very generally understood, uniformly so far as examined, that an attorney at law, by virtue of his employment as such in a given case, has the control and management of a suit in all matters of pro-

cedure, and, in the absence of fraud and collusion, can make such stipulations and agreements as may commend themselves to his judgment, in so far as they may affect the remedy he is endeavoring to pursue. *Chemical Co. v. Bass*, 175 N. C. 426, 95 S. E. 766; *Gardiner v. May*, 172 N. C. 192, 89 S. E. 955; *Harrill v. Railroad*, 144 N. C. 542, 57 S. E. 382; *Westhall v. Hoyle*, 141 N. C. 338, 58 S. E. 863; *Hairston v. Garwood*, 123 N. C. 345, 31 S. E. 653; *Henry v. Hilliard, etc.*, 120 N. C. 479, 27 S. E. 130; 2 R. C. L. tit. "Attorneys," § 63. Under the principles stated it is held in many decisions on the subject that an attorney may consent to a judgment against his client, and the same will be considered as binding, although no actual authority is shown. Under ordinary conditions an implied authority is presumed from his office and employment. *Harrill's Case*, supra; *Stump & Sons v. Long*, 84 N. C. 616. And see numerous authorities to this effect in editorial note to *Tobler v. Nevitt*, 45 Colo. 231, 100 Pac. 416, 23 L. R. A. (N. S.) 702, 16 Ann. Cas. 925, appearing in 132 Am. St. Rep. at page 162.

It is also fully recognized that an attorney, by virtue of his office and ordinary employment in a case, has no implied power to compromise his client's cause of action, or to enter into stipulations or agreements which sensibly impair such client's substantial rights and interests presented and involved in the litigation. *Moye v. Cogdell*, 69 N. C. 93; *Gibson v. Nelson*, 111 Minn. 183, 126 N. W. 731, 31 L. R. A. (N. S.) 523, 137 Am. St. Rep. 549. And see concurring opinion of Walker, Judge, in *Chemical Co. v. Bass*, 175 N. C. 426, 95 S. E. 766, the same containing a helpful discussion and full citation of cases on the subject. Though it is sometimes said that the weight of judicial opinion is in favor of upholding consent judgments, entered under the implied powers of an employed attorney, some of the decisions referred to have been subjected to adverse comment by intelligent writers as trenching upon the second position stated, that an attorney may not without express authority enter into a compromise of the cause of action committed to him, and the sensible impairment of his client's rights thereunder. See editorial note to *Clark v. Randall*, 9 Wis. 135, appearing in 76 Am. Dec., pages 252-259, and 2 R. C. L. tit. "Attorneys at Law," § 91.

[2] And in this jurisdiction it has been expressly held that where a judgment has been taken by consent of the attorney, and it appears of record that such consent is pursuant to a compromise which sensibly impairs the client's substantial rights, and on motion made in apt time it is established that the consent and compromise is without express authority from the client, and even contrary to his instructions, such judgment will be set aside. And the same position should obtain

where, though not appearing of record, it is shown on motion and proper proof that such a judgment has been entered, and the impeaching facts were known to the opposing litigant, or the attendant circumstances were such that knowledge should be imputed. *Bank v. McEwen*, 160 N. C. 414, 76 S. E. 222, Ann. Cas. 1914C, 542, and cases cited.

[3] Under these decisions, and others of like kind, and by courts of approved ability and learning, his honor clearly had the right to deal with the questions presented in the motion; it appearing that the agreement and consent judgment entered into by way of compromise and adjustment was not only without authority, but contrary to the express instructions of the client, and that by such judgment plaintiff was precluded from insisting on her claim for \$150 monthly rental, and also deprived of the \$111.66% monthly rental, which had been awarded her by the jury. And this case of *Bank v. McEwen* is authority for the position, also, that when the facts call for the application of the principle its effect and operation is not prevented because the course has been taken with the sanction and approval of the court. This by no means intimates that his honor would have permitted or signed the judgment entered, had the lack of authority been made known. That was only made to appear at the later hearing, and we deem it not improper here to note, also, that no blame is laid by any one on the attorney who, always faithful to his client's interest, did the duty that he thought was required of him under the circumstances presented.

[4] While we thus uphold the power of the court to take cognizance of the questions presented in the motion, we are of opinion that his honor should have gone further and set aside the entire verdict as the only lawful adjustment of the rights of the parties on the premises. It is an equitable principle, very generally recognized, that in a given transaction a man may not assume and maintain inconsistent positions to the prejudice of another's rights. And the principle so stated is usually allowed to prevail either in court proceedings or in transactions between individuals. *Ingram v. Power Co.*, 181 N. C. 359-411, 107 S. E. 209; *Maxton Auto Co. v. Rudd*, 176 N. C. 497, 97 S. E. 477; *Lipsitz v. Smith*, 178 N. C. 98-100, 100 S. E. 247; *Brown v. Chemical Co.*, 165 N. C. 421, 81 S. E. 463; *Railroad v. McCarthy*, 96 U. S. 258, 24 L. Ed. 693. In the case of *Maxton Auto Co. v. Rudd*, supra, it is said that—

"The position is usually referred to the doctrine of estoppel in pais, which rests, in its last analysis, on the principles of fraud."

From the facts presented in the record, it appears that plaintiff on the first issue had established the right to eject defendant, and

on the second had recovered \$111.66% monthly rental for a wrongful detention. The judge from the bench gave intimation that, unless the plaintiff agreed to a reduction of the amount awarded on the second issue, he would set aside the entire verdict, and the court on the present hearing finds as a fact that his honor would have done so. Acting on this, the counsel in good faith, believing he was within his authority, consented to the reduction, and plaintiff thereby succeeded in maintaining her recovery on the first issue. We have held that the agreement, being in the nature of the compromise and contrary to the client's instructions, could be set aside at plaintiff's demand; but when she repudiates the benefits she must surrender the advantages that arose to her from the action of her attorney, and under a proper application of the authorities cited, and the principles they approve and illustrate, his honor should have set aside the entire verdict, thus giving the parties opportunity to relitigate the issues. This was the course pursued in *Bank v. McEwen*, supra, a case that is decisive of the principal questions presented on defendant's appeal.

[5] In making this disposition of defendant's appeal, we are not unmindful of section 591, Const. St., which requires that a motion to set aside a verdict may be made before the judge who tried the cause and only at the trial term. That statute, however, refers to motions made in the ordinary course and practice of the court, and does not and is not intended to impair or interfere with equitable principles controlling the conduct of the litigant in the subsequent course of a proceeding. As a matter of fact, the trial judge had decided to set aside the entire verdict and at the trial term, and was only prevented from doing so by reason of the agreement which plaintiff has repudiated, and, this being true, she is estopped from resisting the entry of such judgment *nunc pro tunc*.

On defendant's appeal, the judgment will be modified to accord with this opinion, and the costs of said appeal will be divided between the parties.

Modified.

Plaintiff's Appeal.

[6] Plaintiff appeals in the cause, insisting for error that the court should have ruled that, on a wrongful holding over, the defendant was liable for \$150 monthly rental as a matter of law, and this by reason of the notice given, and the stipulations of the contract, that she reserved the right to raise the rent at any time, and that, if any of the rent was not paid, though no demand was made, that defendant would surrender the premises on three days' notice, etc.

There are authorities to the effect that, where a landlord in proper time before ter-

mination of lease notifies the tenant that, if he continues to occupy longer, it shall be at a rental specified, and the tenant, after such notice received, holds over without demur or protest, there will be an obligation to pay the higher rental as specified. 2 McAdam, Landlord & Tenant (3d Ed.) § 279. But this we apprehend is on the ground of acquiescence, and from which an implied contract to pay the higher rental could be reasonably inferred. It may be that such a principle might be extended to a case where a tenant, after such a notice given, withholds possession wantonly without any fair and reasonable belief in his right, though on this supposition we make no present decision. It is ordinarily true that the obligation to pay rent must arise out of contract, express or implied, and we are very well assured that, on the facts of this record, defendant may not be held to a rental of \$150 as a matter of law, merely on plaintiff's notice that such an amount would be insisted on after the stipulated date; it appearing that defendant withheld possession under claim of right and with evidence on his part tending to show that, by a contract subsequent to the principal lease and in consideration of valuable improvements, plaintiff had agreed that defendant's possession should not be disturbed within the year, which had not expired, and no witness having so far testified that the fair rental value would exceed \$60 per month. On the record, plaintiff has established no contract, express or implied, for a greater rental than the fair and reasonable value of the property, and his honor correctly held that, in case a wrongful withholding should be established, this should be the measure of plaintiff's recovery. *Martin v. Clegg*, 163 N. C. 528, 79 S. E. 1105; *De Young v. Buchanan*, 10 Gill & J. (Md.) 149, 32 Am. Dec. 156.

There is no error, and on question presented on plaintiff's appeal the judgment is affirmed.

No error.

(182 N. C. 119)

LEWIS v. NUNN et al. (No. 224.)

(Supreme Court of North Carolina. Oct. 5, 1921.)

Appeal and error *1099(3)*—**Decision on prior appeal conclusive on subsequent appeal involving similar facts.**

Holding of Supreme Court on prior appeal that a tender of the entire mortgage debt by mortgagor was necessary to stay action on the part of the trustee, on default by mortgagor in payment of installment note when due, *held* conclusive on subsequent appeal, involving substantially similar facts.

Appeal from Superior Court, Lenoir County; Bond, Judge.

Action by J. C. Lewis against F. R. Nunn and another. Judgment for plaintiff, and defendants except and appeal. Judgment affirmed. No error.

The action is by purchaser of land at foreclosure by sale of trustee under a deed to secure four several promissory notes, maturing, \$75 on November 1, 1918, \$200 on November 1, 1919, \$200 on November 1, 1920, and \$600 on November 1, 1921, and with a stipulation that, on failure to pay the notes and interest on either of them, or any part thereof, when due, then "all the amounts due in said bonds shall immediately become due and payable." There was default in payment of first note and interest, and on due advertisement property was sold by trustee, at which sale plaintiff purchased and received his deed, etc. Defendant alleged and offered evidence tending to show that the creditor had agreed to indulge defendant as to payment of first note, and that prior to sale, and after its maturity, he had tendered the amount of the first note and accrued interest thereon, together with all other interest on the debt due at time of tender. The cause was submitted to the jury, and verdict rendered on the following issue:

"(1) Are defendants or either of them entitled to redeem the land in controversy in this action? Answer: No."

Judgment for plaintiff. Defendant excepted and appealed, assigning for error the charge of the court that on the evidence, if believed, the jury should answer the issue as stated.

Rouse & Rouse, of Kinston, for appellants. Moore & Croom and Cowper, Whitaker & Allen, all of Kinston, for appellee.

HOKE, J. This cause was before us on a former appeal, and will be found reported in 180 N. C. 159, 104 S. E. 470. On questions more directly relevant to the present trial, it was held there:

"(1) That the mere promise of the mortgagee to extend the time to the mortgagor for the payment of the mortgage note without more has no legal consideration, and is unenforceable.

"(2) Where several notes secured by mortgage are in series, and due at different dates, with provision that upon default in payment of one, all shall become due and payable with interest, after such default in the payment of the note first becoming due, a tender of payment of the note thus due, and interest on all of them in the series, is an insufficient tender."

In this aspect of the matter, the evidence pertinent is substantially the same as that offered at the former trial, there being no testimony or claim on the part of defendant that there had ever been any tender of the amount of the debt, "but only of the note first due, and the accrued interest on the en-

ture sum." His honor correctly ruled that the decision on the former appeal was conclusive, and that in any view of the case the plaintiff was entitled to recover.

In his very earnest and forcible argument before us, counsel for appellant insisted that, while the agreement for indulgence would not constitute a binding contract for lack of a consideration, it should be considered in reference to the first note a waiver of the stipulation maturing the entire debt under the principles recognized and approved by this court in *Blizzell v. Roberts*, 156 N. C. 272, 72 S. E. 378. Without intimation that such a position could be maintained on the facts presented in this record, we think it is not open to appellant, in view of our decision on the former appeal, that a tender of the entire debt was required to stay action on the part of the trustee. That decision on substantially similar facts affords the controlling rule by which the rights of the parties in the present case must be determined, and the recovery by plaintiff must be sustained.

In *Holland v. Railroad*, 143 N. C. at page 437, 55 S. E. at page 836, it was said "that a party who loses in this court cannot review the decision in a second appeal, as the proper way is by a petition to rehear." See *Public Service v. Power Co.*, 181 N. C. 356, 107 S. E. 226.

Judgment for plaintiff affirmed.
No error.

(182 N. C. 149)

**SMITH-COURTNEY CO. v. BOARD OF
ROAD COM'RS OF HERTFORD
COUNTY et al. (No. 109.)**

(Supreme Court of North Carolina. Oct. 5, 1921.)

1. Courts ¶97(5)—Decisions of United States Supreme Court, construing federal Constitution, control.

State courts, in construing the federal Constitution, should follow the decisions of the United States Supreme Court.

2. Constitutional law ¶127—Legislature may restrict or revoke powers of municipal corporations, but not so as to impair obligations of contract.

A Legislature may at any time restrict or revoke at its pleasure any of the powers of a municipal corporation, including, among others, that of taxation, provided its action in that respect shall not operate directly upon the contracts of the corporation, so as to impair their obligation, by abrogating or lessening the means of their enforcement.

3. Constitutional law ¶121(1)—Rule against impairment of obligation of contracts applies to state and agents.

The prohibition of Const. U. S. art. 1, § 10, cl. 1, against the passage of laws impairing the obligation of contracts, applies to the contracts of a state, and to those of its agents

acting under its authority, as well as to contracts between individuals.

4. Mandamus ¶112—Municipal corporation compelled to levy taxes to pay moneys due under contract.

The courts, on treating as void legislation abrogating or restricting power of taxation delegated to a municipality upon the faith of which contracts were made with it, and on the continuance of which alone they can be enforced, can proceed by mandamus and compel at the instance of parties interested the exercise of that power as if no such legislation had ever been attempted.

5. Municipal corporations ¶51—Disincorporation does not void legal subsisting contract.

Disincorporation of municipality by legal proceedings does not void its legally subsisting contracts, and on the reincorporation of the same inhabitants the obligation to pay devolves upon the new corporation.

6. Constitutional law ¶143—Statute making vote necessary to assumption of obligation by new municipality unconstitutional.

A statute making a vote of taxpaying voters necessary to the assumption by a new municipality of a debt of its predecessor, which has been abolished, is an unconstitutional attempt to impair the obligation of a contract, if a liability existed without such vote before the statute.

7. States ¶191(2)—Mandamus against county officers held not "suit against state."

Mandamus to compel county auditors and county treasurers to levy a tax to pay a judgment based on a township debt is not a suit against the state, within the inhibition of the federal Constitution, because such officers have been forbidden by statute to exercise any such power.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Suit against the State.]

8. Constitutional law ¶137—Statute reducing rate of taxation held to impair obligation of contract.

Act March 3, 1921, abolishing the township system for constructing and improving roads and substituting the county system, and fixing the tax limit at 25 cents on each \$100 worth of property, in so far as it prevents the payment of debts due by a township under contracts entered into when the statutes permitted a levy of taxes at the rate of 50 cents on \$100 worth of property, is invalid, as impairing the obligation of contracts.

9. Appeal and error ¶1106(3)—No disposition of cause where all interested persons not present.

A proceeding in mandamus by one of several creditors of a township to compel county officers to levy taxes to pay a debt could not be finally decided without the presence of the other creditors, where the sole plaintiff claimed that he was entitled to the full amount of his claim, and not merely a pro rata part of the tax to be levied, as provided by statute, for the payment of all similar debts of the town-

ship, and an appeal, having been taken from a judgment, was remanded, to the end that the other creditors might be made parties.

Appeal from Superior Court, Hertford County; Calvert, Judge.

Action by the Smith-Courtney Company against the Board of Road Commissioners of Hertford County and others. From the judgment, both parties appeal. Remanded, with instructions.

Lloyd J. Lawrence, of Murfreesboro, for plaintiff.

W. D. Boone, of Winton, for defendants.

WALKER, J. This action was brought to compel the defendants, by a writ of mandamus, to levy the necessary tax to pay a debt to plaintiff of \$400, contracted and due by the former board of road supervisors of Murfreesboro township, for machinery, tools, and equipment to be used, and which were used, by the board in the construction and improvement of the public roads of the said township; the board of road supervisors being authorized by statute (Pub. Loc. Laws 1913, c. 562) to contract the debt so due to the plaintiff. It is alleged in the case, and appears therefrom to be the fact, that there are claims of other parties due to them and contracted for the same purpose as was the claim of the plaintiff, the total of all of the claims amounting to \$11,000, or about that amount. It is further alleged that at the time of contracting the said debts the statute permitted a levy of taxes at the rate of 50 cents on \$100 worth of property, and \$1.50 on the poll, the original rate being 30 cents on the \$100 worth of property and 90 cents on the poll, which by the law of 1919 was increased to 50 cents on the \$100 worth of property and \$1.50 on the poll, so that, at the time the debt of plaintiff and those debts of the other creditors similarly situated were contracted, the limitation to the levy of taxes for the payment of the same was as above set forth; that is, 50 cents on the \$100 worth of property and \$1.50 on the poll. By an act passed on March 3, 1921, the Legislature abolished the township system for constructing and improving the roads of the county, and substituted the county system, thereby forming one entire unit of the county, and placing the control and supervision of the public roads in a county road commission, and fixed the tax limit for road purposes (construction and maintenance) at 25 cents on the \$100 worth of property and 75 cents on the poll, and by section 26 of said act the Legislature authorized a special and additional tax not exceeding 10 cents on the \$100 worth of property and 30 cents on the poll in Murfreesboro township to discharge the existing indebtedness.

[1-7] The plaintiff contends that this reduction of the rate of taxation, from 50 cents

on the \$100 worth of property and \$1.50 on the poll, to 25 cents on the \$100 worth of property and 75 cents on the poll, and of the special tax to 10 cents on the \$100 worth of property and 30 cents on the poll, impairs the obligation of the contract made with the township prior to the date of the reduction, and is therefore in violation of the Constitution of the United States forbidding the passage of a law by any of the states impairing the obligation of a contract (Const. U. S. art. I, § 10, cl. 1); that as the later statutes withdraw the means of fully enforcing the payment of the debt due to the plaintiff, it follows that the obligation to pay all of the debt, or to fully perform the contract in that respect, is impaired, at least, to that extent. While we will not enter upon a full or elaborate discussion of the constitutional question raised here, but leave it for the hearing on the merits, if the case comes back to us, we may refer, at this time, to a few of the many cases decided by the federal Supreme Court, which is the one of last resort upon this phase of the matter in controversy. It has been held by that court that a Legislature may, at any time, restrict or revoke at its pleasure any of the powers of a municipal corporation, including, among others, that of taxation, provided its action in that respect shall not operate directly upon the contracts of the corporation, so as to impair their obligation, by abrogating or lessening the means of their enforcement. Legislation producing this latter result directly, by operating upon those means, is prohibited by the Constitution, and must be disregarded. The prohibition of the Constitution against the passage of laws impairing the obligation of contracts applies to the contracts of the state, and to those of its agents acting under its authority, as well as to contracts between individuals. The courts, treating as void the legislation abrogating or restricting the power of taxation delegated to a municipality, upon the faith of which contracts were made with it, and upon the continuance of which alone they can be enforced, can proceed and by mandamus compel, at the instance of parties interested, the exercise of that power, as if no such legislation had ever been attempted. The Louisiana act of March 6, 1876 (Act No. 31 of 1876), was held to be invalid so far as it limited the power which the city of New Orleans possessed, when the bonds were issued upon which the judgment in that action was recovered, to levy a tax for their payment. In *re Wolff v. Mayor, etc., of New Orleans*, 108 U. S. 358, 26 L. Ed. 395.

Where a municipal corporation is dissolved, and a new corporation is created, composed of substantially the same community, including substantially the same taxable property, within reduced territorial limits, organized for the same general purposes, and

holding by transfer, without consideration, the public property of the former, it is the successor of the old corporation, and is liable for its debts. The obligations of municipal corporations, upon bonds duly issued by them, are secured by all the guaranties which protect the engagements of private individuals. Any legislative enactment which withdraws or limits the remedies for the enforcement of obligations assumed by a municipal corporation, where no substantial equivalent is provided, is forbidden by the Constitution of the United States. *Port of Mobile v. Watson*, 116 U. S. 239, 6 Sup. Ct. 398, 29 L. Ed. 620. Disincorporation of a municipality by legal proceedings does not void its legally subsisting contracts, but on the reincorporation of the same inhabitants, and of a territory including street improvements for which bonds were given, the obligation to pay them devolves upon the new corporation. A statute making a vote of taxpaying voters necessary to the assumption of a new municipality of a debt of its predecessor, which has been abolished, is an unconstitutional attempt to impair the obligation of the contract, if a liability existed without such vote before the statute. *Shapleigh v. San Angelo*, 167 U. S. 646, 17 Sup. Ct. 957, 42 L. Ed. 310.

Mandamus to compel the county authorities, through whom taxes are assessed and collected, to levy a tax to pay a judgment on township bonds cannot be denied on the theory that, because the Legislature of the state might, under its Constitution, have vested in the township authorities the power to assess and collect taxes for corporate purposes, it could not vest such power in county officers. The exercise by a state of its right to alter or destroy its municipal corporations is ineffectual to impair the obligation of municipal contracts. County auditors and treasurers, who are the instruments employed by the state Legislature to assess and collect taxes, may be compelled by mandamus to levy a tax to pay a judgment on township bonds, although the corporate existence of the township has been abolished by the state Constitution, and its corporate agents removed. Mandamus to compel county auditors and county treasurers to levy a tax to pay a judgment on township bonds is not a suit against the state, within the inhibition of the federal Constitution, because such officers have been forbidden by the state Legislature to exercise any such power. *Graham v. Folsom*, 200 U. S. 248, 26 Sup. Ct. 245, 50 L. Ed. 464. The levy and collection of taxes by the city of New Orleans to satisfy outstanding indebtedness of the metropolitan police board, contracted on the faith of the exercise of the taxing power for its payment, do not exhaust the city's power in the premises, where the city has applied the taxes to other purposes, and has failed to turn them over, upon demand, to the board or its representative.

The receiver of the metropolitan police board in the state of Louisiana, as representative of the interested creditors, is unconstitutionally deprived of the right of taxation by the city of New Orleans for the payment of their claims, which right existed before the enactment of Acts La. 1870, No. 5, by the provisions of that act under which the payment of the judgment recovered by such receiver against the city upon outstanding indebtedness of the board, contracted on the faith of the exercise of the city's power to levy taxes for its payment, may be indefinitely postponed until such time as the city is ready and willing to make such payment. *State of Louisiana v. Mayor of New Orleans*, 215 U. S. 170, 30 Sup. Ct. 40, 54 L. Ed. 144.

The cases above cited will show the varying phases in which this question as to the impairment of the obligation of contracts has been presented, and will be of service in the further consideration, of this case. The merger of an existing municipal corporation, owing debts, in another, or the abolishment of a municipal corporation owing debts and the legal effect upon its existing contracts, was presented and decided in *Broadfoot v. Fayetteville*, 124 N. C. 478, 32 S. E. 804, 70 Am. St. Rep. 610; *U. S. v. Memphis*, 97 U. S. 284, 24 L. Ed. 937; *Mt. Pleasant v. Beckwith*, 100 U. S. 514, 25 L. Ed. 699. The debts of a municipal corporation are not extinguished by a repeal of its charter, as is demonstrated by *Broadfoot's Case*, supra, and the several cases cited therein, among which we especially refer to *Meriwether v. Garrett*, 102 U. S. 472, 26 L. Ed. 197; *O'Connor v. Memphis*, 6 Lea (Tenn.) 730; *Wolff v. New Orleans*, supra; *Mobile v. Watson*, supra; *Amy v. Selma*, 77 Ala. 103. It was said in *Port of Mobile v. Watson*, supra, that—

"The remedies for the enforcement of such obligations assumed by a municipal corporation, which existed when the contract was made, must be left unimpaired by the Legislature, or, if they are changed, a substantial equivalent must be provided. Where the resource for the payment of the bonds of a municipal corporation is the power of taxation existing when the bonds were issued, any law which withdraws or limits the taxing power and leaves no adequate means for the payment of the bonds is forbidden by the Constitution of the United States, and is null and void." *Von Hoffman v. Quincy*, 4 Wall. (71 U. S.) 535, 18 L. Ed. 408; *Edwards v. Kearzey*, 96 U. S. 595, 24 L. Ed. 793; *Ralls County Court v. U. S.*, 105 U. S. 733, 26 L. Ed. 1220; *Louisiana v. Pilsbury*, 105 U. S. 278, 26 L. Ed. 1090; *Louisiana v. Mayor of New Orleans*, 109 U. S. 285, 3 Sup. Ct. 211, 27 L. Ed. 936; *Comrs. v. Rather*, 48 Ala. 433; *Edwards v. Williamson*, 70 Ala. 145; *Slaughter v. Mobile County*, 73 Ala. 134.

[8] The proposition we have somewhat discussed receives strong support and striking illustration in *Edwards v. Kearzey*, supra, which went to the United States Supreme

Court from this court, and in which our homestead exemptions were held to be of no avail against the full recovery of pre-existing debts, because they substantially withdrew from a creditor his right, and remedy, to have his contract with the debtor enforced, or placed an obstacle in the way of its proper enforcement, thereby impairing its obligation. It would seem, therefore, that the later statutes, reducing the limit of taxation as it existed when this contract was made, impaired its obligation and, so far as they did so, were invalid, but we will not finally and conclusively decide this question until all interested parties are before us.

[9] We hold that this controversy cannot be finally and fully decided, and settled, without the presence of the other creditors for several reasons, and among them one is that the sole plaintiff here is claiming that he is entitled to the full amount of his claim, and not merely to a pro rata part of the tax to be levied, as provided by one of the statutes cited above, for the payment of all similar debts of Murfreesboro township. It was stated in the argument here that it would take five or six years to pay the existing debts, if levies could only be made under the provisions of the last two statutes, which would amount to a stay law, and would impair the obligation of the contract. *Jacobs v. Smallwood*, 63 N. C. 113, Fed. Cas. No. 7163.

We would be deciding the case by piecemeal should we dispose of it, without hearing from the other creditors, or taking such action and proceedings beforehand as would make the judgment binding upon them. We therefore remand the case, to the end that the other creditors similarly concerned may come in voluntarily, or be brought in, so that they may plead and be concluded by whatever judgment is finally rendered; and it will be so certified. The judge may order an amendment of the pleadings, or a replader, as he may deem necessary, in order to protect the rights of all parties, and to afford all parties ample opportunity to be heard upon the issues involved.

We will not now consider the question concerning the poll tax and its application to special purposes, as it does not necessarily arise in this appeal. The property tax, it is conceded, has been substantially reduced from what it was when the debts due the plaintiff and others were contracted, and this is sufficient to show that the obligation in each of those contracts was impaired, as the means of enforcing them have been denied, or rather diminished, sufficiently to seriously prejudice the rights of those creditors.

Remanded, with instructions.

CLARK, C. J. (concurring in the result).
The statute sought to be enforced, chapter

—, Public Local Laws 1921, entitled "An act to appoint road commissioners for Hertford county," under which the plaintiff asks a mandamus to levy this tax, specifies that its sole purpose is the construction and maintenance of the roads, and for that purpose authorizes a levy of 25 cents on the \$100 worth of property and 75 cents on the poll, and section 26 of said act further authorizes a special and additional tax, not exceeding 10 cents on the \$100 worth of property and 30 cents on the poll in Murfreesboro township to discharge the existing indebtedness for roads in that township. The opinion recognizes the validity of this legislation upon general principles, from which I do not dissent; but it is proper to note, however, that so much of this statute which authorizes the levy of a tax on the poll "for road purposes" is invalid, because in violation of an explicit provision in the state Constitution, which, as adopted in 1868, provides (article 5, § 2):

"The proceeds of the state and county capitation tax shall be applied to the purposes of education and the support of the poor, but in no one year shall more than 25 per cent. thereof be appropriated to the latter purpose."

This provision of the Constitution remains unaltered. When there has been a levy for general purposes, the validity of the poll tax has not always been brought in question, because presumably, when collected, the proceeds of the poll tax would be applied to the constitutional purposes to which it is restricted; i. e., education and the poor. But this particular act is restricted to a specific purpose therein expressed, that the tax is to be levied for the construction and maintenance of roads. So much of the act as levies a poll tax for such purpose is therefore unconstitutional and invalid. This, however, can be struck from the act without impairing the validity of the property tax. This course has been pursued in several cases.

As we have now declared a legislative policy of incurring an indebtedness of \$50,000,000 for the construction and maintenance of roads, it is well to note that, however laudable such purpose may be, the Legislature is forbidden by the Constitution to derive any funds for that purpose from the levy of a poll tax. It is true that at common law, at a time when there was a monopoly of land ownership by the barons in England, there was inaugurated a system by which those who had no wheels or produce to require the use of roads were conscripted without pay to render labor to make the roads for those who had need to use them. When our convention met in 1868, while we did not abolish the poll tax entirely, as nearly all the other states have done, we did restrict the state and county capitation tax to \$2, and inserted as a further and just

protection that the proceeds of the poll tax should be applied to the purposes of education and the support of the poor.

The question now presented, under the Constitution, as now amended, whether, if a mandamus issue to enforce collection of taxes under this statute, it shall embrace an order to collect a capitation tax for that purpose, has never heretofore been before this court in any case. Under the Constitution (article 5, § 1) as it stood before the amendment ratified in November, 1920, there was a requirement that "the state and county capitation tax combined shall never exceed \$2"; but there was also a provision that the state and county capitation tax "shall be equal * * * to the tax on property valued at \$300 in cash." By reason of this requirement of an equation between the capitation tax and the property tax on \$300, there were conflicting decisions whether, when the tax on property exceeded that limitation, the tax on the poll should also exceed it, and there were also conflicting decisions whether, when there was such excess, the tax on the poll could be applied for the benefit of bondholders and other purposes, or was restricted to "education and the support of the poor." In a unanimous opinion by Judge Connor (*Railroad v. Commissioners*, 148 N. C. 220, 61 S. E. 690), and Perry v. Commissioners, 148 N. C. 522, 62 S. E. 608 (Hoke, J.), it was held that the poll tax "could never exceed \$2 on the head," and must be applied to "education and the support of the poor." And there were other cases to the same effect. On the other hand, in *Moose v. Commissioners*, 172 N. C. 419, 90 S. E. 441, Ann. Cas. 1917E, 1183, it was held by a divided court (Clark, C. J., and Walker, J., dissenting) that the limitation of \$2 applies only where the levy is for the ordinary expenses of the state and county government, and only under such levy was the restriction to be observed that the poll tax should be applied only to "education and the support of the poor."

We also had decisions that, inasmuch as the restriction to \$2 on the poll in its terms applied only to the "state and county capitation tax," cities and towns were under no such limitation, and instances were frequent where the total tax levied upon a laboring man, who had nothing to be taxed except his head, often amounted in the aggregate to \$9 or \$10. These conflicting decisions have ceased to have any bearing, because under the Constitution as now amended the "equation of taxation" between the poll and property has been stricken out, and the Constitution (article 5, § 1) now reads:

"The General Assembly may levy a capitation tax on every male inhabitant of the state over 21 and under 50 years of age, which said tax shall not exceed \$2, and cities and towns may levy a capitation tax which shall not ex-

ceed \$1. No other capitation tax shall be levied."

Section 2 of that article of the Constitution, which provides that "the proceeds of the state and county capitation tax shall be applied to the purposes of education and the support of the poor," remains unaltered. It will therefore be seen that there is no equation of taxation under a construction of which the poll tax can now ever exceed \$2 for state and county, or be applied to other purposes than for education and the support of the poor, nor can the cities and towns levy more than \$1 as a capitation tax. The language of the Constitution is now made plain: "No other capitation tax shall be levied." There is no equation of taxation to authorize a judicial construction to the contrary. It is also clear from this language that no capitation tax can be levied upon women, or upon men, except between 21 and 50 years of age. It follows that the mandamus, if it shall issue in this case, cannot require the levy of any capitation tax for the maintenance and construction of roads. So much of the statute as provides therefor must be disregarded and stricken out. The valid portion of the statute which authorizes the levy of a property tax for that purpose is not affected by the invalid requirement of a poll tax.

In England from which we derive so much of our legislation a poll tax was twice levied for short periods over 500 years ago, and then it caused what was known as the "Jack Cade" and also the "Wat Tyler" rebellions. It was each time promptly repealed, and has never been collected since, except for 2 or 3 years in the reign of William III, more than 200 years ago, when, again, it was very promptly repealed. The poll tax was not mentioned in the Constitution made at Halifax in 1776. In the Revised Statutes of 1835 the poll tax was 20 cents, which was levied also on slaves, who were not taxed ad valorem. In the Revised Code of 1854 the poll tax was 40 cents and it is current history that it was levied largely because slaves were not taxed according to their value as property.

The Constitution of 1868, in view of this steady growth of the poll tax in amount, placed a limit by providing, "The state and county capitation tax combined shall never exceed \$2 on the head," and added a just provision that its proceeds should be applied to "education and the support of the poor." In Judge Connor's well-considered opinion in *Railroad v. Commissioners*, 148 N. C. 220, 248, 61 S. E. 690, 699, he emphasized these provisions and adds: "This question can never arise again." It did, however, arise again; a contrary view being taken by a majority of the court in *Moose v. Commissioners*, supra. The question is now settled,

as already stated, by the amendment, which, striking out the equation of taxation, restricts the amount of the capitation tax absolutely and adds: "No other capitation tax shall be levied." In *Railroad v. Commissioners*, 148 N. C. 253, 61 S. E. 702, it is said that our poll tax "is criticized by Hollander on State Taxation, 104, who points out that in this state, in which 60 per cent. of the taxes are paid by persons owning less than \$500, the result is that the small taxpayer, if he pay the poll tax also, pays nearly double the rate of the larger taxpayers."

It was doubtless considerations such as these that procured the adoption of the amendment by which the equation of taxation was stricken out, and the total capitation tax, including that by municipalities, was restricted to \$3 total, with the unequivocal declaration that "no other capitation tax shall be levied," and retaining unaltered at the same time in the Constitution the provision that "the poll tax shall be applied to education and the support of the poor." It is not without significance that simultaneously with the adoption of the policy of appropriating \$50,000,000 for roads there should be this constitutional protection extended to the "man with the hoe"—sometimes called "the forgotten man"; for the same Legislature (1921) took notice of the constitutional provision authorizing the exemption of personal property "to a value not exceeding \$300," and by chapter 38, § 72, p. 270, enacted the exemption of that amount for the first time, though the authority had been in the Constitution for more than 50 years.

We must take notice of the evident intent of the constitutional amendment and of the Legislature that no part of the appropriation for roads or any other purpose than "education and the support of the poor" shall be raised out of a capitation tax, which besides is absolutely limited in amount—even for education and the support of the poor—if levied by the state and county to \$2, and to a levy of \$1 by municipalities.

(152 Ga. 18)

HARRIS et al. v. McDONALD. (No. 2159.)

(Supreme Court of Georgia. Sept. 13, 1921.)

(Syllabus by the Court.)

1. Ejectment §95(2) — Deed insufficient to make prima facie case of title, when grantor is stranger to title.

A deed from one who is apparently a stranger to the paramount title, and who is not shown to have ever been in possession of the premises conveyed, is insufficient to make out a prima facie case showing title in the grantee claiming thereunder.

2. Adverse possession §61 — Administratrix cannot claim adversely to estate.

An administratrix in possession, and while acting as such, cannot claim adversely to the estate of her intestate.

3. Ejectment §95(2) — Estoppel §15 — Grantee in possession not estopped to deny grantor's title; production under notice does not show claim under deed; defendant must show better title than that under deed produced, unless he denies claiming thereunder.

One in possession of land and claiming it as his own may fortify his title or buy his peace of adverse claimants as often as they may appear, and without being estopped to deny the title of such subsequent vendors.

4. Descent and distribution §66, 75—Land descends to children subject to widow's rights; no presumption that widow elected to take child's part.

Upon the death of the husband and father intestate, the title to his realty vests in his children, subject only to the widow's right to take a child's part or have dower assigned therein; and unless it affirmatively appears that within the time prescribed by law the widow elected to take a child's part, no presumption arises that she ever had any vested interest in such realty.

5. Descent and distribution §66 — Widow's election to take child's part may be shown by circumstances; no presumption that estate was insolvent.

That the widow elected to take a child's part in the estate of the husband may be affirmatively shown by circumstances, as well as by direct evidence.

6. Wills §634(8)—Devise to children of life tenant, should she leave any, held to give contingent remainder.

Under a will devising a two-thirds interest in the estate of the testatrix to testatrix's daughter, "for her use during her natural life, and at her death to her children should she leave any, and if she should leave no children or descendants of a child or children, then to [testatrix's] brother [naming him], should he be in life, or if he is dead then to his children surviving share and share alike," the children of testatrix's daughter, all of whom were born some years after the death of testatrix took a contingent two-thirds remainder interest in the estate.

7. Guardian and ward §79—Contingent remainder cannot be sold under order of ordinary.

Such contingent estates of minors cannot be sold by their guardian under order of the court of ordinary.

8. Guardian and ward §61—Contingent remaindermen not estopped by guardian's deed.

An estoppel must be by one's own act. Hence contingent remaindermen are not estopped by their guardian's deed because they did not move to set aside the guardian's sale within a reasonable time (seven years) after they attained their majority; the life tenant or holder of the precedent estate being still in life.

9. Wills \Leftrightarrow 186—Written direction that will be destroyed ineffective, when witnessed by only two witnesses.

A request in writing (attested in this case by two witnesses only) to destroy a will is an effort to revoke the will by written instrument; and in view of Civ. Code 1910, § 3918, "an express revocation by written instrument must be executed with the same formality and attested by the same number of witnesses as are requisite for the execution of a will"—that is, three subscribing witnesses.

10. Wills \Leftrightarrow 173—Direction to third person to destroy insufficient to effect revocation.

Mere direction to destroy a will, not followed by actual destruction, will not effect a revocation, in view of Civ. Code 1910, § 3919, which provides that "an express revocation may be effected by any destruction or obliteration of the original will, or a duplicate, done by the testator, or by his direction, with an intention to revoke."

11. Wills \Leftrightarrow 274, 342—Judgment admitting to record not void because petition does not affirmatively appear; objections to letters of administration accompanied by will held sufficient petition for probate.

A judgment of the court of ordinary admitting a will to record is not void because it is not affirmatively shown that such judgment was based on a written petition to probate the will. The court of ordinary is a court of general jurisdiction, and proceedings prior to judgment will be presumed.

12. Infants \Leftrightarrow 57(2)—Judgment admitting will to record on agreement not void, because one party was a minor, where she enjoyed estate after majority more than seven years.

A judgment of the court of ordinary admitting a will to record, based upon an affidavit of one of the subscribing witnesses to the will and an agreement by the devisees that the will be probated, is not void because one of the devisees (the sole heir at law of the testatrix) was a minor at the time of the making of the agreement; it appearing that such devisee and heir at law enjoyed the estate devised to her by the will for more than seven years after her majority.

13. Direction of verdict held error.

Applying the principles ruled above, the pleadings and evidence raised issues which should have been submitted to the jury for determination, and the court erred in directing a verdict for the defendant.

Error from Superior Court, Calhoun County; W. M. Harrell, Judge.

Action by H. B. Harris and others against Mrs. D. L. McDonald, executrix. Judgment on a directed verdict for defendant, and plaintiffs bring error Reversed.

Mitchell & Mitchell, of Atlanta, and B. W. Fortson, of Arlington, for plaintiffs in error. Pope & Bennet, of Albany, and M. C. Edwards, of Dawson, for defendant in error.

GEORGE, J. This was an action of ejectment. On the conclusion of the evidence the court directed a verdict for the defendant and against the plaintiffs for the premises in dispute. The plaintiffs filed a motion for new trial, which was subsequently amended. To the judgment overruling the motion the plaintiffs excepted.

The plaintiffs sought to recover upon the theory that their grandmother, Mrs. Sarah M. Harper, was the owner of the land at the time of her death in 1872, having purchased it from William H. Davis in 1870, and that under the third item of the will of Mrs. Sarah M. Harper a two-thirds interest in the land was devised to her daughter, Lula N. Harper, who afterwards became the mother of the plaintiffs, "for her use during her natural life, and at her death to her children should she leave any, and if she should leave no children or descendants of a child or children, then to [testatrix's] brother, McCormick Neal, should he be in life, or if he is dead then to his children surviving, share and share alike"; that plaintiffs, who were born some years after the death of their said grandmother, took a contingent two-thirds remainder interest in the land, that interest being contingent upon their mother leaving them in life at the time of her death; that their mother afterwards married Henry R. Harris, Jr., and in 1887 conveyed the land to defendant's testator, J. J. McDonald; that the life tenant, plaintiff's mother, died in 1917, leaving surviving her the plaintiffs in this case, who thereupon became seized of a two-thirds interest in the land in fee.

To prove their case the plaintiffs introduced: (1) A warranty deed from William H. Davis to Sarah M. Harper, dated January 4, 1870, conveying to her the premises in dispute for a consideration of \$8,000; (2) a certified copy of the will of Mrs. Sarah M. Harper, and the probate thereof; (3) A warranty deed from Lula Harper Harris, the life tenant under the will, as to a two-thirds interest in the land, to defendant's testator, J. J. McDonald, dated January 28, 1887, conveying to him for a consideration of \$3,500 the premises in dispute; (4) proof of the marriage of Lula Neal Harper to Henry R. Harris, Jr., in 1878, and that plaintiffs were the sole surviving children of Lula Harper Harris; and (5) proof of the death of Lula Harper Harris on June 11, 1917, and the filing of this suit on November 13, 1917. The deed from William H. Davis to Sarah M. Harper and the deed from Lula Harper Harris to defendant's testator, J. J. McDonald, came from the custody of the defendant, in response to a notice to produce, and both deeds were recorded on November 3, 1902.

The defendant also introduced a deed from Henry R. Harris, Jr., the plaintiff's duly qualified guardian, to E. H. Thornton, dated

December 8, 1888, conveying to him, for a consideration of \$255, a one-fourth and a one-twelfth undivided interest in the premises in dispute. This deed contained the following recital:

"The interests hereby conveyed being the entire interest in said land given to said children by their grandmother, Mrs. Sarah M. Harper."

The defendant also introduced in evidence a deed from E. H. Thornton to defendant's testator, J. J. McDonald, dated December 10, 1888, and conveying to J. J. McDonald, for a consideration of \$1,166.66 a one-third undivided interest in the premises in dispute. All deeds appearing in the record and introduced both by plaintiffs and defendant were recorded on November 3, 1902, in the same Deed Book, consecutively paged.

To meet the prima facie case thus made out the defendant undertook to show: (1) That Robert G. Harper, a citizen of Newton County and the husband of Sarah M. Harper, was in possession of the land at the time of his death in January, 1868, and that the whole title then passed to his sole heir at law, Lula Neal Harper, afterwards Lula Harper Harris, the mother of the plaintiffs, and that consequently her deed to J. J. McDonald conveyed the fee; the defendant contending that Mrs. Sarah M. Harper, under whom plaintiffs claimed, never had any title to the land, because, as the widow of Robert G. Harper, she was not an heir at law, and there was no evidence to show that she had elected to take a child's part of his estate. (2) That William H. Davis (who conveyed to Mrs. Sarah M. Harper, under whom plaintiffs claimed) never had title to nor possession of the land, and that consequently his deed to Sarah M. Harper did not convey title, and Mrs. Sarah M. Harper, the administratrix of Robert G. Harper, could not prescribe under the deed. (3) If Sarah M. Harper ever had any interest in the land, that interest passed upon her death to Lula Neal Harper, her sole heir at law, the defendant contending that the alleged will of Sarah M. Harper had been annulled by her written direction to destroy the same after its execution, and that the alleged probate of the will, based upon an agreement made between Lula Neal Harper, a minor, and McCormick Neal, if binding at all, was binding only between Lula Neal Harper and McCormick Neal, and that the after-born children of Lula Neal Harper could claim no benefit thereunder by way of estoppel or otherwise, and that the alleged probate was ineffectual because no written application for the probate of said will was made to the court of ordinary. (4) If plaintiffs ever had any interest in the land, the same was divested by the sale of that interest, made by their duly qualified guardian to E. H. Thornton, who afterwards conveyed said interest, if any, to J. J. McDonald; the defendant con-

tending that the interest of plaintiffs, if any, was a vested interest, under the will, and could be sold by the guardian, but, if said interest was a contingent interest, it was nevertheless divested by the legal sale made by the guardian, since a sale by a guardian is not adverse to, but for the benefit of, the estate represented by him, and, if the sale by the guardian was illegal, the plaintiffs were estopped, because they did not move to set aside the sale within seven years after the youngest of them had attained majority. (5) The defendant really claimed under Lula Harper Harris, as the sole heir at law of Robert G. Harper.

[1-3] William H. Davis, so far as disclosed by the record, never had title to the land. He never had possession of the land.

"A deed from one who is apparently a stranger to the paramount title, and who is not shown to have ever been in possession of the premises conveyed, is insufficient to make out a prima facie case showing title in the grantee claiming thereunder." *Bleckley v. White*, 98 Ga. 594(3), 25 S. E. 592.

See, also, *Nesmith v. Hand*, 128 Ga. 508, 57 S. E. 763.

Mrs. Sarah M. Harper could not prescribe under the deed, because she was the administratrix of the estate, and while acting as such could not claim adversely to the estate. Moreover, she died within less than two years after the execution of the deed. Was the defendant estopped to deny title in William H. Davis? The fact that the defendant produced under notice the deed from William H. Davis to Sarah M. Harper does not show that the defendant necessarily claimed under the deed.

"Where, in the trial of an action for the recovery of land, the plaintiff relied upon the contention that he and the defendant held under a common grantor, which was denied by the defendant, proof by the plaintiff that the defendant had in his possession a chain of title to the premises in dispute, one link of which was a conveyance from the person claimed by plaintiff to be such common grantor, was not, without more, sufficient to authorize a verdict for plaintiff, as the defendant, for aught that appeared, may have held a valid title from a different source." *McConnell v. Cherokee Mining Co.*, 114 Ga. 84, 39 S. E. 941.

It is settled that a defendant in ejectment may rely upon two sources of title. When, however, a deed comes from his custody and is admitted in evidence against him, the burden is cast upon him to show a better title than the deed conveys, if his title under the deed is not sufficient to meet the case made by the plaintiff, unless the defendant expressly denies that he claims under the deed. *Brinkley v. Bell*, 126 Ga. 480, 483, 55 S. E. 187. See, also, *Barnes v. Maddox*, 136 Ga. 164, 71 S. E. 129. J. J. McDonald, the grantee of Lula Harper Harris, was dead. The

defendant could not, therefore, show by the direct testimony of J. J. McDonald that he claimed the whole title under Lula Harper Harris as the sole heir at law of Robert G. Harper. It appears, however, without dispute, that there was a paramount title in Robert G. Harper, who died in possession of the land. One in possession of land and claiming it as his own may fortify his title, or buy his peace of adverse claimants, as often as they may appear, and without being estopped to deny the title of such subsequent vendors. *Yerby v. Gilham*, 147 Ga. 342, 94 S. E. 246.

[4, 5] If Mrs. Sarah M. Harper elected to take a child's part of the estate of Robert G. Harper, she became the owner of a one-half undivided interest in the lands in dispute. Mrs. Sarah M. Harper qualified as administratrix of Robert G. Harper on or about August 5, 1868. Plaintiffs introduced a certified copy of her petition to the court of ordinary, made within the first year of administration, for an order "permitting her to carry on the farm for the benefit of the heirs, herself and one child of said deceased," and of the order of said court granting the petition at the November term, 1868. Plaintiffs also introduced a certified copy of Sarah M. Harper's petition (filed October 4, 1869) to the court of ordinary for "leave to sell the land for distribution among the legatees and for payment of debts," reciting that "a fair division of said land cannot be had among the heirs," and the order of court at the November term, 1869, granting the same.

"There is no presumption of law that a widow will elect, or has elected, to take a child's part in the estate of her husband. *Jossey v. Brown*, 119 Ga. 758. It must affirmatively appear that she elected to take a child's part within the time prescribed by law. This may appear by an election in writing, duly signed, filed, and recorded in the office of the ordinary; but this is not the only method of proving the fact of such election. The fact of election may be shown by circumstances establishing the same, as well as by direct evidence. If the circumstances are such as to establish that an election has been made in time, it is as much affirmatively established as if there were direct evidence to that effect." *Rountree v. Gaulden*, 128 Ga. 737, 740, 58 S. E. 346, 347.

It is settled in this state that upon the death of the husband and father intestate the title to his realty vests in the children, subject only to the widow's right to take a child's part, or have dower assigned therein; and unless it affirmatively appears that within the time prescribed by law the widow elected to take a child's part, no presumption will arise that she ever had any vested estate in such realty. *Snipes v. Parker*, 98 Ga. 522(2), 25 S. E. 530; *Farmers' Banking Co. v. Key*, 112 Ga. 301(1), 37 S. E. 447; *La Grange Mills v. Kener*, 121 Ga. 429, 49 S. E.

300; *Heard v. Kenney*, 146 Ga. 719, 92 S. E. 211.

The application of the widow, as the personal representative of the estate, for permission to carry on the farm for the benefit of the heirs at law (the widow and one child), made within the first year of administration, is a circumstance from which the jury would be authorized to infer that the widow elected to take a child's part in the estate. While the application for permission to sell was made after the expiration of the first year of the administration, it is nevertheless of some probative value, and tends to show that the widow had elected to take a child's part. The fact that Mrs. Harper purchased the land from Davis and dealt with the land as her own also tends to show that she had elected to take a child's part in the estate. If the estate of Robert G. Harper was solvent, it was to the interest of the widow to take a child's part. There is no presumption that the estate was insolvent.

[6] If Mrs. Harper elected to take a child's part in the estate of her husband, then she had a vested interest in a one-half undivided interest in the land belonging to his estate. The third item of the will of Mrs. Sarah M. Harper is as follows:

"After paying my debts and deducting the property mentioned in the second item of this my last will and testament, I give and bequeath to O. H. Jones in trust for my daughter, Lula N. Harper, two-thirds of my estate for her use during her natural life and at her death to her children should she leave any, and if she should leave no children or descendants of a child or children, then to my brother McCormick Neal, should he be in life, or if he is dead then to his children him surviving share and share alike."

The testatrix died in 1872. At the date of her death Lula N. Harper was unmarried and had no children. Lula N. Harper afterwards intermarried with Henry R. Harris, Jr., and six children were born to her, one of whom died intestate during the lifetime of the life tenant and left no children, but left a widow. The other five children survived the life tenant (who died in 1917) and are the plaintiffs in this case. If the devise had been simply "and at her death to her children," the remainder would have vested in the children as they were born; but the superadded words, "should she leave any," made the remainder contingent. Until the death of Lula N. Harper it could not be ascertained whether she would leave any children. If she had survived her children, none of them would have ever acquired any interest. There was a limitation over to McCormick Neal if Lula N. Harper "should leave no children or descendants of a child or children," but the remainder was "to her children should she leave any." Until the death of Lula N. Harper it was an uncertainty whether she would

leave children at her death; the devise, "to her children should she leave any," is the exact equivalent of the expression "such child or children, they being the heirs of her body, that she may leave in life." Construing the language last above quoted, this court has held the remainder to be contingent. *Smith v. Smith*, 130 Ga. 532, 61 S. E. 114, 124 Am. St. Rep. 177. The vesting of the remainder is made dependent upon the event of the remainderman surviving the life tenant. The superadded words in the will under construction manifest the intention of the maker to vest the remainder only upon the contingency of the remainderman being in life at the time of the death of the life tenant, and serve to distinguish the provision of the will under construction from the provisions of the instruments construed (for example) in the following cases: *Crawley v. Kendrick*, 122 Ga. 183, 50 S. E. 41, 2 Ann. Cas. 643; *Cooper v. Mitchell Investment Co.*, 133 Ga. 769, 66 S. E. 1090, 29 L. R. A. (N. S.) 291; *Burney v. Arnold*, 134 Ga. 141, 67 S. E. 712; *Milner v. Gay*, 145 Ga. 858, 90 S. E. 65; *Gibbons v. International Harvester Co.*, 146 Ga. 467, 91 S. E. 482; and *Cock v. Lipsey*, 148 Ga. 322, 96 S. E. 628.

It is to be noted that the will under construction contains no divesting clause or clause of defeasance, as did the will construed in *Sumpter v. Carter*, 115 Ga. 893, 42 S. E. 324, 60 L. R. A. 274. There are no words of substitution in the will under construction, as in the will construed in *Fields v. Lewis*, 118 Ga. 573, 45 S. E. 437. In the will under construction in that case there were words of substitution, and the superadded words were held to apply to the substituted devisees. In the case of *McDonald v. Taylor*, 107 Ga. 44, 32 S. E. 879, there was no uncertainty as to the person. The remainderman was named. No other person could ever take as remainderman. The superadded words in the will in that case were probably considered as words of defeasance, and upon this theory it was properly held that the remainder was vested. In no case decided by this court has the language of this will been construed as giving a vested remainder. The analogous cases hold the remainder to be contingent. See *Griswold v. Greer*, 18 Ga. 545; *White v. Rowland*, 67 Ga. 546, 44 Am. Rep. 731; *Watson v. Adams*, 103 Ga. 733, 30 S. E. 577; *Crawford v. Clark*, 110 Ga. 738, 36 S. E. 404; *Isler v. Griffin*, 134 Ga. 195, 67 S. E. 854. See also *Fleming v. Hughes*, 99 Ga. 444, 27 S. E. 791.

We do not overlook the rule of construction that, if there be doubt as to whether a remainder is vested or contingent, the remainder will be construed as vested rather than contingent, and as vesting at the earliest opportunity. We do not overlook the distinction between vesting in right and taking

effect in possession or enjoyment, pointed out in many of our cases. On the other hand, no favor to a vested interest can defeat the plain intention of the will in controversy, and, as we construe the will, those children of Mrs. Lula Harper Harris who were in life at the death of Mrs. Lula Harper Harris took a contingent two-thirds remainder interest in the estate of the testatrix.

[7] While the question seems to be an open one in this state, we are of the opinion that the contingent estate of the minor children of Mrs. Lula Harper Harris could not be sold by their guardian under order of the court of ordinary. It has been held that a guardian may sell a vested remainder under an order granting leave to sell the land, his ward having no estate in the land except the remainder so sold. *Wallace v. Jones*, 93 Ga. 420 (5), 21 S. E. 89; *Webb v. Hicks*, 117 Ga. 338, 43 S. E. 738. It has also been held that a contingent remainder is not the subject of a levy and sale. *Mattox v. Deadwyler*, 130 Ga. 461, 60 S. E. 1066; *Harber v. Nash*, 126 Ga. 777, 55 S. E. 928. In *Watson v. Adams*, 103 Ga. 733, 30 S. E. 577, it was held that a contingent remainder is not subject to an attachment. It is agreed that the cases cited above, to the effect that no legal sale of a contingent remainder ad invitum by the sheriff under execution can be made, are not necessarily controlling upon the question presented. *Williams v. O'Neal*, 119 Ga. 178, 45 S. E. 978, is not applicable. See *Jolly v. Lofton*, 61 Ga. 154. Civil Code, § 4181, reads as follows:

"A future interest or estate may be conveyed by deed; but it must operate to transfer the title immediately, or the instrument will be testamentary and revocable."

It is obvious that this provision of the Code is not in point. On the contrary, section 4117 of the Code, which reads in part as follows, "A bare contingency or possibility can not be the subject of sale, unless there exists a present right in the person selling, to a future benefit," is more nearly in point. In *Watson v. Adams*, 103 Ga. 733, 30 S. E. 577, 579, it was said:

"The legacy in the land devised to him by the will was a bare contingency, and that during the lifetime of his mother there existed in him no present right to a future benefit."

Under section 3537 of the Civil Code (Civil Code 1910, § 4117) such a contingency cannot be the subject of sale. While in certain circumstances a court of equity has jurisdiction to decree a sale of land, including every possible interest of contingent remaindermen, such jurisdiction is founded largely upon the fact that a sale of such property, including such interest, cannot be had under an order from the court of ordinary. Compare *Cooney v. Walton*, 151 Ga. —, 106 S. E. 167; *Donaldson v. Donaldson*, 151 Ga. —,

106 S. E. 172; *Ethridge v. Pitts*, 108 S. E. 543, decided September 15, 1921. Under statutes providing that expectant estates are descendable, devisable, and alienable in the same manner as estates in possession, contingent estates of minors may be sold by their guardians under order of the court. *Hovey v. Nellis*, 98 Mich. 374, 57 N. W. 255. Under the New York statute, a contingent remainder in fee may be sold. *Dodge v. Stevens*, 105 N. Y. 185, 12 N. E. 759.

[8] We are also of the opinion that the plaintiffs were not barred because they did not move to set aside the guardian's sale within a reasonable time (seven years) after they attained their majority. Until the death of the life tenant it could not be determined whether they would have any interest in the land. See *Howell v. Wilson*, 137 Ga. 710 (1), 74 S. E. 255. While contingent remaindermen may maintain an equitable suit to prevent waste (see *Kollock v. Webb*, 113 Ga. 762 (2), 39 S. E. 339) this court has never decided that such remaindermen can maintain a suit to cancel a deed as a cloud upon their title. If the plaintiffs themselves had executed a deed to Thornton, it would have been necessary for them to move to cancel the same within seven years after they attained their majority. *Nathans v. Arkwright*, 66 Ga. 179. The conveyance of a contingent remainder is upheld upon the principle of estoppel. *Isler v. Griffin*, 134 Ga. 102 (4), 67 S. E. 854. In order to give rise to the estoppel the conveyance must have been the act of the person subsequently asserting title. An estoppel must be by one's own act. There is no evidence tending to show that plaintiffs ratified the sale by accepting or receiving the purchase price.

[9, 10] The remaining question, therefore, is whether the will was revoked by Mrs. Harper's written direction to cancel it after its execution, and, if not so revoked, whether the will was legally probated. It appears that Mrs. Harper, after the execution of the will, left the same with the ordinary of Fulton county, the county of her residence. On March 18, 1872, Mrs. Harper, then in the state of New York, addressed the following letter to the ordinary:

"On receipt of this letter you will please turn over to Mr. John Neal, Sr., the will which I made on January 9, 1872, or about that date, and, if it is recorded, cancel the record, as I have decided not to make that disposition of the property. Mr. Neal will please destroy the will, as it is worthless, not being according to my desire. Please preserve this letter, and it shall be authority for both yourself and Mr. Neal to act as desired. This change of intention on my part is made from deliberation, and not from any influence, whatever, exercised by others."

The letter was signed by Mrs. Harper, and was witnessed by two witnesses only. The written request to destroy the will is nothing

more than an effort to revoke the will by written instrument. Under Civil Code, § 3918:

"An express revocation by written instrument must be executed with the same formality and attested by the same number of witnesses as are requisite for the execution of a will."

Civil Code, § 3919, provides that:

"An express revocation may be effected by any destruction or obliteration of the original will, or a duplicate, done by the testator, or by his direction, with an intention to revoke."

Under this section it is necessary that the will be actually destroyed or obliterated. Mere direction to destroy, not followed by actual destruction, will not effect a revocation. The suggestion is made that Mrs. Harper did not lose her right to destroy the will because the public officer failed in his duty. It was not the official duty of the ordinary to destroy the will. This question is in principle controlled by *Howard v. Hunter*, 115 Ga. 357, 41 S. E. 638, 90 Am. St. Rep. 121.

[11] The judgment of probate is attacked upon the ground that no petition to probate the will appears in the evidence. It appears that an application for letters of administration on the estate of Mrs. Sarah M. Harper was filed in the court of ordinary of Fulton county. It was alleged in the application that Mrs. Harper died intestate. McCormick Neal objected to the grant of letters of administration, upon the ground that Mrs. Harper died testate, and attached to his objections the will of Mrs. Harper. In the circumstances aforesaid, it cannot be held that there was no petition, or the equivalent of a petition in writing, to probate the will. Even if there were no petition, the court of ordinary is a court of general jurisdiction. The judgment admitting the will to record is all that is necessary. The petition and other proceedings prior to judgment will be presumed. The judgment can in no event be collaterally attacked. *Patterson v. Lemon*, 50 Ga. 231, 236; *Medlin v. Downing Lumber Co.*, 128 Ga. 115 (1), 57 S. E. 232; *Hooks v. Brown*, 125 Ga. 122, 53 S. E. 583; *Churchill v. Jackson*, 182 Ga. 666, 64 S. E. 691. The case of *Fischesser v. Thompson*, 45 Ga. 459, holding that a proceeding in the court of ordinary not based on a written petition is void, was reviewed, and in effect overruled, in *Barclay v. Kimsey*, 72 Ga. 725.

[12] It is insisted that the probate of the will is void, because based upon an agreement made between Lula Neal Harper (afterwards Lula Harper Harris) and McCormick Neal. It appears that plaintiffs' mother, at the time the agreement was made, was only 18 years old; but she held the life estate under the will from 1872 to 1887, when she conveyed to the defendant's testate. At the date of this conveyance she was 33 years old. Al-

though a minor at the time the agreement was made, it would seem that she was bound by the agreement, under Civil Code, § 4233. It further appears that the will was actually probated by the judgment of the ordinary. It was probated on the affidavit of a subscribing witness to the will. In addition, the agreement between Lula Neal Harper and McCormick Neal was made the judgment of the court. This agreement was expressly made for the purpose of settling a family controversy. Probate in common form becomes conclusive after the lapse of seven years; and if, after the lapse of seven years, an heir is still a minor, he has four years after the arrival of age within which to call the probate in question. *Sutton v. Hancock*, 118 Ga. 436, 45 S. E. 504. Upon a careful review of the evidence in this case we are of the opinion that the probate of the will of Mrs. Sarah M. Harper was not void for any of the reasons urged by the defendant in error—certainly not upon an inspection of the record. A valid judgment admitting the will to record is, of course, conclusive on the question of revocation discussed above.

[13] The rulings above made sufficiently cover the assignments of error on the admissibility of evidence, in so far as those assignments of error are meritorious. In view of those rulings, it follows that the court erred in directing a verdict for the defendant, and in subsequently overruling the motion for new trial.

Judgment reversed.

All the Justices concur, except ATKINSON and HILL, JJ., disqualified.

(152 Ga. 31)

MUNFORD et al. v. PEEPLES et al.
(No. 2193.)

(Supreme Court of Georgia. Sept. 13, 1921.)

(Syllabus by the Court.)

1. Wills Ⓒ573(2), 601(1), 612(3)—Bequest in trust held to give absolute fee, not cut down by further provisions.

Where a testator, by item 5 of his will, bequeathed to his son, R. S. Munford, in trust for the testator's daughter, L. M. Peebles, one half of his shares of the capital stock of a certain mining company (the other half being bequeathed to the son by another item absolutely), vesting the trustee with full and complete control of said stocks, with the exclusive right and authority to vote same at all stockholders' meetings, and to sell the stock as in his judgment may be best for the interest of all parties concerned, and where the testator also provided, in a subsequent clause of item 5 of the will, that the trustee shall pay to the daughter, "or to the heirs of her body, should she be dead, all dividends that may accrue upon said shares of stock, and the proceeds of any sale that he may make of same, to be hers or

theirs, as the case may be, absolutely. But should my said daughter * * * die leaving no issue of her body, children, or children of children, before the executing of the trust herein created, then the stock herein bequeathed to my son * * * as trustee, or the residue thereof should any have been sold, shall be and become the property of the said [son] absolutely." Held, that the daughter takes an estate in fee, which is not cut down to a less estate by item 5 or any subsequent part of the will.

2. Pleading Ⓒ214(3)—Trusts Ⓒ189, 371(1)—Wills Ⓒ671, 682(2)—In favor of legatee of full age and sound mind held executed; allegations of petition taken as true on demurrer; petition to have trust declared void not demurrable; will giving trustee power of sale held to require sale within reasonable time; will giving property in trust held not to create trust for contingent remainderman.

Where an estate was bequeathed by a testator to a named trustee for his daughter, as set out in headnote 1, and a petition was filed by the daughter against the trustee, alleging that at the time the testator executed his will she was over 21 years of age, of sound mind, and had since that time remained of sound mind and fully capable of receiving, owning, controlling, and enjoying property in her own right without the intervention of a trustee, and also alleging malfeasance and nonfeasance on the part of the trustee, and praying for injunction, receiver, and that such devise be declared to convey the absolute fee to her, such petition was not subject to demurrer on the ground that the trust was executory, and not executed, and the court did not err (at a regular term of court) in overruling the demurrer on that ground; and where, on a hearing for temporary injunction, the evidence for the plaintiff was sufficient to sustain the allegations of her petition, the court did not err in granting a temporary injunction.

Error from Superior Court, Bartow County; M. C. Tarver, Judge.

Suit by Mrs. L. M. Peebles and others against R. S. Munford and others. Judgment overruling demurrer and continuing a restraining order, and defendants bring error. Affirmed.

L. S. Munford died, leaving his last will and testament, which was admitted to probate in solemn form, the material portions of which are as follows:

"Item 5. I hereby give, devise, and bequeath to my son, Robert S. Munford, in trust for my daughter, Lewis Munford Peebles, wife of O. T. Peebles, one-half ($\frac{1}{2}$) of my shares of the capital stock of the Etowah Development Company, and one-half ($\frac{1}{2}$) of my shares of the capital stock of the First National Bank of Cartersville, Ga., hereby vesting him, the said Robert S. Munford, with full and complete control of said stocks with the exclusive right and authority to vote same at all stockholders' meeting, and to sell the Etowah stock as in his judgment may be best for the interests of all parties concerned, but the bank

stock may be sold at the instance of the said Lewis Munford Peeples, and upon her written request. Said trustee shall pay to said Lewis Munford Peeples, or to the heirs of her body should she be dead, all dividends that may accrue upon said shares of stock, and the proceeds of any sale that he may make of same, to be hers or theirs, as the case may be, absolutely. But should my said daughter, Lewis Munford Peeples, die leaving no issue of her body, children, or children of deceased children, before the executing of the trust herein created, then the stock herein bequeathed to my son, Robert S. Munford, as trustee, or the residue thereof should any have been sold, shall be and become the property of the said Robert S. Munford, absolutely.

"Item 6. I hereby give, devise, and bequeath to my daughter, Lewis Munford Peeples, wife of O. T. Peeples, in trust, for and during her natural life for the joint use and benefit of herself and children, including the children she now has as well as those that may hereafter be born to her, the following real estate, to wit: (A) All of my lands lying on and adjacent to Pettitt's creek in the fifth district of the third section of Bartow county, Georgia, including the following farms, to wit: That certain farm known as my old home place, where I lived for many years; also the farm known as the Old Bishop place, the same being sometimes known as the old Rock House place and adjoining the home place aforesaid; also, the farm known as the old Munford Mill place. (B) Also, that certain farm lying on, or near, Pettitt's creek in said county, formerly known as the J. G. Lowery place; with all of the live stock, farming tools, and machinery on each of said farms, for use in the operation of such farms, to be treated as part and parcel of such farm and to go with such farm to said devisees in the same way and on the same limitations as the farm itself. (C) Also, that certain storehouse and lot on the South side of Main St., in the city of Cartersville, Ga., now occupied by J. W. Vaughan & Co. (D) Also, that certain storehouse and lot on the south side of Main St., in Cartersville, Ga., now occupied by the Bank of Cartersville. (E) Also, that certain house and lot on the north side of Leake St., in Cartersville, Ga., now occupied by J. C. Fink and adjoining on west the residence lot of Capt. Bob Anderson. (F) Also, that certain town lot, with the two frame buildings thereon, located on the southwest corner of Bartow and Carter Sts. in the city of Cartersville, Ga. It is my will and desire that on the death of my said daughter, Lewis Munford Peeples, all of the real estate mentioned in this item and devised and bequeathed to her, in trust for herself and children during her natural life, shall then vest in, and is hereby devised and bequeathed in fee simple, to the children of my said daughter who may survive her, and to the surviving child or children of any deceased child or children who may have died before their said mother; the child of such deceased child or children to receive the share or interest which would have been received by such deceased child or children, had such deceased child or children have survived my said daughter; the said Lewis Munford Peeples only having the right to use, for the benefit of herself and children, the income arising from the property devised in this item."

"Item 9. In the event of the death of my daughter, Lewis Munford Peeples, leaving surviving her one or more children under twenty-one years of age, or one or more grandchildren who are children of a deceased child of my said daughter, then and in either of such events I hereby appoint my son in law, Oscar T. Peeples, as testamentary guardian of any and all of such minor children or grandchildren, with authority to take charge of and manage and control the property and interests of such minor children or grandchildren of my said daughter, given them under this will, during their minority; but the appointment of said testamentary guardian is conditioned upon his first giving a good and sufficient bond in double the value of the property and effects to come into his hands as such guardian, payable to the ordinary of Bartow county, Georgia, signed as surety by some good and solvent fidelity insurance company doing business in Georgia, in compliance with the laws thereof, and conditioned for the faithful discharge by the said Oscar T. Peeples of all the duties of his office as such guardian; said bond, and the surety thereon, to be approved by the ordinary of Bartow county, Ga. On failure of my said son-in-law to accept said guardianship, or to make and file in the office of the ordinary of Bartow county, Ga., with his approval, the bond required above, within four months after the death of my said daughter, then and in that event his appointment as guardian shall not take effect, and I hereby appoint my son, Robert S. Munford, as testamentary guardian of the minor children and (or) grandchildren, as aforesaid, of my daughter, and no bond shall be required of him as such guardian.

"Item 10. It is my express will and desire, and I hereby positively direct, that none of the property bequeathed and devised to my daughter, Lewis Munford Peeples, in trust for herself and her children, during her natural life, shall at any time for any cause or purpose, or by order of any court upon any pretext, be sold by her for reinvestment or any other purpose; but only the annual income may be disposed of by her, and the same prohibition and restriction is hereby placed on the power of the testamentary guardian of the minor children and (or) grandchildren of my said daughter, should any there be; the intention of this will and testament being, that the property I have devised and bequeathed for the benefit of my said daughter and her children, and the children of her deceased children dying before her, shall remain intact during her lifetime and during the term of said guardianship, if any there should be. I positively forbid and prohibit any encroachment whatever on the corpus of said bequest and devise, until the trust herein and hereby created is fully executed."

After the testator's death, and the probate of his will, the trustee named voted the shares of stock in the Etowah Development Company, and exercised exclusive control over the shares bequeathed to Mrs. Lewis Munford Peeples, until the filing of the present suit. Mrs. Peeples and others filed an equitable petition against Robert S. Munford, as trustee, individually and as executor, and against Etowah Development Company, al-

leging that she was over 21 years of age, was of sound mind, was sui juris, and laboring under no legal disability, and was fully capable of receiving, owning, controlling, and enjoying property in her own right without the intervention of a trustee, alleging also various acts of mismanagement, malfeasance, and nonfeasance against Robert S. Munford as trustee, etc., and praying that the will be construed, especially the fifth item thereof; that the trust created therein be declared an executed trust and invalid; that the ownership of the shares of stock be declared not subject to defeasance in the event of Mrs. Peeples' death at any time after the death of the testator; that the trustee be required to transfer and assign the shares of stock, held by him as trustee, to Mrs. Peeples on her election to take the same in satisfaction of her legacy without a sale, etc.; that R. S. Munford, individually and as executor of L. S. Munford, and as trustee, be enjoined from selling or attempting to sell any portion of the stock without special order of the court, etc., and that, until the removal of Munford as trustee, a receiver be appointed to manage and control the shares of stock; and for general relief; etc. The defendant demurred and answered. The plaintiff amended her petition, which was demurred to, and the demurrers were overruled, to which judgment the defendant excepted.

On the interlocutory hearing the restraining order was continued of force pending the further order of the court, provided the plaintiff, Mrs. Peeples, would execute a bond in the sum of \$100,000, conditioned to pay the Etowah Development Company damages in the event it is held on final hearing that the right to vote the stock in controversy was in Robert S. Munford at the time of filing the suit, and that he was not subject to removal, etc. In the event plaintiff failed to make the bond, the temporary restraining order was to be dissolved, provided the defendant, Munford, executed a like bond in the sum of \$100,000, etc. To this judgment Munford excepted.

G. H. Aubrey and J. T. Norris, both of Cartersville, for plaintiffs in error.

Neel & Neel, of Cartersville, for defendants in error.

HILL, J. (after stating the facts as above). [1] 1. The first question to be considered is: What estate did Mrs. Peeples take in the stock bequeathed by the fifth item of testator's will? Did she take a life estate only, or did she take an absolute or defeasible fee? Considering first the language of item 5 alone, it will be observed that R. S. Munford was created trustee for testator's daughter, Lewis Munford Peeples, alone. The trustee is not expressly declared trustee for any one else, in this item of the will. It confers

on the named trustee "full and complete control" of the stock, with the exclusive right and authority to vote it at all stockholders' meetings, and to sell it "as in his judgment may be best for the interests of all concerned," etc. This item also provides that the bank stock may be sold at the instance of the cestui que trust and upon her written request, which was done, and the bequest as to that stock is not under consideration here. The trustee is directed, in item 5, to pay to Mrs. Peeples, "or to the heirs of her body should she be dead, all dividends that may accrue upon said shares of stock, and the proceeds of any sale that he may make of same, to be hers or theirs, as the case may be, absolutely." It is further provided that, should testator's daughter, Mrs. Peeples, "die leaving no issue of her body, children, or children of deceased children, before the executing of the trust herein created, then the stock herein bequeathed to my son, Robert S. Munford, as trustee, or the residue thereof should any have been sold, shall be and become the property of the said Robert S. Munford, absolutely." What estate, then, did Mrs. Peeples take in the property bequeathed under this item of the will? Nowhere in this item does the testator expressly give the stock to his daughter "for life," nor does he use language of similar import.

It will be observed in this connection that by item 6 of his will the testator gives, devises, and bequeaths to his daughter, Mrs. Peeples, in trust, "for and during her natural life, for the joint use and benefit of herself and children, including the children she now has, as well as those that may hereafter be born to her," certain lands, city property, and personal property. At the end of this item (6) the testator again alludes to the real estate mentioned in this item, and provides that on the death of his daughter all of the real estate "devised and bequeathed to her, in trust for herself and children *during her natural life*, shall vest in, and is hereby devised and bequeathed in fee simple, to the children of my said daughter who may survive her," etc. In item 10 of the will the testator again provides that the "property bequeathed and devised to my daughter, Lewis Munford Peeples, in trust for herself and her children, *during her natural life*" (italics ours), shall not "be sold by her for re-investment or any other purpose." Considering these expressions of limitation *for life* in the items of the will other than item 5, that is, the limitation of the property devised to *the daughter in trust for life*, and considering that there is no such express limitation *for life*, in item 5, as to the stock bequeathed, it is convincing to our minds that the testator did not intend that his bequest of the stock in the Etowah Mining Company, to his daughter, in item 5 of the will, should

be for her life only. In item 5 the stock is given in trust for Mrs. Peebles without limiting it to her life, but it is expressly provided that the trustee has the right to sell the stock as in his judgment may be best for the interest of all parties concerned, and pay the proceeds thereof to her or them as the case may be, absolutely. It is true that the testator directs the trustee to pay the cestui que trust, Mrs. Peebles, or to the heirs of her body should she be dead, all dividends that may accrue upon the shares of stock, etc.; but we do not think that this language will cut down the original gift, even if this refers to the mining stock (which we construe to be an absolute fee), to a life estate, or to a base or defeasible fee.

The general rule is that courts will not by construction reduce an estate, once devised absolutely in fee, by limitations contained in subsequent parts of the will, unless the intention to limit the devise is clearly and unmistakably manifest. *Smith v. Slade*, 151 Ga. —, 106 S. E. 106, and cases cited; *Wilcher v. Walker*, 144 Ga. 526, 529, 87 S. E. 671. We are of the opinion that the intention of the testator to limit the devise to his daughter to a life estate is not clearly and unmistakably manifest in his will. The bequest in item 5 is to R. S. Munford, as trustee for Mrs. Peebles, of the Etowah Development Company stock, and to no other person. The language of the testator as expressed in the first part of this item was sufficient to vest in Mrs. Peebles the fee to the mining stock. The question arises: Does the subsequent language, directing the trustee to pay Mrs. Peebles, "or to the heirs of her body should she be dead," the dividends accruing on the stock, and the proceeds of the sale thereof, to be hers or theirs absolutely, cut down the estate from an absolute fee to a lesser estate? We do not think so. Certainly not in the absence of some clause clearly limiting the interest of Mrs. Peebles to less than a fee. It is true that under section 3660 of the Civil Code of 1910, limitations over to "heirs," "heirs of the body," "lineal heirs," "lawful heirs," "issue," or words of like import, shall be held to mean children, whether the parents be alive or dead; and, under such words, children and the descendants of deceased children, by representation in being at the time of the vesting of the estate, shall take an estate in remainder. But in such case there must be a previous life estate in the parent. But here the testator has not expressly bequeathed the stock in trust for Mrs. Peebles for and during her natural life, and at her death the remainder to her children. Had he done so, undoubtedly Mrs. Peebles would have taken only a life estate, and on her death, leaving children surviving her, they would take the stock as remaindermen.

But such is not the case; and this conclusion is borne out by the use of the language of the testator in other items of the will, with reference to other and different property devised, where the language creating a life estate in Mrs. Peebles, with remainder over, is clear and unmistakable. It would have been easy for the testator, by item 5, to create a life estate in Mrs. Peebles in the mining stock, with remainder over, if he had so intended, as he did so clearly in items 6 and 10 of the will, where he expressly created a life estate in Mrs. Peebles as trustee, with remainder over to her children, etc. See *Craig v. Ambrose*, 80 Ga. 134, 136, 137, 4 S. E. 1, where the devise was to a certain woman and "her bodily heirs." It was held that at the death of the testator the fee vested in the woman. "A devise of real estate to 'A. or his heirs,' gives to A. an estate in fee, the word 'or' being read 'and.'" *Hawkins on Wills*, 180. An owner of land executed a deed to certain land to a named woman "and her bodily heirs." "This is to be distinctly understood: That this twenty acres is all that she will get of lot No. 301; also this is not to be sold for any consideration; it is to remain hers and her children's, hers and their natural lives." The tenendum clause was to the woman and "her bodily heirs, executors, administrators, and assigns, in fee simple." It was held that such deed conveyed a fee-simple estate to the woman, by virtue of section 3661 of the Civil Code of 1910. *Stamey v. McGinnis*, 145 Ga. 226, 88 S. E. 935; *Ewing v. Shropshire*, 80 Ga. 374, 7 S. E. 554. As bearing upon the intention of the testator in item 5, in using the words "or heirs of her body," and that these words were not intended to create a remainder over to the children of Mrs. Peebles living at her death, it is to be borne in mind that the testator expressly provided for the children of Mrs. Peebles in item 6 of his will, where he bequeathed to them an equal share with their mother in the income of certain city property and farms. and at the mother's death the children are given the remainder in fee simple.

Let us consider another view as to the meaning of item 5. It is a well-understood rule in this state that the law favors the vesting of estates at the earliest possible time, and—

"Where there are divesting clauses in a will, the law is disposed to give them such effect as to vest the estate indefeasibly at the earliest possible moment. Language doubtful in its meaning should not be construed to lessen the fee previously devised." *Crumley v. Scales*, 135 Ga. 300, 308, 69 S. E. 531; Civil Code 1910, § 3680.

Where a testator in his will bequeathed property to his wife during her natural life, and at her death to be equally divided among all his surviving children and the legal rep-

representatives of such as may be deceased, it was held that the words of survivorship had reference to the death of the testator, and not to the death of the tenant for life, and that all the children of testator who were in life at his death took vested remainders under the will, to be enjoyed at the death of the tenant for life. *Vickers v. Stone*, 4 Ga. 461. For additional cases stating the rule favoring the vesting of certain legacies at testator's death, see *Mendel v. Stein*, 144 Ga. 107, 86 S. E. 220; *Crossley v. Leslie*, 130 Ga. 782 (5), 786, 788, 61 S. E. 851, 14 Ann. Cas. 703; *Wilcher v. Walker*, 144 Ga. 526, 528, 529, 530, 87 S. E. 671; *Crumley v. Scales*, 135 Ga. 300, 305, 309, 69 S. E. 531; *Clanton v. Estes*, 77 Ga. 352, 1 S. E. 163; *Legwin v. McRee*, 79 Ga. 430, 4 S. E. 863; *Fields v. Lewis*, 118 Ga. 573, 45 S. E. 437. In the *Crumley Case*, supra, the testator had four daughters, all of whom, except one, had children at the time the will was executed. The testator devised to the three other daughters specific lots, in language clearly creating in them life estates and remainders to their children, respectively, upon their deaths. To two of these daughters, in separate items of the will, he gave two other lots "absolutely and in fee simple," and no language was used indicating that the property so given was to go to any one upon the death of the devisee. To the daughter who had no children he devised a lot for and during her life, and provided:

"But if she should leave no child or children, to go to her sisters, * * * or their children, in three equal shares."

By the twelfth item of his will the testator disposed of the residuum of his estate, as follows:

"I give, devise, and bequeath, absolutely in fee simple, all the balance of my property which I may own at the time of my death, both real and personal, and wherever located, in equal shares to my four daughters [naming them]. Should any of my said children die leaving child or children, such child or children shall take the share of their deceased parent."

It was held that—

"Under the twelfth item of the will, all four daughters having survived the testator, each of them was entitled to her respective share therein devised in fee simple, and their children did not, under the will, acquire any interest whatever in the property so devised."

It is stated in 2 *Alexander on Wills*, § 996, as a general rule, that if it appears from the whole will that payment of any legacy was merely for the convenience of the estate, or of the one charged with payment, the beneficiary will take a vested interest at the death of the testator, and the vesting of the estate will not be deferred, where payment is directed to be deferred until certain property be sold. Civil Code 1910, § 3899, provides that—

"An unconditional gift of the entire income of property, or interest accruing from a fund, will be construed into a gift of the property or fund, unless the provisions of the will require a more limited meaning."

In *Swann v. Garrett*, 71 Ga. 566, 569, *Blandford, J.*, said:

"Where a testator directs that his executors shall sell certain property and divide the proceeds between certain named legatees, it is optional with the legatees to elect to take either the property itself or the money arising from the sale of the same. Such a bequest is as much of the property itself as of the money arising from the sale of the same; to allow the legatee to take property, instead of money arising from the sale, is no violation of the testamentary scheme of the testator; the purpose of testator is that the legatees, who are the objects of his bounty, shall have his property; and if this can better be accomplished by the legatees taking the property itself, rather than have a sale of the same and taking money arising from such sale, what objection can be raised to this course?"—citing 1 *P. Williams*, 130, 389, 471; 1 *Roper on Legacies*, 547; 2 *Jarman on Wills*, 188, note; 2 *Story's Equity*, 1213, 1215; *Puryear v. Puryear*, 16 Ala. 489. And see *Smith v. Dunwoody*, 19 Ga. 256, 257, 258; *Thomas v. Owens*, 131 Ga. 255, 62 S. E. 218.

This doctrine of reconversion, or equitable conversion, is based on the principle that equity will not compel the execution of a trust against the wishes of the person beneficially interested. *Corpus Juris* lays down the general rule as follows:

"In the application of the doctrine of equitable conversion, it is a well-settled rule that, if money is directed by a will or other instrument to be laid out in land, or land is directed to be turned into money, the party entitled to the beneficial interest may in either case, if he elects so to do, cause a reconversion of such property and take it in its original state, notwithstanding there is a positive direction to convert the property; and such an election is an affirmative element in the establishment of his right to the property. Such an election, however, can not be made if the rights of others will be injuriously affected thereby." 13 *C. J.* 885, § 81.

From the foregoing we conclude that the bequest in item 5 of testator's will creates an absolute estate in fee in *Mrs. Peeples*, and that the subsequent provision in said item that the trustee named "shall pay to said *Lewis Munford Peeples*, or to the heirs of her body should she be dead, all dividends that may accrue upon said shares of stock, and the proceeds of any sale that he may make of same, to be hers or theirs, as the case may be, absolutely," is not a limitation or lessening of the fee-simple estate first bequeathed, but is "alternative or substitutionary, and is to have effect only in the event of the first devisee dying before the death of the testator." *Crumley v. Scales*, 135 Ga.

300, 305, 309, 69 S. E. 531. It follows that the bequest in item 5 confers on Mrs. Peebles, who survived the testator, the title in fee to the stock of the Etowah Development Company, and that she is entitled to it without a sale by the trustee, if she so elects; she being of legal age and laboring under no legal disability.

[2] 2. The next question to be considered is whether the trust created by item 5 of the testator's will is executed or executory. This question was first raised by the demurrer to the petition, which demurrer was overruled by the court. It is insisted by the plaintiff in error that item 5 created a valid continuing trust for Mrs. Peebles, on the ground of wasteful and spendthrift habits of Mrs. Peebles; in other words, that it created "a spendthrift trust" for her. But the petition alleges to the contrary. On this point it is alleged that at the time testator made his will Mrs. Peebles was over 21 years of age and of sound mind, and has since that time remained of sound mind, and is fully capable of receiving, owning, controlling, and enjoying property in her own right without the intervention of a trustee, and was not then, and is not now, of the class of persons specified in section 3729 of the Civil Code of 1910, for whom trust estates may be created in this state; and therefore the plaintiff insists that the bequest of one-half of the shares of stock in the Etowah Development Company to Robert S. Munford, in trust for plaintiff, is not a valid continuing trust, but became an executed trust for the benefit of the plaintiff alone, and that she is now entitled to have the perfect legal title to the bequest vested in her, free from the attempted trust. These allegations, so far as well pleaded, must be taken as true on demurrer, and we are of the opinion that the court did not err in overruling the demurrer for any reason assigned; and on the trial of the merits of the injunction feature of the case, the court did not err in granting the injunction.

Under item 5 of the will, in case of the sale of the mining stock by the trustee, the proceeds of the sale are to be turned over to Mrs. Peebles absolutely and in her own right; and if the testator thought his daughter capable of managing the income from and proceeds of the sale of the stock, as he evidently did, it is difficult to see why she should not have the capacity to vote her own stock in electing directors, who can secure competent persons to conduct the operations of the Etowah Development Company, and otherwise to protect her own interests in connection with the stock. The question resolves itself into this: Can a trust estate be created in this state for the benefit of a person who is sui juris? In such a case, says Turner, J., delivering the opinion of the court

in *Thompson v. Sanders*, 118 Ga. 928, 930, 45 S. E. 715, 716:

"The statute of uses immediately transfers the legal estate to the use, and no trust is created, although express words of trust are used. So absolute is the statute that it will operate upon all conveyances attempting to set up such a trust, although it be the plain intention of the settler that the estate should vest and remain in the trustee named; for the intention of the citizen cannot control express enactments of the Legislature or positive rules of property."

It was stated and held in the above case:

"Where a testator by his will devised certain land to W. S., 'in trust for his wife, M. A., and her children, during his life, and at his death to be their property, and this property not to be sold for debts contracted by him, to have and to hold the same in trust for his wife and children,' the trust was immediately executed as to the wife, she being of age, and as to the children as they respectively came of age."

And see *Gray v. Obear*, 54 Ga. 231, 235; *Banks v. Sloat*, 69 Ga. 330; *Kille v. Fleming*, 78 Ga. 1; *Harrold v. Westbrook*, 78 Ga. 5, 2 S. E. 695; *Parrott v. Dyer*, 105 Ga. 93, 31 S. E. 417; *Brantley v. Porter*, 111 Ga. 886, 36 S. E. 170; *Fleming v. Hughes*, 99 Ga. 444, 27 S. E. 791, and cases cited; *Wright v. Hill*, 140 Ga. 567, 79 S. E. 546; *Armour Fertilizer Works v. Lacy*, 146 Ga. 196 (2), 91 S. E. 12; *Lester v. Stephens*, 113 Ga. 495, 499, 39 S. E. 109. And see cases in which realty, or realty and personalty, was devised and bequeathed. *Bowman v. Long*, 26 Ga. 142, 147; *De Vaughn v. Hays*, 140 Ga. 208, 78 S. E. 844.

The Civil Code of 1910, § 3729, provides as follows:

"Trust estates may be created for the benefit of any minor, or person non compos mentis. Any person competent by law to execute a will or deed may, by such instrument duly executed, create a trust for any male person of age, whenever in fact such person is, on account of mental weakness, intemperate habits, wasteful and profligate habits, unfit to be entrusted with the right and management of property: Provided, the requisitions of the law in all other respects are complied with; and provided further, if when so created by deed, the same shall be recorded where the cestui qui trust resides, within three months from its execution, and if not so recorded the same shall be null and void: Provided also, if at any time the grounds of such trust shall cease, then the beneficiary shall be possessed legally and fully of the same estate as was held in trust, and any person interested may file any proper proceeding in the superior court, where the trustee resides, to have the trust annulled on that ground, if he so desires. Any person having claims against the beneficiary may avail himself of the provisions of the Code in relation to condemning trust property at common law."

Even if the trust created can be construed as a "spendthrift trust," the plaintiff is

seeking in the manner provided in the foregoing section of the Code to have the trust declared void for the reasons stated in the petition, viz. that she is over 21 years of age and fully capable of managing her own property. We think she has met this requirement. See *De Vaughn v. Hays*, 140 Ga. 208, 211, 78 S. E. 844.

In the instant case the provisions of the will do not expressly create a "spendthrift trust," but, on the contrary, the testator's direction, in item 5, that the trustee might sell the mining stock and turn over to the cestui qui trust the proceeds of the sale absolutely, indicates to the contrary. Other provisions of the will also give the daughter valuable property absolutely, which negatives the idea of the testator creating a "spendthrift trust" for his daughter. And still other provisions of the will than in item 5 created Mrs. Peeples a trustee, for herself and children, of valuable property devised. In addition to the foregoing, the testator, in item 8 of his will, provided that after payment of all of his just debts and expenses of executing his will and administering his estate, and after satisfying the "foregoing legacies," his estate—

"be divided as nearly as practicable into two equal shares, including therein all property, both real and personal, including jewelry and silverware, accounts, notes, stocks, bonds, choses in action of every character, and property of every description, whether tangible or intangible, except money, in kind, and that the money of my estate, including that arising from my life insurance, be then apportioned to each of my said two shares of property in kind, in such proportion as to equalize the two shares in valuation; and I give, devise, and bequeath one of said equal shares to my son, Robert S. Munford, absolutely, and I give, devise, and bequeath the other of said equal shares to my daughter, Lewis Munford Peeples, absolutely."

And then the testator provides, in case of disagreement as to the valuation of the property left by the residuary clause of his will, as to how the disagreement shall be settled. It seems evident, therefore, from this and other items of the will to which reference has been made, that the testator was of the opinion that his daughter had the capacity to manage property which was bequeathed to her absolutely. In the Illinois case of *O'Hare v. Johnston*, 273 Ill. 458, 113 N. E. 127, the court, having under consideration a will for construction and whether it created a spendthrift trust, said:

"He [testator] would hardly have appointed his son one of the executors, if he had considered him a person not to be trusted with business matters."

And it seems to us that the testator in the instant case would not have appointed his daughter as trustee, for herself and her children, of valuable property, as he did in item 6 of the will, if he had considered her a

spendthrift and incapable of managing her own business affairs, or the interests of her children. We know of no presumption in such circumstances in favor of a spendthrift trust; and if testator had so intended, it would have been an easy matter for him to have said so. But he has failed to say so expressly. It may be that he created the trust for an entirely different reason, but that is left entirely to conjecture. Whatever the reason for creating this trust, if it is done contrary to law, and made for one sui juris, and contrary to public policy, the intention of the settlor must yield to the rule of law which prohibits the creation of trusts for one sui juris. However, this general statement must be understood with the qualification that—

"If there be limitations over, and restrictions in favor of other persons, for whose use a trust is capable of being created, the trust estate would be upheld." *Sargent v. Burdett*, 96 Ga. 111, 117, 22 S. E. 667, 668.

In the present case we are of the opinion that there is no life estate created with limitation over. The power was given the trustee in item 5 of the will to sell the stock of the Etowah Development Company, "as in his judgment may be best for the interests of all parties concerned." It is insisted that this gave the trustee the power to refuse to sell it, and, further, that it conferred on him a personal right, in that he owned most of the other stock, and therefore he could exercise a discretion in using the power which would be for his personal advantage. It is also insisted, on the other hand, that the only reasonable construction of this item of the will is that the trustee should make the sale within a reasonable time, and turn over the proceeds to the cestui que trust, Mrs. Peeples, as the sole beneficiary, provided she should not die before the sale occurred. We think the latter view the better one. Otherwise the trustee could arbitrarily prolong the trust in his own interest as against the interest of the cestui que trust. The rule has been stated that—

"Where the creator of a trust makes its duration discretionary with the trustee, still such discretion is not arbitrary, but must be exercised reasonably and in the interest of the cestui que trust." 39 Cyc. 95, note 47; *Avery v. Avery*, 90 Ky. 618, 14 S. W. 593; *Cushman v. Cushman*, 102 App. Div. 377, 92 N. Y. Supp. 833; *In re Walkerly*, 106 Cal. 627, 41 Pac. 772, 49 Am. St. Rep. 131; *In re Cooper's Estate*, 150 Pa. 576, 24 Atl. 1057, 30 Am. St. Rep. 829, 831.

But it is further insisted by the plaintiff in error that the trust created in item 5 was created in order to protect his contingent remainder; that the legal title to the stock was put in him, with the discretion to sell the Etowah Mining stock "as in his judgment may be best for the interests of all parties concern-

ed," and thus to prevent Mrs. Peeples from disposing of it during her lifetime and defeating the contingent remainder in case of the sale or disposition of the stock before the death of the plaintiff. The reply to this contention is that the trust is created expressly for the plaintiff. No one else is named as cestui que trust in the will, and this fact throws much light on the question as to whether one of the purposes of the trust was the protection of the contingent remainder of Robert S. Munford. And even if the trust should be construed as one created for Mrs. Peeples as life tenant, it could not by reason of that fact alone be also construed to mean that it was created to protect the contingent remainder estate, unless the testator's intention in this respect is clearly expressed, or necessarily implied from the language of the will; and we think no such language is contained in the will. And this being so, we think that in the circumstances of the case the trust for Mrs. Peeples, the owner of the estate preceding the contingent remainder estate, will be considered as executed from the death of the testator, and that Mrs. Peeples is entitled to the possession of, and title to, the property free from any trust whatever. Compare *Smith v. Frost*, 144 Ga. 115, 86 S. E. 235; *Tillman v. Banks*, 116 Ga. 250, 252, 42 S. E. 517; *Glover v. Stamps*, 73 Ga. 209, 54 Am. Rep. 870; *Overstreet v. Sullivan*, 113 Ga. 891, 39 S. E. 431; also *Brantley v. Porter*, *Fleming v. Hughes*, *Kile v. Fleming*, and *Harrold v. Westbrook*, *supra*. In the *Fleming* case, *Simmons, C. J.*, speaking for the court, said:

"As shown by the decisions of this court first above mentioned, and the authorities cited therein, our Married Woman's Act of 1886 terminates a trust far quicker than the statute of uses. Under the latter statute, a trust for a woman, married or single, became executed only by the death of herself or her husband in her lifetime; while, under our act first mentioned, the trust, if created before, terminates at the date of the act, if the cestui que trust was then 21 years of age, and if afterwards, upon like condition, it became a legal estate instant, from the date of the deed, or the death of the testate, whether the estate be solely for the beneficiary, or there is a limitation over in trust, or not. Therefore the cases of *Askew v. Patterson*, 53 Ga. 209, *Ford v. Cook*, 73 Ga. 215, *Knorr v. Raymond*, 73 Ga. 764, *Cushman v. Coleman*, 92 Ga. 772, 774, 775, and other cases like them, where trusts were expressly created for both the life tenants and remaindermen, and the life tenants died before our Married Woman's Act, as well as such cases of trust as have been determined otherwise than as above after said act, without its effect being made a question for this court to decide, are clearly distinguishable from, and have no appli-

cation whatever to, the case at bar. Moreover, under the old law in England, and possibly in this state before the Code, a trust to preserve a contingent remainder, which was only necessary because such a remainder was then liable to be defeated by the premature termination of the life estate by forfeiture or otherwise, was usually by granting or devising the remainder after the life estate, and during the life of the life tenant, to a trustee for that express purpose, with a legal remainder over to the contingent beneficiaries after the death of the life tenant (*Tiedeman on Real Property*, 424; *2 Washburn on Real Property*, 509; *4 Kent's Com.* 256; *2 Blackstone*, 171, 172; *Fearne on Contingent Remainders*, m. p. 323; *2 Leading Cases in American Law of Real Property*, p. 367; note 17 Am. St. Rep. 839), or by making the grant or devise direct to a trustee for the life tenant, with the legal remainder over (*Moody v. Walters*, 16 Vesey, 294)."

In the instant case the trust is expressly declared to be for Mrs. Peeples, and no trust is expressly declared, or arises by necessary implication, in favor of the contingent remainderman, Munford; and, this being so, it follows that no trust can be declared created for the contingent remainderman. See, in this connection, *Overstreet v. Sullivan*, *supra*. If it was the purpose of the testator in creating the trust to preserve the contingent remainder for the plaintiff in error, he would doubtless not have directed the trustee, if he deemed it best for the interests of all parties concerned, to sell the mining stock and turn the proceeds over to Mrs. Peeples absolutely. If the purpose was to protect the contingent remainder in the event of sale, the testator would, in all probability, have had the trust attach to the proceeds of the sale of the stock, and would have empowered the trustee to retain the proceeds of the sale during the life of the first taker (Mrs. Peeples) and pay her the interest thereon during her life, with remainder over. But this was not done, but instead a trustee was appointed, with power to sell the stock, the trustee, according to the evidence, being a mining expert, who could sell to better advantage than his sister, who was not, and then turn over the proceeds of the sale to her absolutely.

In the view we take of this case, we think there was no intention of the testator, as gathered from the whole will, to create a trustee for the contingent remainderman. We are of the opinion that the court did not err in any of the rulings, nor in granting the order complained of, including the temporary injunction.

Judgment affirmed.

All the Justices concur.

(152 Ga. 71)

PENTON v. MYERS PARK PLACE CORPORATION et al. (No. 2135.)

(Supreme Court of Georgia. Sept. 15, 1921.)

(Syllabus by the Court.)

Executors and administrators §520—**Vendor and purchaser** §130(7)—**Prescriptive title sufficient basis for suit for specific performance; court held to have jurisdiction of suit by foreign executrix to sell land.**

A testator, a citizen of the state of New Jersey, died on April 26, 1884, leaving a will which was duly probated in that state. By the terms of the will all the property of the testator, wherever being, was left to his wife "for and during her natural life." After termination of this life estate, one half of the income from the entire property was directed to be paid to Mary, the daughter of James Wayne Cuyler, a deceased son of the testator; and the other half of such income was directed to be paid to Alice H. Cuyler, the mother of Mary and widow of testator's son, so long as she remained such widow. Should Alice H. marry again, \$10,000 from the corpus of testator's estate should be paid to her in lieu of the "income" above mentioned, and from and after such marriage the whole of the income from the rest of testator's estate should be paid to Mary so long as she should live. Should she die leaving a child or children, or the representative of children, and should her mother, Alice H. Cuyler, be living and unmarried, the executors were directed to pay to her out of the estate of the testator the sum of \$10,000, and to divide the rest of the estate equally among such child or children or the representatives of children of Mary, the daughter, that may be living at the time of her death. Should she die without leaving child or children, or the representative of children, leaving her mother, Alice H., alive and unmarried, then Alice H. should receive the sum of \$10,000, and all the rest, residue, and remainder of the estate should go to the heirs at law of the testator's two deceased brothers, Richard R. Cuyler and Telemon Cuyler, to be equally divided among them, and to their executors, administrators, and assigns forever. Should Alice H. not be alive or should she be married at the time of the death of Mary, and should Mary die without leaving child or children or the representative of children, all of the estate of the testator should be equally distributed to the heirs at law of his above-named deceased brothers. By a codicil Alice H. was nominated as coexecutrix of the will.

Only one of the nominated executors and Alice H., executrix, qualified. The executor subsequently died, leaving Alice H. as sole surviving executrix. The first life estate terminated at the death of the testator's widow on June 29, 1885. Mary, the daughter of Alice H., became Mary Edgerton by marriage; and there were three children, the issue of said marriage—Cecely, a daughter, who had attained majority prior to June 14, 1911, and two sons, Philip and Rowland, who died unmarried before said date, without leaving child or children. By a second marriage said Mary became McCreery, and the issue of that mar-

riage on June 14, 1911, was one child, Isabel, 8 years of age. Another child was born after the date just mentioned. There were living also, on June 14, 1911, one daughter and grandchildren and great-grandchildren of the two deceased brothers of the testator. Of the property left by the testator there were certain lands in Chatham county, Ga. On June 14, 1911, Alice H., never having married again, instituted a suit in the superior court of Chatham county, Ga., in her individual capacity and as sole surviving executrix. Her daughter Mary and such of her children as were then in life, and the descendants above mentioned of the testator's two deceased brothers, were named as parties defendants. All of the defendants except one, being nonresidents of the state, were served by publication, and guardians ad litem were appointed for such of them as were minors, and they accepted the appointment and served as such. The resident defendant was also duly served. The petition alleged all that is stated above, and further: "Petitioner shows that all the above 200 acres of land is farming lands, and unproductive, save for small rentals; that some 40 acres of said tract known as Cuyler lots Nos. 7 and 8 became part of the city of Savannah about the year 1906, known as the south part of lot 8 Kehoe Ward, the north part lot 8 Oliver Ward, and all of lot 7 Oliver Ward, and shortly thereafter the property was assessed for taxes upon the basis of city lots; and that petitioner, in February, 1910, paid \$1,013.92 city taxes for the years 1907 and 1908, and, having gotten the assessment reduced, your petitioner thereafter has been compelled to pay in the neighborhood of \$325.25 annually as city taxes on this property, not to mention the state and county taxes, \$93.72 annually; and your petitioner avers that the income from said land, amounting to less than \$100 annually, is wholly insufficient to pay the taxes, and that petitioner has been compelled to pay the taxes out of her own pocket, and the estate is now due her upon the item of taxes alone \$3,500, and said items will increase indefinitely unless this honorable court afford some relief to petitioner. Petitioner shows that an offer has been made to buy these 40 acres, also one of the swamp lots, the north 15 acres of lot 26, at \$150 per acre or \$2,250; and other offers will be made, these 40 acres known as the south part of lot 8 Kehoe Ward, the north part of 8 Oliver Ward, and all of lot 7 Oliver Ward, for the sum of \$22,500, of which \$5,000 is cash, balance payable in one, two, three, and four years at 5 per cent. per annum. And your petitioner is advised and believes that this would be a good sale for the property; and she desires to sell from time to time all of said property and make title to the same in order to reimburse herself, and in order that the balance of the purchase price may be preserved and distributed in accordance with the will of John M. Cuyler, it being manifestly to the best interest of all concerned that this be done." The prayer was: "That the executrix be authorized to sell the said tract of about 40 acres, formerly known as 7 and 8 Cuyler lots, and that she be authorized to execute and deliver a deed to the purchaser as above stated; that the proceeds of the sale be applied to repay her for her advances; that the surplus be

turned over to her as executrix under the laws of Georgia governing the distribution of funds to foreign executors, or upon such terms as to the court may seem proper."

The defendants appeared and demurred to the petition, on the following grounds: (1) That said petition sets forth no cause of action. (2) That, from an examination of the will exhibited with said petition, it appears that the executrix under said will is not clothed with any trust in relation to the title to said lands, and without being so clothed is without power to institute proceedings for the sale of said land. (3) That said petition shows no facts that would authorize the payment of taxes out of the funds arising from said sale, in the event that said sale can be made." The demurrer was overruled. The answer admitted all of the allegations of the petition, and added the following: "Further answering said petition, your defendants show unto the court that, while they admit the facts shown in said petition and that they are all of the parties interested under said will, they deny that the said plaintiffs and particularly that the said executrix has any right or power to bring about the sale of the said property; for it will be seen from an examination of the will in said case that said executrix is not clothed with any trust in relation to the title of said lands, and consequently said executrix cannot have or maintain said proceedings."

At the time of filing the suit the plaintiff also filed in the court a copy of the probated will of the testator and the proceedings thereon in the surrogate's court of New Jersey, duly exemplified under the act of Congress. On the trial the jury returned the verdict: "We, the jury, find in favor of the contentions of plaintiff." On the verdict so rendered the court entered the following decree: "Whereupon it is considered, ordered, and adjudged that the prayers of said petition be and the same are hereby granted. (1) That Alice Cuyler, executrix, of the estate of John M. Cuyler, be and she is hereby directed to make, execute, and deliver a deed conveying in fee simple, unto Collins Brothers Company and their assigns, at and for the sum and price of \$550 per acre for 40 acres, more or less, being approximately twenty-two thousand five hundred dollars (\$22,500), with interest thereon from October 19, 1911, at the rate of five per cent. (5%) per annum, those forty acres (40), more or less, of land situate, lying, and being in the county of Chatham, and known upon the map or plan of the city of Savannah as the south part of lot 8 Kehoe Ward, and the north part of lot 8 Oliver Ward, and all of lot 7 Oliver Ward; said land being more fully described in the petition in this case, reference to the same being hereby made."

The Myers Park Place Corporation, as remote grantee of Alice H. Cuyler, executrix of the will of John M. Cuyler, deceased, instituted an equitable action in the superior court of Chatham county, against George H. Penton and Alice H. Cuyler as executrix, for specific performance of a contract for the sale of two

certain lots of land in a subdivision of Cuyler lot No. 7 in Oliver Ward, which plaintiffs had contracted to sell to said Penton, and to settle plaintiff's rights as against the estate of the testator. Penton raised two objections to the grant of the relief prayed against him: (1) That the testator did not have a deed to said lot No. 7, and that the estate did not have any title to said lot which the executrix could convey; (2) that the court decreeing the sale of the land was without jurisdiction to render the decree, and consequently the sale did not divest the title of all persons who might be interested under the will.

The case was submitted to the judge for decision without a jury, upon an agreed statement of facts, and judgment was rendered for the plaintiff. The defendant excepted. So far as necessary to be stated, the agreed facts are as follows: There could not be found of record any deed to the testator conveying said lot No. 7, but that lot was included in the property claimed by the widow of the testator as part of the estate of the latter, when she died in 1885. Shortly before her death she turned the property over to certain persons to manage it as agents of the testator's estate. Subsequently the representatives of the testator's estate took actual possession of all of lot No. 7, with other property of the testator, and maintained such possession openly, notoriously, exclusively, and continuously for a period of more than 20 years before June 14, 1911. Upon the foregoing statement of facts we rule as follows:

1. On the basis of the agreed statement of facts, the trial judge was authorized to find that the estate of the testator had a valid prescriptive title to the land specified in the contract that was the basis of the suit for specific performance.

2. The court of equity had jurisdiction to entertain the suit for leave to sell the land and the decree ordering the sale was valid and binding upon all persons who might take under the will. *Cooney v. Walton*, 151 Ga. —, 106 S. E. 167; *Donaldson v. Donaldson*, 151 Ga. —, 106 S. E. 172.

3. The evidence submitted by agreed statement of facts was sufficient to authorize the decree for specific performance.

Error from Superior Court, Chatham County; P. W. Meldrim, Judge.

Suit by the Myers Park Place Corporation against George H. Penton and Alice H. Cuyler, executrix, for specific performance. Judgment for plaintiff, and G. H. Penton brings error. Affirmed.

Geo. H. Richter, of Savannah, for plaintiff in error.

W. W. Gordon and E. S. Elliott, both of Savannah, for defendants in error.

ATKINSON, J. Judgment affirmed. All the Justices concur.

(152 Ga. 81)

POWELL et al. v. STATE. (No. 2588.)

(Supreme Court of Georgia. Sept. 15, 1921.)

(Syllabus by the Court.)

1. Appeal and error §15—Two defendants, adjudged guilty of contempt, may bring joint bill of exceptions on one writ of error.

Where a rule nisi for contempt of court was brought against two defendants jointly, and they made a joint answer thereto and were tried together, and the judge, sitting both as a court and jury, after hearing evidence rendered two separate judgments, in one of which he adjudged one of the defendants to be in contempt of court and sentenced him to pay \$100 and to serve 20 days in jail, and in the other he adjudged the other defendant to be in contempt of court and sentenced him to pay \$100, the two defendants in these circumstances may bring a joint bill of exceptions from such judgment to the court having jurisdiction thereof. Nothing in the foregoing ruling is to be construed as preventing each of the defendants from excepting to the judgment in his own case.

2. Contempt §44—City court of Miller county had authority to punish for contempt.

Conceding, without deciding, that the city court of Miller county "has no inherent power to define contempts of court," still under section 4643 of the Civil Code of 1910 the city court of Miller county has authority to issue attachments and inflict summary punishment for contempt of court in the circumstances enumerated in the second question propounded by the Court of Appeals, and which is answered in the second division of the opinion.

Certified Questions from Court of Appeals.

Contempt proceeding by the State against H. C. Powell and another. From judgments adjudging them guilty of contempt, the defendants took exceptions to the Court of Appeals, which certified questions to Supreme Court. Questions answered.

G. B. Cowart, of Colquitt, Benton Odom, of Newton, and E. E. Cox, of Camilla, for plaintiffs in error.

N. L. Stapleton, Sol., of Colquitt, for the State.

HILL, J. 1. The Court of Appeals requested instructions upon the following questions, a determination of which is necessary for a decision of this case:

"(1) A rule nisi for contempt of court was brought against two defendants jointly; they made a joint answer thereto, and were tried together. After hearing evidence, the judge, who was sitting both as court and jury, rendered two separate written findings and judgments. In one he adjudged one of the defendants to be in contempt of court, and sentenced him to pay \$100 and to serve 20 days in jail; and in the other he adjudged the other defendant to be in contempt of court and sentenced him to pay \$100. Under these circumstances,

can the two defendants bring a joint bill of exceptions to this court?

"(2) If the above question is answered in the affirmative, then an answer is requested to the following question: Several criminal cases against Dewey Powell and Frank Heard were pending in the city court of Miller county, and Elisha Roland had been subpoenaed to attend at a certain specified term of the court as a witness for the state in those cases. The witness Roland lived in Early county. Upon the hearing of the contempt proceedings the evidence for the state showed that after the witness Roland had been subpoenaed, but before he had appeared at court, the fathers of Dewey Powell and Frank Heard saw him in Early county and endeavored to bribe him to leave the state, and not to appear and testify against their sons in the city court of Miller county. There was also evidence which authorized a finding that the father of Dewey Powell, while the above-mentioned cases were pending in the city court of Miller county, and after the witness Roland had been subpoenaed as a witness therein, and before he had appeared at court, endeavored in the county of Miller to bribe another person to prevent the witness Roland from attending court as a witness against his son. Conceding that the city court of Miller county has no inherent power to define contempts of court, and is limited to those set out in section 4643 of the Civil Code of 1910 (Hewitt v. State, 12 Ga. App. 168, 76 S. E. 1054), has that court authority, under the foregoing circumstances, to punish the fathers of Dewey Powell and Frank Heard, or either of them, for a contempt of court?"

[1] 1. The first question propounded by the Court of Appeals must be answered in the affirmative. Undoubtedly each one of the defendants had the right to except to the judgment rendered against him separately, but the two defendants can bring a joint bill of exceptions to review the judgments by one writ of error. The case of *Futch v. Mathis*, 148 Ga. 558, 97 S. E. 516, was where two separate actions were brought against two defendants, and by agreement of counsel they were consolidated and tried as one case, and separate verdicts and judgments were rendered in each case in favor of the plaintiffs. By agreement of counsel representing both suits, motions for new trial were consolidated and heard as one motion upon one record, and there was but one judgment overruling the two motions, and but one bill of exceptions was brought to this court. It was held in that case that each of the defendants had the right to except to the overruling of the motion for new trial in his own case. But it was further held that the consolidation of the two motions for new trial, and the overruling of the motions in one judgment, did not authorize the two defendants to unite in one bill of exceptions to review judgments in two distinct cases by one writ of error. The writ of error in that case was dismissed, because this court was of the opinion that there was no provision

of law for such procedure, and that the Supreme Court was without jurisdiction to entertain such bill of exceptions. The following cases were cited in support of that view: *Western Assurance Co. v. Way*, 98 Ga. 746, 27 S. E. 187; *Center v. Fickett Paper Co.*, 117 Ga. 222, 43 S. E. 498; *Dickey v. State*, 101 Ga. 572, 28 S. E. 980; *Averitt v. Simpson*, 147 Ga. 352, 94 S. E. 242; *Cutter v. Central Bank, etc.*, 147 Ga. 754, 95 S. E. 285. And see, also, to the same effect, *Walker v. Conn.*, 112 Ga. 314, 37 S. E. 408; *Erwin v. Ennis*, 104 Ga. 861, 31 S. E. 444; *Bates v. Harris*, 112 Ga. 32, 34, 37 S. E. 105; *Wells v. Coker Banking Co.*, 113 Ga. 857, 39 S. E. 298; *Purvin v. Ferst's Sons & Co.*, 114 Ga. 689, 40 S. E. 723; *Cole v. Stanley*, 118 Ga. 259, 45 S. E. 282; *Valdosta Guano Co. v. Hart*, 119 Ga. 909, 47 S. E. 212.

In the cases cited in support of the *Futch Case*, supra, and like cases, there were two cases to be tried, but by agreement or order consolidating the two cases they were tried as one; and in the case of *Brown v. L. & N. R. Co.*, 117 Ga. 222, 43 S. E. 498, this court held that an order passed upon agreement of counsel that two suits, each based solely upon a common-law cause of action in favor of different plaintiffs and against the same defendants, did not have the effect to merge the two cases into one, but the effect of such order was to provide simply that the suits should be consolidated only to the extent of being tried together. But in the present case it appears that there was but one rule nisi against the defendants jointly for contempt; and while there were two separate judgments by the judge, sitting both as court and jury, the judgment was the same in each case, except as to the decree of punishment inflicted upon each defendant, which was different. So that the present case is distinguishable from the *Futch Case*, and those upon which it was based, and similar cases, in that there were two cases really, and judgments entered in those cases; whereas there was but one case tried in the present instance. This being so, we think that a single bill of exceptions will lie in the case under consideration, and that the court in which the bill of exceptions is pending has jurisdiction to determine the same.

[2] 2. Conceding, without deciding, that the city court of Miller county "has no inherent power to define contempts of court," we will consider whether that court has power to punish for contempts, under Civil Code (1910) § 4643. That section is as follows:

"The powers of the several courts of this state to issue attachments and inflict summary punishment for contempt of court shall not extend to any cases, except the misbehavior of any person or persons in the presence of said courts or so near thereto as to obstruct the administration of justice, misbehavior of any of the officers of said courts in their official transactions, and the disobedience or re-

sistance by any officer of said courts, party, juror, witness, or other person or persons to any lawful writ, process, order, rule, decree, or command of the said courts," etc.

The latter part of the same action provides that—

"The disobedience or resistance of any officer of said courts, party, juror, witness, or other person or persons to any lawful writ, process, order, rule, decree, or command of the said courts" (*italics ours*), shall be a contempt of court.

From the statement of facts contained in the second question propounded by the Court of Appeals, we think it is clear that the fathers of the boys indicted were not "disobedient" to, but did, under the above section of the Code, "resist," the lawful writ of the court. The word "resist" here no doubt was used by the Legislature in its ordinary and usual signification. The word "resist" is defined in the *Standard Dictionary* as follows:

"To oppose, strive against, or obstruct; * * * to bring to naught, to baffle," etc.

And the conduct of the contemnors in this case falls within practically all of the descriptive terms contained in this definition. The bribing or attempting to bribe the witness who had been subpoenaed to appear against the sons of the respondent was opposing, striving against, or attempting to obstruct the processes of the court, and was intended to bring to naught and baffle such processes of the court, and therefore, in every respect, falls within the meaning given by the lexicographers to the word "resist" as contained in section 4643 of the Civil Code of 1910, and should be given the meaning here ascribed to it in view of the context of the statute, though it would not necessarily be applicable to the term "resist" as used in Penal Code (1910) § 811, because there the act of resisting contemplated and denounced as criminal is one committed while the officer is in the act of executing or attempting to execute some process of the court. We think, therefore, that the city court of Miller county has authority, under the circumstances detailed in question 2, to issue attachments and inflict summary punishment upon the fathers of Dewey Powell and Frank Heard, or either of them, for a contempt of court under Civil Code, § 4643, on the ground that they bribed or attempted to bribe the witness from attending court in obedience to the subpoena.

We do not think, however, that the mere effort to secure the services of a third person to induce the witness not to attend, where there is nothing to show that this effort to secure such services resulted in an effort upon the part of the third person to bribe the witness, would of itself constitute a contempt within the meaning of this statute.

We think, therefore, the second question propounded by the Court of Appeals must likewise be answered in the affirmative, except as to the conduct of one of the contemnors in endeavoring to bribe a third person to prevent the witness Roland from attending court as a witness against the respondents' sons, which would not be a contempt of court, as indicated above.

All the Justices concur.

(152 Ga. 97)

ROBERTS v. ROWELL et al. (No. 2258.)

(Supreme Court of Georgia. Sept. 24, 1921.)

(Syllabus by the Court.)

Appeal and error \S 588—No review of evidence, unless properly briefed.

There being no bona fide effort to brief the evidence in the case, the so-called brief of evidence being largely composed of objections to evidence and the argument of counsel thereon, colloquies between counsel and between counsel and the court, and various statements of the court in ruling on the admissibility of evidence, such document will not be considered as a brief of evidence. Accordingly, this court will not review the evidence, and, as no question is presented by the bill of exceptions which can be intelligently considered and passed upon without reference to the evidence, the judgment below must be affirmed. *Bishop v. Brown*, 138 Ga. 738, 75 S. E. 1119, and citations.

Error from Superior Court, Haralson County; F. A. Irwin, Judge.

Action between G. M. Roberts and J. A. Rowell and others. From an adverse judgment, the former brings error. Affirmed.

Lloyd Thomas, of Tallapoosa, and J. S. Edwards, of Buchanan, for plaintiff in error.

Eugene Spradlin, of Carrollton, M. J. Head, of Tallapoosa, and W. P. Robinson and Price Edwards, both of Buchanan, for defendants in error.

ATKINSON, J. Judgment affirmed. All the Justices concur.

(152 Ga. 76)

DAVIS et al. v. ORLAND CONSOL. SCHOOL DIST. et al. (No. 2216.)

(Supreme Court of Georgia. Sept. 15, 1921.)

(Syllabus by the Court.)

1. Schools and school districts \S 97(4½)—Demurrer to petition to validate school bonds held properly overruled.

The court did not err in overruling the demurrer filed by the interveners to the amended petition and answer.

2. Appeal and error \S 1078(1)—Assignments, not referred to in brief, treated as abandoned.

Assignments of error, to which no reference is made in the brief of the plaintiff in error, will be treated as abandoned.

3. Schools and school districts \S 91—Statute providing for election for issuance of bonds for consolidated district held valid.

It is contended that the act under which the election was held is illegal and void, and that the bonds cannot be validated, for the reasons: (a) Said act does not provide how or in what manner money to pay off the bonds shall be raised; (b) said act does not specify the property upon which nor the territory within which a tax for that purpose shall be levied; (c) said act does not vest in any person or persons authority to issue, sell, and dispose of the bonds, nor to levy and collect a tax for their liquidation. This contention appears to be without merit, upon consideration of the act of 1919 (Acts 1919, pp. 288, 349), known as the "Code of School Laws." Section 143 of the act of 1919 provides: "When one-fourth of the registered qualified voters of a school district, consolidated district, or county, in which a local tax is now or may hereafter be levied for school purposes, or of a district in a county now levying a local tax, shall be filed with the board of trustees, or board of education of such a school district, consolidated district or county, a petition asking for an election for the purpose of determining whether or not bonds shall be issued for the purpose of building and equipping a school house or houses for said school district, consolidated district or county, the required number of petitioners to be determined by the said board of trustees, or board of education, it shall be the duty of said board of trustees, or board of education, to fix the amount, denomination, rate of interest, and dates when due, and call such election in terms of law now provided for a county issue of bonds. * * * The said board of trustees, or board of education, in case the election is for a bond issue, shall follow the law as required of county authorities as embodied in section 440 et seq. of the Code of 1914, volume 1, in the issue thereof." Section 442 of Civil Code of 1910 provides: "When said notice is given and said election held in accordance with the preceding section, if the requisite two thirds of the voters of the county, municipality, or division at said election vote for bonds, then the authority to issue the bonds in accordance with paragraphs 1 and 2, section 7, article 7 of the Constitution is hereby given to the proper officers of said county, municipality, or division." Section 145 of the act of 1919 provides: "The county authorities, in levying and assessing taxes for the purpose of paying the interest and returning and paying off said bonds shall, in the event that the entire county is not embraced within the area or territory in which said election is held, levy and assess such taxes only against the property located within the area or territory within which said election is held. For the purpose of taking care of the expense of these bonds for districts, consolidated districts, or county, the board of trustees or board of education shall recommend and the board of commissioners shall levy a tax not to exceed five mills on

the school district, consolidated district, or county, as the case may be."

4. Schools and school districts \Leftrightarrow 97(4)—Burden on persons attacking validity of school bonds to show proper petition was not presented.

It is contended that there is no evidence of the fact that one fourth of the qualified voters petitioned the Board of Trustees to call the election for bonds. After such election has been held the burden is upon those attacking its validity to show that a proper petition was not presented, and interveners in this case failed to establish their contention. *Wilson v. Dunn*, 143 Ga. 361, 85 S. E. 198; *Ray v. Swain*, 148 Ga. 208 (2), 96 S. E. 209.

5. Appeal and error \Leftrightarrow 1078(4)—Schools and school districts \Leftrightarrow 97(4½)—Evidence as to vote on issuance of bonds held sufficient to support judgment of validation; assignment as to evidence considered abandoned.

The evidence submitted to the court as to whether or not there was the requisite number of qualified votes in favor of the issuance of bonds is, without contradiction, to the effect that there were 112 registered qualified voters in the district, that 68 voted in favor of bonds, and 3 voted against bonds. This evidence was sufficient to support the judgment of validation.

(a) Some of this evidence was objected to, and error was assigned on its admission; but there is no reference in the brief of plaintiff in error to these assignments of error, and accordingly they will be considered as abandoned.

6. Schools and school districts \Leftrightarrow 97(7)—It is no reason for invalidating bonds that they are dated prior to date of election.

Where an election is held on the question of issuing bonds, as in the present case, on the 9th day of a given month, and it is proposed that such bonds, if issued, are to be dated on the 1st day of the same month, and shall bear interest from date at the rate of 6 per cent. per annum, and are to be paid off within 30 years, the fact that the bonds bear date eight days previous to the date of the election affords no reason why said bonds should not be validated.

7. Schools and school districts \Leftrightarrow 97(4½)—Provision for payment of bonds unnecessary before application for validation.

Where an election for bonds was held on the 9th day of July, 1920, and it is proposed that all of said bonds shall be paid off and retired on the 1st day of July, 1950, the fact that said bonds are dated July 1, 1920, will not make said bonds void on the ground that their issuance is not in conformity with paragraph 2, § 7, art. 7, of the Constitution of Georgia (Civ. Code 1910, § 6564), which provides as follows: "Any county, municipal corporation, or political division of this state, which shall incur any bonded indebtedness under the provisions of this Constitution, shall, at or before the time of so doing, provide for the assessment and collection of an annual tax, sufficient in amount to pay the principal and interest of said debt within thirty years from the date of the incurring of said indebtedness." It is not necessary under the Constitution that provision for the payment of such indebtedness shall be

made until "at or before" the liability is created, and such provision need not be made before the application for validation. *Epping v. City of Columbus*, 117 Ga. 263 (12).

8. Assignment of error—Abandonment.

All other assignments of error not specifically dealt with are either abandoned or are without merit.

Error from Superior Court, Treutlen County; E. D. Graham, Judge.

Petition by the Solicitor General of the Oconee Circuit, seeking validation of bonds proposed to be issued by the Orland Consolidated School District, in which A. R. Davis and others intervened. There was a judgment validating the bonds, and interveners bring error. Affirmed.

The solicitor general of the Oconee circuit filed a petition seeking the validation of bonds to the value of \$20,000, proposed to be issued by Orland consolidated school district, Treutlen county, the proceeds to be used for the purpose of building and equipping a schoolhouse in said district. The petition recited that a petition bearing the signatures of more than one-fourth of the registered qualified voters of the district, requesting that an election be held to determine whether the bonds should be issued, was presented to the board of trustees of said school district; that the board provided by proper resolution for the holding of the election, and caused notice to be published in the newspaper in which the advertisements of the sheriff of the county are carried, in full compliance with the law relating thereto; that the election was duly held; that the returns and tally sheets of said election, properly certified and presented to the board of trustees, showed that, of the 112 registered qualified voters in said district, 68 of 71 ballots cast in said election were favorable to the issuance of the bonds; that this number constituted a majority of the registered voters in said district, and more than two-thirds of the total number of votes polled; that said board of trustees had in writing personally notified the solicitor general of the facts above stated, and that the petition for validation was filed within 20 days from the date of the service of such notice. An answer was filed by Orland consolidated school district, which admitted all the allegations of the petition for validation, and averred that the district had no outstanding bonded indebtedness, that the total assessed value of property in the district amounted to \$328,117, and that the proposed issue of bonds would be within the constitutional limitation upon the debt which could be created by the district.

It is shown by the petition for validation that the election was held July 9th. There

appears in the record a copy of a resolution adopted by the board of trustees, dated July 10, 1920, providing that notice in writing of the result of the election be forthwith given to the solicitor general, and that he be requested to institute proper proceedings for the purpose of procuring the validation of the bonds. The petition for validation was filed on August 3, 1920, and it alleged that notice in writing of the result of the election was by the board of trustees served upon the solicitor general personally on July 23d. Certain taxpayers intervened, and demurred to the petition for validation and the answer thereto, upon the grounds: (1) Because the petition failed to show the date of service upon the solicitor general of written notice of the result of the election; (2) because the petition and answer are defective, in that they fail to show or have attached the list of voters used in said election or the list of qualified voters of said district, and in that they fail to show the order of the trustees of said district calling said election, and in that they fail to show the tally sheets of said election, and also fail to show an order organizing said Orland school district; (3) that said petition and answer are insufficient, in that they fail to show the facts necessary to authorize the validation of said bonds.

The demurrer was overruled, and the interveners then filed a plea denying all the material allegations of the petition, and objecting to the validation of the bonds, on the grounds: (1) That the order and notice calling said bond election is insufficient, for the reasons: (a) It fails to name the dates and years interest payments are to be made, and fails to show the amount of interest to be paid annually or semiannually. (b) It provides that the proposed issue of bonds shall bear date July 1, 1920, and shall bear interest from that date, which date was prior to the holding of the election. (2) That said bonds cannot be legally validated and issued, for the reason that the call for election and notice thereof does not provide for the payment of the bonds within 30 years. (3) That the petition for validation of said bond issue shows that it was not filed in the clerk's office of Treutlen superior court within 20 days from the date that notice in writing of said election was served on the solicitor general. (4) That the election and the act under which it was held are illegal and void, and that the bonds cannot be validated, for the reasons: (a) Said act does not provide how or in what manner money to pay off the bonds should be raised. (b) Said act does not specify the property upon which nor the territory within which a tax for that purpose shall be levied. (c) Said act does not vest in any person or persons authority to issue, sell, and dispose of the

bonds, nor to levy and collect a tax for their liquidation.

Upon these pleadings the matter proceeded to trial, and after hearing the evidence the court entered a judgment validating the bonds. There are assignments of error on the overruling of objections to evidence, but there is no mention of these in the brief for the plaintiffs in error.

W. J. Wallace, of Soperton, for plaintiffs in error.

W. A. Wooten, of Eastman, A. O. Saffold, of Vidalia, and N. L. Gillis, Jr., and Will Stallings, both of Soperton, for defendants in error.

BECK, P. J. Judgment affirmed. All the Justices concur.

(152 Ga. 80)

CITIZENS' TRUST CO. v. BUTLER et al.
(No. 2230.)

(Supreme Court of Georgia. Sept. 15, 1921.)

(Syllabus by the Court.)

1. Deeds §47—Secretary of grantees banking corporation could attest conveyance.

In this state a secretary of a banking corporation, who is not a stockholder therein or otherwise beneficially or pecuniarily interested in the transaction, is not disqualified from attesting, as an official witness, a deed of conveyance in which the corporation is the grantee; there being no express statute forbidding such officer to act. 1 O. J. 808, § 117; 1 R. C. L. 272, § 44; cases cited in note to *Ardmore Nat. Bank v. Briggs Mach. Co.*, 23 L. R. A. (N. S.) 1075-1078; *Woodland Bank v. Oberhaus*, 125 Cal. 320, 57 Pac. 1070; *Florida Savings Bank, etc., v. Rivers*, 36 Fla. 575, 18 So. 850; *Horbach v. Tyrrell*, 48 Neb. 514, 67 N. W. 485, 489; 37 L. R. A. 434; *Ogden B. & L. Ass'n v. Mensch*, 196 Ill. 554, 63 N. E. 1049, 89 Am. St. Rep. 330; *Bardsley v. German-American Bank*, 113 Iowa, 218, 84 N. W. 1041; *Banking House, etc., v. Stewart*, 70 Neb. 815, 98 N. W. 34; *Keene Guaranty Sav. Bk. v. Lawrence*, 32 Wash. 572, 73 Pac. 680; *Girard v. Null*, 90 Neb. 713, 134 N. W. 272. Analogous cases in this state are those in which an attorney at law for a mortgagee or grantee in a security deed has been held to be a competent official witness to the execution of the paper. *Jones v. Howard*, 99 Ga. 451, 27 S. E. 765, 59 Am. St. Rep. 231; *Austin v. Southern Home Ass'n*, 122 Ga. 439, 50 S. E. 382; *Harvard v. Davis*, 145 Ga. 580, 89 S. E. 740.

(a) In *Hastey v. Roberts*, 149 Ga. 479, 100 S. E. 569, it was said: "A stockholder or officer, though incompetent to take an acknowledgment of a mortgage on realty as a notary, because he is a stockholder or officer of the mortgagee corporation, is not incompetent as a nonofficial witness to the signature of the mortgage." That case did not involve the power of an official witness to attest the paper, and the record filed in this court shows further that the attesting witness was a stockholder

In the light of the facts, the language of this court above quoted did not amount to a binding ruling that an officer, who was not also a stockholder or otherwise pecuniarily interested in the transaction, was incompetent as an official witness to the paper.

2. Corporations \S 426(10)—Corporation held to have ratified conveyance of personality as security for loan, where placed to its credit and checked out.

A paper whereby a corporation purported to convey legal title in personal property to a bank as security for a loan of money concluded as follows: "In witness whereof, the said borrower has hereunto set his hand and seal this 24th day of March, 1919." The instrument was signed: "Universal Light & Power Co., L. D. Wyly, Prest." No corporate or other seal was affixed. The paper was offered in evidence on the trial of a bail trover proceeding instituted by the bank against a third person claiming a special property in the goods under a transferee of the alleged maker of the paper. In this connection there was evidence tending to show that the money advanced by the bank on the strength of the security was placed by the bank on deposit to the credit of the corporation (named as maker of the paper); that the corporation had a place of business in the city of Savannah, which was in charge of L. D. Wyly, who was president of the corporation; that the corporation was conducting such business and carried a general account with the bank; that in the course of the business of the corporation the money advanced by the bank was regularly checked out. Held that, even if there was not sufficient proof of specific original authority from the corporation to its president to execute the paper, the corporation, having received the fruits of the loan by checking out the money in the regular course of its business, could not repudiate the act of its president in signing the paper, but would be held to have ratified his act. *Jones v. Ezell*, 134 Ga. 553, 68 S. E. 303; *Bank of Garfield v. Clark*, 138 Ga. 798 (2), 76 S. E. 95.

3. Nonsuit improper.

Applying the principles stated in the preceding notes, the Court of Appeals erred in affirming the judgment of the trial court excluding the paper from evidence, thus rendering it impossible for the plaintiff to prove title to the property in controversy, and granting a nonsuit.

Certiorari from Court of Appeals.

Action in trover by the Citizens' Trust Company against C. J. Butler and others. From a judgment of the Court of Appeals (103 S. E. 852), affirming a judgment of nonsuit, plaintiff brings certiorari. Reversed.

Anderson, Cann & Cann and McIntire, Walsh & Bernstein, all of Savannah, for plaintiff.

Geo. H. Richter, of Savannah, for defendants.

ATKINSON, J. Judgment reversed. All the Justices concur.

DAVIDSON et al. v. BLACKWELL et al. (No. 2224.)

(Supreme Court of Georgia. Sept. 13, 1921.)

(Syllabus by the Court.)

1. Wills \S 497(3)—Great-grandchildren held not included in devise to grandchildren.

The court did not err in the construction of the will, nor in the decree rendered in accordance therewith, in so far as complaint is made in the case before us.

(Additional Syllabus by Editorial Staff.)

2. Wills \S 602, 603(3)—Grandchild held to take fee-simple title, defeasible on dying without children.

Under a will devising land to a granddaughter, to be sold and distributed among testator's children and grandchildren on her death without child or children, held, that such granddaughter took fee-simple title, defeasible on her dying without child or children.

3. Wills \S 497(3)—Great-grandchildren held not to take under will, where parent conveyed contingent interest.

Where granddaughter of testator took fee-simple title to land, defeasible on her dying without child or children, going "to my children and my grandchildren, to be divided between them," etc., and grandchild of testator by a son conveyed, or attempted to convey, his contingent interest to such granddaughter and then predeceased her, leaving children who were great-grandchildren of the testator, held, that such great-grandchildren did not take under the will, and such contingent interest in the land passed to a grantee in a deed executed by the granddaughter prior to her death, irrespective of when the contingent interest vested.

4. Wills \S 497(2, 3)—"Children" does not include grandchildren, and "grandchildren" does not include great-grandchildren.

The word "children," in a will, does not include grandchildren, and the word "grandchildren" does not include great-grandchildren, unless the will discloses a contrary intention (citing Words and Phrases, First and Second Series, "Children"; "Grandchildren").

Error from Superior Court, Jasper County; J. B. Park, Judge.

Petition by J. K. Blackwell, as administrator de bonis non cum testamento annexo of the will of James Aken, deceased, and others, for construction of the will. From an adverse judgment, Lillie Davidson and another bring error. Affirmed.

W. S. Florence, of Monticello, for plaintiffs in error.

A. Y. Clement, A. S. Thurman, Greene F. Johnson, and E. M. Baynes, all of Monticello, for defendants in error.

Blackwell, as administrator de bonis non cum testamento annexo of the will of James Aken, filed a petition for construction of the

will and direction. As far as it appears, all persons interested therein were made parties, and the case was by agreement submitted to the judge on the pleadings, the case being controlled by a question of law. The court rendered a judgment, to which only two of the parties, Lillie Davidson and Florence Pouder, excepted. The remaining parties being content with the judgment, only so much of the record need be stated as concerns the plaintiffs in error.

The will of James Aken was executed on February 21, 1871, and a codicil to the same was executed on September 5, 1871. The testator died in 1872, and the will was probated in solemn form during the same year. The testator had only four children, Sam, Mary, Charles P., and John C., all of whom, except Charles P., predeceased the testator. Mary, who by marriage became Mary Geiger, left one child, Ellen, who afterwards became Ellen Pendergrass. Sam Aken left a son, Ransom H. Aken, the father of the plaintiffs in error, who claim the interest which they allege their father would have taken in certain land which Ellen Pendergrass took under the will, had he been in life at and subsequent to the death of Ellen Pendergrass. The other two children both left children, but their interests are not involved in that part of the judgment of the trial court to which the plaintiffs in error have excepted. The portions of the will material to a decision of the question presented are as follows:

"Article 2. I give, grant, and devise to my two grandchildren, Ransom H. Aken and Ellen Geiger, as tenants in common, all the land of which I may die seized and possessed, situated lying and being between Camp creek, Gap creek, and Turkey creek, in the county of Jasper, in said state, as those streams now run, including my present homestead. The interest of said Ellen Geiger in the same to be subject to the limitations and conditions herein-after expressed and annexed.

"Article 3. My will and desire is (and I so direct) that all the balance of my estate of every kind whatsoever, including all the land I own on the northwest side of Turkey creek, the same being situated part in the county of Morgan and part in said county of Jasper, be sold by my executors and the proceeds thereof be equally divided between all of my children and grandchildren, excepting my said grandson John F. Aken. Each set of my grandchildren to take such share as would be going to his or her or their parents were he or she in life, and no more.

"Article 4. My will and desire is that all the property of every kind which granddaughter Ellen Geiger may receive under this my will, in case should she die leaving no children's children at the time of her death, shall go to the other legatees named in this will, excepting always my said grandson John F. Aken. That is to say, to my children and grandchildren to be divided between them as provided in article 3 above," and "that portion of my said land which may be going to my granddaughter Ellen Geiger [afterwards Ellen Pendergrass] be subject to the same limitations, conditions, and

restrictions as attach to all other property given her by said original will."

The petition further alleges that, subsequently to the death of the testator, Ransom H. Aken and Ellen Pendergrass entered into possession of the land bequeathed to them, with the assent of the executors, and later entered into a voluntary partition of said lands, whereby each entered into possession in severalty of the portion of the lands devised to them as tenants in common under article 2 of the original will of James Aken, and that the petitioner as administrator, recognized the voluntary partition of said land; that subsequently to the death of the testator, and subsequently to the partition of the lands devised to Ransom H. Aken and Ellen Pendergrass, Ransom H. Aken by deed conveyed to Ellen Pendergrass all of his rights in remainder in and to the lands awarded to Ellen Pendergrass under and by virtue of said voluntary partition, and that subsequently to said conveyance Ellen Pendergrass conveyed to J. H. Bullard all of her rights under said deed from Ransom H. Aken, and that Bullard is now claiming to be the owner of such interest in said land as Ransom H. Aken would have taken under the will of the testator had he not conveyed the same to Ellen Pendergrass. Ransom H. Aken died subsequently to the execution of the deed to Ellen Pendergrass, and previously to the death of the latter.

The plaintiffs in error, the only living children of Ransom H. Aken, contend that the only interest acquired by Bullard under his deed from Ellen Pendergrass was her life estate; that as beneficiaries under the will of James Aken they succeeded, upon the death of Ellen Pendergrass, to whatever interest their father, Ransom H. Aken, would have taken had he been in life at the time of the death of the life tenant; that the intention of the testator that great-grandchildren as a class should share in the distribution of the estate is manifested by the provision that in the event of the death of Ellen Pendergrass without "children or children's children" the property devised to her should be distributed in accordance with article 3 of the will. The petition of the administrator alleges, further, that it is contended by certain of the grandchildren of the testator that children of grandchildren, or great-grandchildren of the testator do not take any interest in or share in the estate. Ellen Geiger, née Pendergrass, was a woman of mature age at the death of the testator, but subsequently died, never having had a child.

The court rendered a decree, in so far as the name is brought in question by this bill of exceptions, as follows:

"Sam Aken, a son of testator, died previous to the death of testator. Therefore his son, Ransom H. Aken, was entitled to one-third of the property bequeathed to Ellen Geiger; his interest being a contingent interest, which

became vested upon the death of the said Ellen Geiger, without children or the representatives of children. As he conveyed a contingent interest in certain property left to the said Ellen Geiger, and as she conveyed this property to J. H. Bullard, as will be seen from the copies of said deed attached to the intervention of the said J. H. Bullard, said conveyance places the title of the land described therein in the said J. H. Bullard—that is, one-third undivided interest as set forth in said intervention—and the said J. H. Bullard would be entitled to one-third interest in the proceeds of the sale of the lands described in said conveyances. Under the law, a contingent interest can be conveyed. *Isler v. Griffin*, 134 Ga. 192, 67 S. E. 854; *Irby v. Smith*, 147 Ga. 329, 93 S. E. 877. Ransom H. Aken took under the will, but his children or representatives of children took as his heirs at law. Said heirs at law would be entitled to one-third of the net proceeds of the lands not included in said deeds."

GILBERT, J. [1-3] Under the terms of the will Ellen Geiger, afterwards Ellen Pendergrass, a grandchild of the testator, took fee-simple title to the land in question, defeasible upon her dying without child or children. *Curles v. Wade*, 151 Ga. —, 106 S. E. 1. In the same item of the will it is further provided that on the occurrence of the event just mentioned the property devised to her "shall go to the other legatees named in this will, . . . that is to say, to my children and my grandchildren, to be divided between them as provided in article 3 above." Article 3 provides that the land be sold and the proceeds thereof equally divided between all of my children and my grandchildren, except one specified grandson, and "each set of my grandchildren to take such share as would be going to his or her or their parent were he or she in life, and no more." Ransom H. Aken, father of the plaintiffs in error, as appears from the statement of facts preceding, executed a deed during his lifetime to Ellen Pendergrass, conveying any remainder interest that he might have, and died previously to the death of Ellen Pendergrass. The question as to whether Ransom Aken, at the time of the execution of his deed, possessed an interest in the land which he was capable of conveying to Ellen Pendergrass, as against the grandchildren of the testator other than the plaintiffs in error, need not be decided; for, as we have pointed out further on in this decision, the plaintiffs in error, who are great-grandchildren of the testator, took no interest under the provisions of the will in favor of grandchildren. Any supposed claim of these plaintiffs in error is necessarily referable to their right of inheritance from Ransom Aken, their father; and if the estate in controversy here fell in to Ransom Aken, either upon the death of the testator or upon the death of Ellen Pendergrass, so that, had he never executed a conveyance to Ellen Pendergrass, the plaintiffs in error would have inherited, when that estate did fall in, the deed which he exe-

cuted to Ellen Pendergrass immediately became operative to convey the estate to her according to the terms of the conveyance, and by reason of her deed, to the benefit of her grantee, J. H. Bullard; so that in either event, irrespective of when the contingent interest vested, it was conveyed to Bullard by means of the deeds of Ransom Aken and Ellen Pendergrass. *Isler v. Griffin*, 134 Ga. 192 (4), 67 S. E. 854; *Irby v. Smith*, 147 Ga. 329, 93 S. E. 877.

[4] Inasmuch as the plaintiffs in error, great-grandchildren of the testator, could not take this property by inheritance from Ransom Aken, his deed having conveyed whatever interest he might have had, the remaining question is whether they could take under the provisions in the will in favor of grandchildren; in other words, does the term "grandchildren" include "great-grandchildren," the plaintiffs in error insisting that under the terms of the will the testator intended to include great-grandchildren, as well as grandchildren, to take the share or interest of their deceased parent. It has been decided by this court that the word "children," unless the will discloses a contrary intention, does not include grandchildren. *Walker v. Williamson*, 25 Ga. 549; *Willis v. Jenkins*, 30 Ga. 167; *Crawley v. Kendrick*, 122 Ga. 183, 50 S. E. 41, 2 Ann. Cas. 643; *Lyon v. Baker*, 122 Ga. 189, 50 S. E. 44; *Fulghum v. Strickland*, 123 Ga. 258, 51 S. E. 294; *Smith v. Smith*, 130 Ga. 532, 61 S. E. 114, 124 Am. St. Rep. 177; *Brookings v. Trawick*, 151 Ga. —, 106 S. E. 550, and authorities cited. See, also, *Pimel v. Betjemann*, 183 N. Y. 194, 76 N. E. 157, 2 L. R. A. (N. S.) 580, 5 Ann. Cas. 239; 1 Words and Phrases, Second Series, 675. The same principle would apply, in considering the intention of the maker of a will who had referred therein to children and grandchildren, as to whether it was his intention to include great-grandchildren. 28 R. C. L. 253; *Cummings v. Plummer*, 84 Ind. 403, 48 Am. Rep. 167; *Thomas v. Thomas*, 97 Miss. 697, 53 South. 630 (7); 40 Cyc. 1455.

In view of the authorities just cited we find no basis upon which the words "children and grandchildren," as employed in this will, can be construed to include great-grandchildren. It necessarily follows that since the plaintiffs in error are great-grandchildren, they acquired no interest in the land in question on the death of Ellen Pendergrass. Moreover, if the estate of Ransom Aken, the father of the plaintiffs in error, acquired any interest in the land at the death of Ellen Pendergrass, it would operate to the benefit of the grantee in his deed, relating back to the time of the grant, and would serve to convey that title and interest out of the estate. Ellen Pendergrass having, in her lifetime, conveyed the title to J. H. Bullard, it would necessarily follow that the trial court correctly decided that J. H. Bullard acquired an interest which otherwise would have gone

to Ransom H. Aken on the death of Ellen Pendergrass.

Judgment affirmed.

All the Justices concur.

(27 Ga. App. 371)

BERNHARDT v. FEDERAL TERRA COTTA CO. (No. 11761.)

(Court of Appeals of Georgia, Division No. 2.
Sept. 27, 1921.)

(Syllabus by the Court.)

1. Damages \S 141—No recovery of damages from third person causing breach of contract, in absence of allegations showing damages from breach of such contract, or that third person had notice of such contract.

The plea offered by the defendant, which was in the nature of a recoupment, praying for damages alleged as resulting from breach by the plaintiff of the contract sued on, as a result of which breach the defendant was forced to commit a breach of a contract which he at the time had with third persons, by the terms of which he was to erect for them a building upon certain terms and conditions by a certain date, and, upon his failure to comply with his obligations under this contract and complete the building by the date named, to respond to them in liquidated damages in a certain amount per day for each day the completion of the building was delayed by him, was insufficient to set up a cause of action in his favor against the plaintiff for liquidated damages which the defendant may have sustained by reason of his having been forced by the plaintiff into a breach of his contract with such third persons. Even assuming that the plaintiff had notice of the provisions of the contract between the defendant, and those persons, and that any damages sustained by the defendant as a result of his having been forced by the plaintiff into a breach of his contract with them were in contemplation of the parties when they entered into the contract sued on, the plea was insufficient to sustain an action therefor, since it failed to contain any allegation showing that the defendant had actually sustained such damages, either by having paid damages or by having become liable therefor to such third persons. A mere allegation of the existence of the defendant's contract with third persons, and that it contained such a provision as to liquidated damages to be paid by the defendant as a result of his delay in completing the contract by a specified date, and a forced breach of this provision by him caused by the act of the plaintiff, in the absence of any allegation as to the terms of this contract, and as to facts showing that the defendant had actually sustained such damages, is not sufficient to establish the defendant's claim for such damages against the plaintiff. See, in this connection, *Bernhardt v. Federal Terra Cotta Co.*, 24 Ga. App. 635, 101 S. E. 588.

2. Plea properly disallowed.

The trial judge therefore did not err in disallowing the plea, and, since this action is

the only ground of error insisted upon, the judgment must be affirmed.

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by the Federal Terra Cotta Company against C. W. Bernhardt. Judgment for plaintiff, and defendant brings error. Affirmed.

Wm. A. Fuller and Troutman & Freeman, all of Atlanta, for plaintiff in error.

J. L. Mayson and J. M. Wood, both of Atlanta, for defendant in error.

STEPHENS, J. Judgment affirmed.

JENKINS, P. J., and HILL, J., concur.

(27 Ga. App. 374)

PAYNE, Director General, v. CHAMBLISS. (No. 11802.)

(Court of Appeals of Georgia, Division No. 2.
Sept. 27, 1921.)

(Syllabus by the Court.)

1. Railroads \S 381(6), 387—Care required when pedestrian uses trestle.

The mere walking along a railroad track or railroad trestle is not in every case negligence per se, and, even if negligence per se, such negligence will not in every case bar a recovery for injuries received from an approaching train. Whether or not one is negligent, or to what degree he may be negligent, in crossing on a railroad trestle must be determined by the nature of the trestle, its length, height, etc., together with the character of its surroundings. Whether or not one negligently crossing upon a railroad trestle would be barred from recovery for injuries received from an approaching train must be determined by whether or not the railroad company exercised towards him the proper degree of diligence required under the circumstances.

2. Railroads \S 370—Lookout required at place used by pedestrians.

Whether or not a person on a railroad track, or crossing upon a railroad trestle, is a trespasser or licensee, the railroad company is bound to exercise special care and diligence to avoid injuring him if he is present at a place where people, with the knowledge of the railroad company, are in the habit of crossing in considerable numbers. "At such places the railway company is bound to anticipate the presence of persons on the track, to keep a reasonable lookout for them, to give warning signals, such as will apprise them of the danger of an approaching train, to moderate the speed of its train so as to enable them to escape injury, and a failure of duty in this respect will make the railway company liable to any person thereby injured," provided that his own negligence does not bar a recovery. 2 Thomp. Neg. \S 1726, cited with approval in

Williams v. Southern Ry. Co., 11 Ga. App. 305, 311, 75 S. E. 572.

(27 Ga. App. 382)

3. Railroads ⇐394(1)—Petition held to charge negligence as to pedestrian on trestle.

A petition which alleges that the plaintiff was crossing on a railroad trestle which was approximately 40 feet long and 10 feet high, and that people in great numbers were in the habit of walking along the trestle, with the knowledge of the railroad company's agents, and that the plaintiff, while thus walking along the trestle, was injured by an approaching train, and which charges negligence on the part of the railroad company as above set out, sets out a cause of action.

4. Appeal and error ⇐1078(3)—Ground of demurrer not insisted on abandoned.

The second ground of the demurrer, not being insisted upon by the plaintiff in error, will be considered as abandoned.

5. Appeal and error ⇐856(2)—Pleading ⇐193(3)—Petition must show cause of action against railroad originated in county; ground of demurrer not considered below held available on appeal.

It not appearing from the petition that the cause of action originated in the county in which the suit was brought, the general demurrer on this ground should have been sustained. *Ocilla Southern R. Co. v. McAllister*, 20 Ga. App. 400, 98 S. E. 26; *Coney v. Horne*, 98 Ga. 723, 20 S. E. 213. This is true even though this ground is argued for the first time in this court, since it may be taken advantage of on general demurrer and was properly presented in the record in the court below.

6. Judgment overruling demurrer reversed.

The judgment overruling the demurrer is reversed, with leave to the plaintiff to amend by showing the above jurisdictional fact at the time the remittitur of this court is made the judgment of the court below.

Jenkins, P. J., dissenting.

Error from City Court of Americus; W. M. Harper, Judge.

Action by J. H. Chambliss against J. B. Payne, Director General. Judgment for plaintiff, and defendant brings error. Reversed, with directions.

Yeomans & Wilkinson, of Dawson, for plaintiff in error.

Wallis & Tort, of Americus, for defendant in error.

STEPHENS, J. Judgment reversed, with direction.

HILL, J., concurs.

JENKINS, P. J., dissents.

JENKINS, P. J. I dissent from what is said in the fifth division of the decision. See *Burton v. Wadley Southern Ry. Co.*, 25 Ga. App. 599, 103 S. E. 881.

PAYNE, Federal Agent, v. MANHATTAN FRUIT & PRODUCE CO. (No. 11972.)

(Court of Appeals of Georgia, Division No. 2 Sept. 27, 1921.)

(Syllabus by the Court.)

Certiorari ⇐10—No renewal of void petition.

Since a void petition for certiorari cannot, after it has been dismissed, be renewed under section 4381, Civ. Code 1910, providing for the renewal of suits within six months after dismissal, and since it appears from the record that the petition for certiorari in the present case was a renewal of one which had been adjudicated as void for the want of a valid bond, and dismissed on that ground, the trial judge did not err in refusing to sustain the certiorari.

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Proceeding in certiorari by G. B. Payne, Federal Agent, against the Manhattan Fruit & Produce Company. From a judgment refusing to sustain the certiorari, plaintiff brings error. Affirmed.

Lovick G. Fortson and Randolph & Parker, all of Atlanta, for plaintiff in error.

R. R. Jackson and John F. Echols, both of Atlanta, for defendant in error.

STEPHENS, J. Judgment affirmed.

JENKINS, P. J., and HILL, J., concur.

(27 Ga. App. 377)

NATIONAL NOVELTY IMPORT CO. v. BOWEN & FINE. (No. 11817.)

(Court of Appeals of Georgia, Division No. 2 Sept. 27, 1921.)

(Syllabus by the Court.)

1. Sales ⇐124—Vendee, on returning goods, entitled to retain sufficient to cover freight charges.

This being a suit to recover the contract price for a lot of merchandise alleged by the plaintiff to have been sold and shipped to the defendant, and it appearing that the contract entered into between the parties was entire, and not severable, and there being evidence in support of the defendant's plea that part of the goods delivered to him by the plaintiff were materially different from the goods contracted for, and that the defendant had, immediately upon discovering this fact, canceled the contract and returned the entire shipment of goods to the plaintiff, less an amount sufficient to reimburse the defendant for freight charges on the goods expended by him and chargeable to the plaintiff, the verdict for the defendant was authorized. *Main v. Simmons*, 2 Ga. App. 821, 59 S. E. 85; *Elgin Jewelry Co. v. Estes*, 122 Ga. 807, 50 S. E. 939; *Snellgrove v. Dingelhof*, 25 Ga. App. 334, 103 S. E. 418.

2. Instructions and refusal to strike plea not error.

The court did not err in refusing to strike the defendant's plea or in instructions to the jury.

Error from Superior Court, Candler County; R. N. Hardeman, Judge.

Action by the National Novelty Import Company against Bowen & Fine. Judgment for defendants, and plaintiff brings error. Affirmed.

Kirkland & Kirkland, of Metter, for plaintiff in error.

O. W. Turner, of Metter, for defendants in error.

STEPHENS, J. Judgment affirmed.

JENKINS, P. J., and HILL, J., concur.

(27 Ga. App. 372)

ATLAS ASSUR. CO., LIMITED, OF LONDON, ENGLAND, v. FIRST NAT. BANK OF BARNESVILLE.

FIRST NAT. BANK OF BARNESVILLE v. ATLAS ASSUR. CO., LIMITED, OF LONDON, ENGLAND.

(Nos. 11784, 11785.)

(Court of Appeals of Georgia, Division No. 2, Sept. 27, 1921.)

(Syllabus by the Court.)

1. Principal and agent §141, 146(2)—Liability where one executes note or bill as general agent.

Where one executes a promissory note or a bill of exchange in his own name, with a descriptive suffix, such as "general agent," attached to his signature, and where it does not appear on the face of the instrument that he is acting for or in behalf of any one as principal, the instrument is presumably his individual obligation, and before any one can be held liable thereon as principal it must affirmatively appear that at the time of the execution of the instrument it was the intention of the parties to bind a particular person as principal, and that the maker, in executing the instrument, had authority to act as agent for, and to bind such person as, the principal. *Burkhalter v. Perry*, 127 Ga. 438, 56 S. E. 631, 119 Am. St. Rep. 343.

2. Principal and agent §109(2)—Authority of general agent to draw bill of exchange must appear.

Where a bill of exchange was drawn by "Oswald G. Boyle, general agent," on the "Atlas Assurance Company, Limited, of London, Eng-

land," and the latter had not accepted it, even though it was the intention of the parties at the time to bind the drawee as principal, the latter cannot be held liable as principal, even though it appear that the maker was at the time of the execution of the instrument the general agent of the drawee, in the absence of proof that he was authorized to draw the instrument, or that he had authority so to do under his powers and duties as general agent.

3. Drawee of bill of exchange held not liable.

This being a suit by the transferee of a bill of exchange against the drawee, and it not appearing from the petition and the copy of the bill of exchange attached thereto that the drawee had accepted the bill of exchange, and there being in the petition nothing that indicates that the plaintiff is seeking to hold the drawee liable upon the theory that the maker, in executing the bill of exchange, acted as the agent of the drawee, the court erred in not sustaining the defendant's motion in the nature of a general demurrer to dismiss the plaintiff's case; and since the verdict rendered for the plaintiff was without evidence to support it, under the rulings in paragraphs 1 and 2 above, the court erred also in overruling the defendant's motion for a new trial.

4. Courts §190(6) — Record insufficient to show that motion for new trial in city court was in vacation.

It appearing, from a recital in the bill of exceptions, that the defendant in the court below filed its motion for a new trial "on June 10, 1920, and during the March term of the city court," and it not appearing anywhere from the record that such date was in vacation, this court cannot hold that the trial judge erred in overruling the respondent's motion to dismiss the motion for a new trial upon the ground that it was filed in vacation.

Error from City Court of Zebulon; E. F. Dupree, Judge.

Action by the First National Bank of Barnesville against the Atlas Assurance Company, Limited, of London, England. Judgment for plaintiff, and both parties bring error. Reversed on main bill of exceptions, and affirmed on cross-bill of exceptions.

Smith, Hammond & Smith, of Atlanta, for plaintiff in error.

Redding & Lester, of Barnesville, for defendant in error.

STEPHENS, J. Judgment reversed on the main bill of exceptions; judgment affirmed on the cross-bill of exceptions.

JENKINS, P. J., and HILL, J., concur.

(27 Ga. App. 357)

STATE et al. v. PASCAL et al.
(No. 12105.)(Court of Appeals of Georgia, Division No. 2.
Aug. 23, 1921. Rehearing Denied
Sept. 27, 1921.)*(Syllabus by the Court.)***Taxation** §651—Constable cannot levy a tax
fi. fa. when the principal amount exceeds
\$100.

While, under section 1151 of the Political Code (1910), executions for nonpayment of taxes are directed "to all and singular the sheriffs and constables of this state," and under section 1166 "the tax collector may place his fi. fa.'s in the hands of any one constable of the county, who shall be authorized to collect or levy the same in any part of the county," the authority of a constable under these sections must be construed with the limitations imposed by section 1165, which expressly prohibits such officer from levying "a tax fi. fa. when the principal amount exceeds one hundred dollars." *Winn v. Butts*, 127 Ga. 385, 387, 56 S. E. 406; *Butler v. Davis*, 68 Ga. 173; *Watson v. Swann*, 83 Ga. 198, 203, 9 S. E. 612. The fi. fa. in the present case exceeding the maximum statutory amount, the levy was properly dismissed on motion.

Error from Superior Court, Camden County; J. P. Highsmith, Judge.

Proceeding by the State and others against J. R. Paschal and others to collect certain taxes. From a judgment for defendants the plaintiffs bring error. Affirmed.

Cowart & Vocelle, of St. Marys, for plaintiffs in error.

S. C. Townsend, of St. Marys, for defendants in error.

JENKINS, C. J. Judgment affirmed.

STEPHENS and HILL, JJ., concur.

On Motion for Rehearing.

JENKINS, P. J. On motion for rehearing, and in the light of the argument therein set forth, the entire question determined by the judgment in this case has been given renewed consideration. The three sections of the Civil Code of 1910 which bear upon the question involved are as follows:

Section 1151: "Executions for nonpayment of taxes, against persons who are not required to pay to the treasurer, are issued by the tax collectors of their respective counties as soon as the last day for payment has arrived, and must be directed to all and singular the sheriffs and constables of this state."

Section 1165: "Executions may be levied by either of the officers to whom directed, or other officer who by law may be authorized in their place; but a constable can not levy a tax fi. fa. when the principal amount exceeds one hundred dollars, and if a tax fi. fa. for less than one hundred dollars be levied by a

sheriff, his fee for said levy shall be that now allowed constables, and if the levy be made upon personalty, the same shall be advertised and sold as is now provided for justice court fi. fa.'s. If the constable levies on land, it must be returned to and sold by the sheriff of the county."

Section 1166: "The tax collector may place his fi. fa.'s in the hands of any one constable of the county, who shall be authorized to collect or levy the same in any part of the county, and it shall be the duty of the constable or constables, or other levying officer to whom the tax collector may deliver said tax fi. fa.'s for collection, to proceed promptly to enforce by levy and sale the collection of the same, and said levying or collecting officer shall make prompt settlements with the tax collectors, and in no event shall he be allowed longer than ninety days from the time the fi. fa.'s are placed in his hands, within which to make final settlement with the collector and return to him the tax collected and the uncollected fi. fa.'s with proper entries thereon. Any constable or other levying officer who shall fail or refuse to make such final return or settlement within the time above stated shall forfeit all costs that might be due him on said fi. fa.'s, and be subject to be ruled before any court of competent jurisdiction and made to account as required by this section."

The argument of able counsel in their original brief is based upon the theory that, since the law does not do vain and futile things, and since, as they contend, a constable already had territorial jurisdiction under the act of 1852 (Civil Code 1910, § 1151) to levy tax fi. fa.'s anywhere within the limits of his county, the Code provision of 1863 (Civil Code of 1910, § 1156) must therefore necessarily be taken and construed as having for its sole purpose an extension of the constable's jurisdiction as to the amount of a tax fi. fa. which he is authorized to levy in a case where all the fi. fa.'s are turned over to one such officer. In the motion for rehearing attention is called to the fact that the latter portion of the present section 1166, beginning "and it shall be the duty of the constable," etc., prescribing diligence and imposing penalties upon constables as such levying officers, could not have been the purpose of the original 1863 Code section, since these latter provisions were only added to the original provisions of section 1166 by the act of 1899. Ga. L. 1899, pp. 26, 27. In the motion counsel furthermore contend as follows:

That "the court overlooked the fact that sections 1165 and 1166 are not to be construed together, but that section 1166 repeals section 1165 to the extent that the tax collector has authority to designate a particular constable who is amenable to him, and that constable then has full authority to levy all fi. fa.'s, regardless of amount, and that it so repeals said section, for the reason that section 1165 is taken from the act of 1852, and section 1166 was placed in the Code in 1863 for the purpose

of changing the act of 1852 to the extent thus indicated."

The authority to levy and collect tax *fi. fa.*'s seems to have been originally vested in the sheriffs. Under the act approved December 12, 1804, which was re-enacted by subsequent acts and long continued of force, it was provided:

"It shall be the duty of the sheriffs in each county, to receive from the tax collector therein all executions that may be tendered to him for taxes, and to levy and collect the same, and to make due returns to the said collector within thirty days after the receipt of each execution, where personal property is levied on, and where it shall be real estate, sixty days," etc. Cobb's Digest (1851), 29, § 80, p. 1068.

Thus, prior to the act of 1852, the powers of constables to levy, while running coextensively with the jurisdictional amounts of justices of the peace as to other executions, did not extend to tax *fi. fa.*'s at all, and by the enabling statute of 1852 their jurisdiction to levy tax executions was expressly limited to those not exceeding thirty dollars in amount. This act, approved January 21, 1852 (G. L. 1851-52, p. 294, § 23, II), provided as follows:

"That when the tax collector of any county shall hereafter issue an execution for taxes in arrear, the same shall be directed to all and singular the sheriffs and constables of this state, and shall be levied by either officer when the tax does not exceed thirty dollars; but where the tax exceeds that sum, the execution shall be levied by the sheriff alone." Cobb's Statutes and Forms (1859) § 99, II, p. 662.

This act of 1852, as amended by the Code of 1863 and by the act of 1876, is the basis of section 1151 of the Civil Code of 1910. By the Code of 1863 the jurisdiction of constables was extended in amount to \$50, and by the act of 1876 to \$100.

It does not follow, however, as the movant seems to assume, that merely because the act of 1852 requires that all tax executions shall be directed "to all and singular the sheriffs and constables of this state," the territorial jurisdiction of constables was thereby in any wise extended or affected. As was said in *Butler v. Davis*, 68 Ga. 173, 174:

"These executions are directed to all and singular the sheriffs and constables, in order that the *proper* officer might levy." (Italics ours.)

Almost from the beginning all executions from courts of record were directed "to all and singular the sheriffs of this state." Act Dec. 14, 1811; Cobb's Dig. p. 510. Justice court executions were directed "to all and singular the constables of said county" (Cobb's Statutes and Forms, p. 263), and this was the form even when a constable could not levy a justice court execution outside of

his own bailiwick, which was the rule until the year 1869. *Lapsley v. Ga. Loan Co.*, 99 Ga. 459, 27 S. E. 717. Even the sheriff, under the act of 1852, could not have levied a tax execution outside of his own proper territorial jurisdiction, although all of them were addressed "to all and singular the sheriffs and constables of this state." The purpose of the act of 1852 was to empower constables to levy tax *fi. fa.*'s not exceeding \$30, which up to that time they were unauthorized to levy at all. It was only subsequently, and by section 812 of the first Code (1863), that constables were for the first time given the right to levy tax executions beyond the limits of their own bailiwicks. By section 811 of that Code the jurisdiction as to amount was also extended from \$30 to \$50, in conformity with the increase of justice court jurisdiction to that amount by the act of March 5, 1856. The provisions of the Code of 1863 were as follows:

Section 810: "Executions for nonpayment of taxes, against persons who are not required to pay to the treasurer, are issued by the tax collectors of their respective counties as soon as the last day for payment has arrived, and must be directed to all and singular, the sheriffs and constables of this state."

Section 811: "Executions may be levied by either of the officers to whom directed, or other officer, who, by law may be authorized in their place; when the principal amount does not exceed fifty dollars, the levy and sale must be made by a constable and not otherwise; if the constable levies on land or negroes, they must be returned to and sold by the sheriff of the county."

Section 812. "The tax collector may place his *fi. fa.*'s in the hands of any one constable of the county, who shall be authorized to collect or levy the same in any part of the county."

Section 812 corresponds with the first portion of section 1166 of the present Code, and section 810 is identical with section 1151. Thus, while it was not until 1869 that constables were given the right to levy executions, other than those for taxes, outside of their own bailiwicks, the provisions of section 812 of the Code of 1863 gave them, as to tax executions, territorial jurisdiction extending over the entire county. By the preceding section (811) their previous jurisdiction as to amount was extended from \$30 to \$50. This change of jurisdiction as to amount was doubtless effected to make it conform to their jurisdiction as to other *fi. fa.*'s, which, as stated, had been increased from \$30 to \$50 by the act of 1856. Cobb's Stats. and Forms, pp. 254, 257. The language of section 811 of the Code of 1863 is not, within itself, altogether clear and free from ambiguity. It might possibly have been urged that, while that section expressly prohibited sheriffs from levying tax executions of less than \$50 (*Morris v. Tinker*, 60

Ga. 466 [1]), it does not within itself plainly and expressly limit the jurisdiction of constables to that amount.

But whatever doubt, if any, might have existed as to that is resolved by the decision of the Supreme Court in *Butler v. Davis*, 68 Ga. 173, wherein it was held: "In 1873 a constable could not levy a tax *fi. fa.* for more than \$50." This decision construed sections 886 and 888 of the Code of 1873, which as to the provisions in question were identical with the language of the sections quoted from the Code of 1863. Since the only change under the act of 1876 (Ga. L. 1876, p. 30), amending section 811 of the Code of 1863 (Civil Code of 1910, § 1165; Code of 1873, § 888), was to clarify the language in accordance with the ruling of the Supreme Court just quoted, and to change the limitation in amount from \$50 to \$100, the ruling of the Supreme Court in *Butler v. Davis* seems absolutely conclusive in the case at bar.

In addition to this, there is language used in the later case of *Watson v. Swann*, 83 Ga. 198, 203, 9 S. E. 612, 613, decided since the act of 1876, which would also seem to be conclusive. In that case, Chief Justice Bleckley said:

"As to tax *fi. fa.*'s not exceeding one hundred dollars in amount, the constable has as wide range territorially as the sheriff, and, we think, as wide a range as to the kind of property to be seized." (Italics ours.)

The point seems also clearly decided in *Winn v. Butts*, 127 Ga. 385, 387, 56 S. E. 406, 407, where the Supreme Court said:

"The execution is directed 'to all and singular the sheriffs and constables of this state.' Pol. Code, § 894. It may be levied by either of the officers to whom it is directed, or other officer who by law may be authorized to act in their place. A constable cannot levy an execution for taxes when the principal amount exceeds \$100. If it is for less than \$100, it may be levied either by the sheriff or a constable."

Thus it appears that the act of 1862 did not give to constables the right to levy tax executions outside of their own districts or bailiwicks, that such authority was the main purpose of section 812 of the Code of 1863 (Civil Code of 1910, § 1166), and that under these three decisions of the Supreme Court the pecuniary jurisdiction of constables remains limited, despite the provisions of section 1166.

Referring specifically to the quoted portion of the motion, wherein counsel contend that section 1165, in so far as it expressly limits in amount the jurisdiction of constables in levying tax executions, is repealed by the later Code section (1166), it might be first said that the limitation imposed by section 1165 is plain and specific, and that a repeal

by implication of such a definite statutory provision is not favored. *Verdery v. Walton*, 137 Ga. 213, 216, 73 S. E. 390; *Sampson v. Brandon Grocery Co.*, 127 Ga. 454, 456, 56 S. E. 488, 9 Ann. Cas. 331; *Hammond v. State*, 10 Ga. App. 143, 145, 72 S. E. 937. But, in addition to this, the plain and express pecuniary limitation imposed by section 1165 is, in point of fact, of later date than section 1166, on which the movant relies. While section 1166 dates from the Code of 1863 (section 812), section 1165, as now embodied in the Code, is a re-enactment of the act of February 25, 1876 (Ga. L. 1876, p. 30), when the plain and emphatic pecuniary limitation was changed from \$50 to \$100, at which amount it now stands.

Motion for rehearing denied.

(37 Ga. App. 378)

GUARANTY MUT. LIFE & HEALTH INS.
CO. v. SEALS. (No. 11822.)

(Court of Appeals of Georgia, Division No. 2
Sept. 27, 1921.)

(Syllabus by the Court.)

New trial ~~§~~ 18, 81—Sufficiency of petition not raised on motion for new trial.

Questions as to the sufficiency of a petition cannot be raised in a motion for a new trial. Where the defendant has not excepted to the sufficiency of the petition, either by demurrer, or by a motion in the nature of a general demurrer to dismiss the plaintiff's case for want of a cause of action appearing in the petition, he cannot, under the general assignment of error "that the verdict is contrary to law and against the principles of justice and equity," in a motion for a new trial, insist that the petition does not set out a cause of action. *Roberts v. Keeler*, 111 Ga. 181(6), 36 S. E. 617; *Kelly v. Strouse*, 116 Ga. 872(6), 888, 896, 43 S. E. 280. This is true, even though the verdict and judgment were rendered in a case on appeal to the superior court from the justice court, and where the defendant had no opportunity to file a demurrer to the petition. This ruling is not in conflict with anything contained in headnote 5 or the corresponding division of the opinion in *Kelly v. Strouse*, supra.

Error from Superior Court, Richmond County; H. C. Hammond, Judge.

Action by Minnie Seals against the Guaranty Mutual Life & Health Insurance Company. From an adverse judgment, defendant brings error. Affirmed.

Paul T. Chance, of Augusta, for plaintiff in error.

T. S. Lyons and J. S. Watkins, both of Augusta, for defendant in error.

STEPHENS, J. Judgment affirmed.

JENKINS, P. J., and HILL, J., concur.

(27 Ga. App. 381)

**FIVE MINUTE VULCANIZER & AUTO
SUPPLY CO. v. McMILLAN et al.**
(No. 11965.)

(Court of Appeals of Georgia, Division No. 2
Sept. 27, 1921.)

(Syllabus by the Court.)

1. Principal and agent — Directed verdict proper where evidence demanded finding.

In a suit by the plaintiff to recover the purchase price of goods sold to the defendant in compliance with the terms of a contract between the plaintiff and the defendant, wherein, among other things, the plaintiff agreed to give to the defendant the exclusive right to handle the plaintiff's product within certain territory, and where the defendant filed a counterclaim to the plaintiff's suit, alleging a breach by the plaintiff of its covenant in the contract to give to the defendant exclusive territorial rights as above set out, and praying damages for such breach, where the evidence demanded a finding for the plaintiff for the indebtedness sued on, and failed to sustain the defendant's counterclaim, a direction of a verdict for the plaintiff was proper.

2. Principal and agent — Special damages alleged from breach of contract not established.

Whether or not the legal measure of damages for the alleged breach of the contract by the plaintiff was the expenses which the defendant necessarily incurred in preparing the territory by advertising and sending out salesmen, etc., for the purpose of facilitating his sales therein as alleged by the defendant in his counterclaim, it nevertheless not appearing that such expenses were necessarily incurred as a result of the plaintiff's breach of the contract, and the defendant praying only for special damages as above set out, the defendant's counterclaim was not sustained.

3. Appeal and error — Exclusion of evidence of breach of contract harmless where no damages shown.

In view of the foregoing rulings, the evidence offered by the defendant, tending to show that the plaintiff had in its pleadings in a former suit admitted a breach of the contract sued upon, as set out by the defendant in his counterclaim, which evidence was excluded by the trial judge, would not, if admitted, have raised any issue of fact for the jury.

4. New trial erroneously awarded.

The verdict directed for the plaintiff, therefore, being demanded as a matter of law, the judge of the superior court erred in sustaining the defendant's certiorari and awarding a new trial.

5. Certiorari overruled and judgment ordered entered.

It appearing, however, that the appellate division of the municipal court, in affirming the judgment of the trial court, entered a final judgment for the plaintiff in excess of that rendered on the trial and authorized under the law, it is therefore ordered that the judgment of the superior court sustaining the cer-

tiorari be reversed, and that the certiorari be overruled and a final judgment entered, writing off the excess and awarding judgment for the plaintiff against the defendant for the amount of the verdict and the judgment entered thereon by the trial judge in the municipal court.

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action by the Five Minute Vulcanizer & Auto Supply Company against J. E. McMILLAN and others. Verdict for plaintiff in the municipal court was set aside by Superior Court, and plaintiff brings error. Reversed, with direction.

Walter S. Dillon, of Atlanta, for plaintiff in error.

R. W. Crenshaw and A. E. Wilson, both of Atlanta, for defendants in error.

STEPHENS, J. Judgment reversed, with direction.

JENKINS, P. J., and HILL, J., concur.

(27 Ga. App. 373)

**HINES, Director General of Railroads, v.
OWENS.** (No. 11798.)

(Court of Appeals of Georgia, Division No. 2
Sept. 27, 1921.)

(Syllabus by the Court.)

1. Trial — Proper to refuse to charge on proposition not relied upon.

A failure of the court to charge a certain proposition of law furnishes no ground for complaint to a party to the suit who does not rely upon such proposition of law to sustain his case. It follows therefore that in a suit against a railroad company for personal injuries, where the plaintiff alleges, as negligence causing the injury, that the defendant failed to blow the whistle of its locomotive when approaching the crossing at which the injury occurred, and where the defendant in its pleadings denies such failure and alleges that it did blow the whistle, and offers evidence to sustain such allegation, it is not error for the trial judge to fail to charge that railroad companies are not required to blow the whistles of their locomotives on approaching crossings or public roads within the corporate limits of cities, towns, and villages of this state. Pen. Code 1910, § 520. In view of the above ruling, it was not error for the court to fail to charge "the law relative to the running of railroad trains within the corporate limits of a city and approaching a crossing therein, as set out in Acts Gen. Assem. Ga. 1918, p. 212 et seq."

2. Trial — Request containing substance of given charges properly refused.

The various requests to charge, in so far as the same were pertinent and not argumentative, were covered by the court in the general charge to the jury. Although such requests contain sound propositions of law, announced

by the Supreme Court of this state in various adjudications, it does not necessarily follow that such language should be given in charge to the jury. *Savannah Electric Railway Co. v. Joseph*, 25 Ga. App. 518, 103 S. E. 723.

3. Instructions—Charge held fair and not misleading.

The charge of the court fairly and impartially presented all the issues in the case, and was not subject to the objection that it tended to confuse the minds of the jury, or was erroneous for any reason insisted upon.

4. Personal injuries—Verdict held not excessive.

Considering the nature of the injuries, as testified to by the plaintiff, his pain and suffering and the impairment of his capacity to work, this court cannot conclude that the verdict for the plaintiff for \$5,000, which was approved by the trial judge, was excessive.

5. Personal injuries—Verdict authorized by evidence.

The evidence authorized the verdict, and no error of law appears.

Error from Superior Court, Newton County; W. E. H. Searcy, Jr., Judge.

Action by Lee Owens against W. D. Hines, Director General of Railroads. Judgment for plaintiff, and the defendant brings error. **Affirmed.**

Rogers & Tuck, of Covington, and J. C. Knox, of Monroe, for plaintiff in error.

King & Johnson, of Covington, for defendant in error.

STEPHENS, J. Judgment affirmed.

JENKINS, P. J., and HILL, J., concur.

(27 Ga. App. 379)

CITY OF MACON v. HAWES. (No. 11855.)

(Court of Appeals of Georgia, Division No. 2.
Sept. 27, 1921.)

(Syllabus by the Court.)

1. Trial §255(14)—No error in failing to charge without request as to duty to reduce damages occasioned by conduct of adjoining owner.

In a suit by a landed proprietor to recover damages for an injury to his buildings, caused by the conduct of the defendant (an adjacent proprietor) in causing an unnatural and artificial accumulation of water to be discharged and precipitated upon the land of the plaintiff, and where the charge of the court clearly restricted the plaintiff to a recovery for damage occasioned by the water, the plaintiff being under no duty to do anything to prevent such damage (*Athens Mfg. Co. v. Rucker*, 80 Ga. 291 [4], 4 S. E. 885), it was not error to fail to charge (without special request) that it was the duty of the plaintiff to exercise ordinary and reasonable care to reduce the damage to

his property occasioned by the conduct of the defendant.

2. Damages §111, 174(3)—Measure of damages for injury to building; evidence as to cost to put back in condition admissible.

While the plaintiff's measure of damage to his building is the cost of replacing it in the condition in which it was when the damage occurred (*Harrison v. Kiser*, 79 Ga. 588[8], 595, 4 S. E. 320; *Empire Mills Co. v. Burrell Engineering, etc., Co.*, 18 Ga. App. 253[2], 256, 89 S. E. 530), evidence that it would cost a certain sum to "put it back in the condition it was when it was built" was not erroneously admitted, when the witness further stated, in immediate connection therewith, that it would cost the sum to which he testified "to put the building in a safe condition," and that he "made the estimate on the basis of putting the building back in a first-class condition and making it safe, putting it back secure, tearing down the back walls, rebuilding the foundation walls, and putting the drain way in a safe condition, I was just looking for the damage to the building."

3. Requested instruction covered by given instruction.

The substance of the request to charge set out in the first ground of the amendment to the motion for a new trial was fully covered by the charge given.

4. Damages §174(3)—Witnesses §406—Condition of building years before damage properly rejected.

Evidence of the condition of the building 10 years prior to the time of its damage was properly rejected by the court, since such evidence was immaterial and irrelevant to illustrate the present issue, or to impeach a witness testifying to the condition of the building immediately prior to the time of the damage.

5. Damages §188(1)—Amount shown with reasonable certainty.

There being evidence in detail as to the nature of the damage to the building as a result of the discharge and precipitation of water on the plaintiff's land, caused by the defendant, and it being inferable, from the evidence, that the building was in a safe condition before it was damaged, and there being evidence of the cost of restoring it to such condition, the verdict is not subject to the objection that it is unsupported by evidence, in that the evidence fails to show with reasonable certainty the amount of the damage to the building.

6. Judgment §253(1)—Verdict within amount prayed for, though in excess of special damages, held not contrary to law.

The verdict rendered for the plaintiff, while being in excess of the aggregate amounts prayed for as special damages, is not in excess of the lawful interests upon such amounts, computed from the time of the injury to the date of the verdict, and, being within the amount prayed for as damages generally in the petition, is not contrary to law, as being in excess of the amount sued for. See, in this connection, *Ga. R. Co. v. Crawley*, 87 Ga. 191, 192, 13 S. E. 508; *McConnell Bros. v. Slappey*, 134 Ga. 95(9), 67 S. E. 440.

7. Verdict supported by evidence.

The evidence supports the verdict and no error of law appears.

Error from Superior Court, Bibb County; H. A. Mathews, Judge.

Action by H. B. Hawes against the City of Macon. Judgment for plaintiff, and defendant brings error. Affirmed.

Robt. G. Plunkett and P. F. Brock, both of Macon, for plaintiff in error.

Jordan & Moore, of Macon, for defendant in error.

STEPHENS, J. Judgment affirmed.

JENKINS, P. J., and HILL, J., concur.

(27 Ga. App. 384)

MAYOR, etc., OF HOGANSVILLE v. PLANTERS' BANK. (No. 12051.)

(Court of Appeals of Georgia, Division No. 2. Sept. 27, 1921.)

(Syllabus by the Court.)

1. Municipal corporations \S 248(1), 249—Not liable under unauthorized contract; no ratification by use of benefits.

A municipality cannot be held liable upon an implied contract for the value of any benefits received by it under a contract made with one of its officials, where the municipality is expressly forbidden to make such a contract. Such a contract, being void, cannot be ratified by an acceptance or use by the municipality of the benefits furnished thereunder. *Hardy v. Mayor and Council of Gainesville*, 121 Ga. 327, 48 S. E. 921; *Horkan v. City of Moultrie*, 136 Ga. 561, 71 S. E. 785; *Neal v. Town of Decatur*, 142 Ga. 205, 82 S. E. 546; *Dillon on Municipal Corporations*, § 797 et seq.; *Berka v. Woodward*, 125 Cal. 119, 57 Pac. 777, 45 L. R. A. 420, 73 Am. St. Rep. 31; *McNay v. Lowell*, 41 Ind. App. 627, 84 N. E. 778; *Brazil v. McBride*, 69 Ind. 244; *Macy v. Duluth*, 68 Minn. 452, 71 N. W. 687.

2. Municipal corporations \S 231(3)—Not liable for electric current used under contract with corporation of which officials were stockholders.

In a suit against a municipality to recover for beneficial services, such as electric lights, alleged to have been furnished to the municipality, where one of the defenses interposed by the defendant, and sustained by evidence, was that the mayor and one of the members of the municipal council were, during the period when such services were furnished to the municipal-

ity, stockholders, and interested pecuniarily in the corporation which furnished the services, and that therefore such services were furnished under a contract which was void under a provision of the charter of the municipality that "no person holding an office in this municipal corporation shall, during the term for which he was elected or appointed, be capable of contracting with said corporation * * * for the performance of any work which is to be paid out of the treasury of said town," it was error for the court to charge that if the mayor and council of the municipality, knowing that such services were being furnished, accepted the same and made payments to the corporation furnishing such services, the municipality, notwithstanding that certain members of the council in the municipality during such period were stockholders in the corporation furnishing the services, would be liable to the plaintiff for the reasonable value of the services rendered.

3. Municipal corporations \S 231(4)—Liable for reasonable value of services rendered under unenforceable contract.

The municipality, however, would be liable to the plaintiff for the reasonable value of the services rendered and applied by the municipality to its benefit in the exercise of a lawful corporate function, when accepted by it during the period when a contract with the municipality by the corporation furnishing the services could be legally entered into, and not be invalid, upon the ground that an officer in the municipality was pecuniarily interested therein: Provided, however, that such liability does not constitute such a debt against the municipality as is prohibited by the Constitution.

4. Assignments of error reviewed.

It is unnecessary to pass upon the assignments of error not dealt with in the foregoing rulings.

5. Motion for new trial.

The court therefore erred in overruling the defendant's motion for a new trial.

Error from Superior Court, Troup County; John D. Humphries, Judge.

Action by the Planters' Bank against the Mayor, etc., of Hogansville. Judgment for plaintiff, and defendant brings error. Reversed.

Hall & Jones, of Newnan, for plaintiff in error.

Hatton Lovejoy, of La Grange, for defendant in error.

STEPHENS, J. Judgment reversed.

JENKINS, P. J., and HILL, J., concur.

(27 Ga. App. 385)

HOME REALTY CORPORATION v. MORROW. (No. 12054.)(Court of Appeals of Georgia, Division No. 2.
Sept. 27, 1921.)*(Syllabus by the Court.)*

1. Principal and agent ⇨136(4)—No recovery of money paid by agent to principal.

Where money is paid to the agent of another, the payor cannot, in a suit against the agent, recover the sum thus paid, where the agent had, before the suit, paid the money over to his principal.

2. Principal and agent ⇨136(4)—No recovery of money paid to agent and appropriated in payment of indebtedness due from principal.

When a principal authorizes his agent, who has in his hands money collected for the principal, to appropriate the money to the cancellation of an indebtedness due by the principal to the agent, this is equivalent to the agent's paying the money to his principal.

3. Verdict—Demand.

This being a suit in the municipal court of Atlanta by the payor against the agent, and a verdict for the defendant being demanded as a matter of law, the judge of the superior court erred in not sustaining the defendant's certiorari, complaining of a judgment rendered for the plaintiff.

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action by J. R. Morrow against the Home Realty Corporation. Judgment for plaintiff in the municipal court sustained on certiorari, and defendant brings error. Reversed.

Anderson, Rountree & Crenshaw, of Atlanta, for plaintiff in error.

J. Caleb Clarke, of Atlanta, for defendant in error.

STEPHENS, J. Judgment reversed.

JENKINS, P. J., and HILL, J., concur.

(27 Ga. App. 382)

MACON, D. & S. R. CO. v. HEARD BROS.
et al. (No. 12005.)(Court of Appeals of Georgia, Division No. 2.
Sept. 27, 1921.)*(Syllabus by the Court.)*

1. Bailment ⇨21—Bailee for hire may maintain.

A bailee for hire has such title and right of possession as will authorize it to maintain a suit in trover. Civ. Code 1910, §§ 3488, 4482; McWhorter & Armor v. Moore, 7 Ga. App. 439, 87 S. E. 115.

2. Trover and conversion ⇨11—Innocent purchaser's liability stated.

While it is a conversion of personal property for one in possession, without title, to sell

the property and receive the proceeds (Branch v. Planters' Loan & Savings Bank, 75 Ga. 342), although the one in possession was an innocent purchaser from one with no authority to sell from the true owner, yet where the true owner lost possession of the property through the negligent and fraudulent acts of its own agents and employees, such owner could not maintain trover for the property against one who innocently came into possession thereof, and who had in good faith disposed of the property without any notice of the claim of the true owner.

3. Verdict proper for defendant.

It appearing in the instant case, which is a suit in trover to recover the possession of certain property, that the plaintiff lost possession of the property through the fraudulent and negligent acts of its own agents and employees, and that the defendant was guilty of no negligence or fault in the premises, and has disposed of the property in good faith and without any notice of the plaintiff's claim, the trial judge did not err in directing a verdict for the defendant.

Error from City Court of Macon; Will Gunn, Judge.

Action by the Macon, Dublin & Savannah Railroad Company against Heard Brothers and others. From judgment for defendants on directed verdict, plaintiff brings error. Affirmed.

Chas. Akerman and Jesse Harris, both of Macon, for plaintiff in error.

T. A. Jacobs, Jr., Jno. R. L. Smith and Grady C. Harris, all of Macon, for defendants in error.

STEPHENS, J. Judgment affirmed.

JENKINS, P. J., and HILL, J., concur.

(27 Ga. App. 388)

WADE v. EASON. (No. 11979.)(Court of Appeals of Georgia, Division No. 2.
Sept. 28, 1921.)*(Syllabus by the Court.)*

1. Partnership ⇨110—On foreclosure of mortgage by partner to copartner, held error to strike counter affidavit claiming in defense that defendant was being proceeded against individually for a partnership debt.

This is a foreclosure, in one action, of two mortgages made by Wade to Eason, one for \$3,000, and a subsequent one for the same \$3,000 indebtedness, and for an additional indebtedness of \$200. The defendant mortgagor filed a counter affidavit, alleging that at the time of the execution of the subsequent mortgage he and the plaintiff were in partnership, conducting farming operations, and that it was given to secure \$200 advanced to him for the benefit of the partnership, and was procured by the plaintiff, and the indebtedness represented by the original mortgage included therein.

in accordance with an agreement and understanding between them that it was executed solely for the purpose of being used by the plaintiff to negotiate a loan of money thereon for the benefit of the partnership, and that, since the partnership had not terminated, the defendant could not be proceeded against individually for the partnership debt. *Held*, that the court erred in striking the defendant's counter affidavit in so far as it set up this defense to the subsequent mortgage. See, in this connection, *Miller v. Freeman*, 111 Ga. 654, 36 S. E. 961, 51 L. R. A. 504; *Paulk v. Creech*, 8 Ga. App. 738, 70 S. E. 145.

2. Mortgages ¶415(1)—Unenforceable subsequent mortgage held not to bar foreclosure on former.

It appearing that the original mortgage for \$3,000 had been executed as a transaction between the parties individually, and before any partnership relation between them was in existence, and there being no valid plea of payment of this mortgage, or any other defense thereto, set up in the defendant's counter affidavit to the foreclosure, the court properly struck the counter affidavit in so far as it applied to the original mortgage.

3. Pleading ¶192(3) — Counter affidavit in mortgage foreclosure held to insufficiently allege discharge of indebtedness.

Where the counter affidavit alleged that the indebtedness secured by the original mortgage arose out of a contractual relation between the parties, and set out the terms of such contract, and made a general allegation to the effect that the defendant had complied with his obligations under such contract, without alleging particularly how the obligations had been complied with, it insufficiently alleged a discharge of the indebtedness, and was therefore subject to special demurrer, on the ground that the particulars of the alleged "payment" were not set out.

4. Mortgages ¶415(1)—Allegation as to damages in counter affidavit on foreclosure properly stricken.

The counter affidavit was properly stricken in so far as it set up that the defendant was, by the mortgagee's conduct in "fraudulently procuring the execution of the second mortgage," damaged in his farming operations by virtue of his laborers and tenants being interfered with, and crippled in his ability to carry out his contract of purchase for land with a third person. *Arnold v. Carter*, 125 Ga. 319, 54 S. E. 177.

5. Counter affidavit—Striking.

The trial judge erred in striking the counter affidavit in its entirety.

Error from City Court of Waynesboro; Wm. H. Davis, Judge.

Action by A. J. Eason against L. M. Wade. Judgment for plaintiff, and defendant brings error. Reversed.

Pierce Bros., of Augusta, M. C. Barwick, of Louisville, and E. V. Heath, of Waynesboro, for plaintiff in error.

Wm. H. Fleming, of Augusta, Phillips & Abbot, of Louisville, and F. S. Burney, of Waynesboro, for defendant in error.

STEPHENS, J. Judgment reversed.

JENKINS, P. J., and HILL, J., concur.

(89 W. Va. 29)

GEORGE WASHINGTON LIFE INS. CO. v. JAYNE et al.

(Supreme Court of Appeals of West Virginia. Sept. 13, 1921.)

(Syllabus by the Court.)

Vendor and purchaser ¶279—Parties purchasing property in suit from plaintiffs held entitled to excess of purchase money on judicial sale over agreed price.

The rights of no one else being affected thereby, purchasers from the owners by written contract of the subject matter of a suit to enforce a vendor's lien after decree of sale, which the owners refuse to execute, may intervene by petition to be made parties to the suit and to have decreed to them, as equitable owners of the property sold, the excess of purchase money over the price which they had agreed to pay for it.

Case Certified from Circuit Court, Kanawha County.

Action by the George Washington Life Insurance Company against Cecelia M. Jayne and another, in which E. B. Stephenson and others intervened, and their demurrer to the petition was overruled, and they were ruled to answer and the case certified. Affirmed.

Koontz & Hurlbutt, of Charleston, for interveners E. B. Stephenson and others.

Morton & Mohler and Lively & Stambaugh, all of Charleston, for defendants.

MILLER, J. After the decree to enforce the vendor's lien was pronounced in this cause, but before its execution by the special commissioner appointed for that purpose, E. B. Stephenson, A. B. Koontz and William Jones intervened by petition and were made parties, setting up therein their contract for the purchase of the property from the defendants, Cecelia M. Jayne and David A. Jayne, which the defendants had failed to execute by perfecting their title to the property and the execution of a deed in accordance with the provisions of the contract, alleging furthermore that by the failure of the defendants to comply with their contract the property was sold by the commissioner after an understanding between him and counsel for the parties to the suit, that the plaintiff should buy in the property and con-

vey it to petitioners for the price and upon the same terms as provided in the contract, but that at said sale another party appeared and bid in the property for \$1,200 in excess of the price agreed upon between defendants and petitioners, rendering it impossible for the plaintiff to convey it to petitioners, but that as by the contract the equitable title to the property thereby became vested in them, they were entitled to the excess of purchase money, which they prayed might be decreed them out of the proceeds of said sale.

The demurrer of the defendants Jayne to the petition was overruled, and they were ruled to answer, and upon their motion the correctness of the ruling of the court upon said demurrer has been certified to us for decision.

We are of opinion that the ruling of the circuit court upon the demurrer to the petition was clearly right. The validity and terms of the contract are not questioned. Petitioners were ready, able and anxious at all times to execute the contract on their part. No excuse for the failure of the defendants to do so on their part yet appears, and if the facts as alleged in the petition, exhibiting the contract duly signed, sealed and acknowledged by the defendants, are true, the effect of the contract was to invest in the petitioners the equitable title to the property subject to its terms, and the right to the surplus money arising from the sale of course would follow the equitable title.

We see nothing of merit in the contention that it was illegal and improper for counsel for the parties to agree, as they are alleged to have done, that the commissioner should sell, and to indicate the price at which the property should subsequently be sold by the plaintiff as purchaser to petitioners. This was not an agreement to stifle bidding or injure any one, certainly not the defendants, for whatever might be bid at the sale by any one not a party to the agreement over and above the price which petitioners had agreed to pay defendants therefor would belong to the former as equitable owners, no creditor or other person being affected thereby.

Nor is there anything in the contention that petitioners were not entitled to come into the cause after the decree of sale adjudicating the rights of the original parties to the suit. Upon the sale the court had the funds in hand, the proceeds of the sale, and authority and jurisdiction to dispose of them to the rightful claimants. Petitioners might possibly have paid off the vendor's lien and then sued for specific performance, but they did not choose to do so. It was their right to allow the property to be sold, and if sold for more than they agreed to pay for it, to demand the excess of purchase money. This they have done.

The right of the petitioners to so intervene is ruled, we think, by the principles of *Cassady v. Cassady*, 74 W. Va. 53, 81 S. E. 829, holding that a stranger to a chancery suit, claiming an interest in the subject matter thereof, may, with leave of the court, make himself a party thereto by petition; and of course this includes the right to have his rights decreed to him in the cause. The rights of the petitioners in this cause appear to be fixed by the terms of the written contract; but they are here only on the demurrer to the petition. What may appear on the trial affecting the rights of the other parties, we do not know; but it is clear the petition presents a good cause for relief.

The ruling of the circuit court will, therefore, be affirmed.

(89 W. Va. 62)

VANSENDE v. KERR.

(Supreme Court of Appeals of West Virginia.
Sept. 20, 1921.)

(Syllabus by the Court.)

1. Receivers §95—Special receiver incurring obligation without special authority is personally liable.

If a special receiver, without special contract limiting his liability and without authority specially conferred or implied, enters into a contract with a third person, whereby he incurs money or other obligation, he is personally liable thereon, as in the case of executors, administrators and trustees on like contracts.

2. Receivers §183—Declaration against special receiver individually for money advanced to pay interest on receiver's certificates held demurrable.

A declaration against a special receiver in his individual right for money advanced by plaintiff to pay interest on receiver's certificates, which alleges want of authority in the receiver to borrow money to pay such interest, but does not aver want of authority to issue and negotiate such receiver's certificates bearing interest, is bad on demurrer, the receipt given by the special receiver for such advancement showing that the money so advanced was to be paid out of the first money available for that purpose.

Case Certified from Circuit Court, Monongalia County.

Action by H. W. Vansenden against Raymond E. Kerr. Demurrer to declaration sustained, and case certified. Affirmed.

Glasscock & Glasscock, of Morgantown, for defendant.

MILLER, J. The sufficiency of plaintiff's declaration being challenged by demurrer, the court below sustained the demurrer and certified the question to this court.

The action was upon the following instrument, called a note in the pleading:

"This is to certify that there is due and payable out of the first funds available, to Thomas F. Barrett, or his assigns, Fifteen hundred (\$1500.00) dollars for money advanced to the undersigned Receiver to pay interest on the first issue of Receiver's Certificates for period October 1, 1918, to April 1, 1919.

"Morgantown, W. Va., July 10, 1919.

"Raymond E. Kerr, Special Receiver,

"Morgantown & Wheeling Railway Co."

The averments of the declaration so describing and setting out the instrument are that the defendant thereby promised to pay Thomas F. Barrett, or his assigns, the sum of \$1,500.00; that he had no lawful authority as special receiver to make and execute the instrument, and thereby became personally liable for the payment of said sum so demanded, with lawful interest thereon; that at the time of the making and delivery of said note or certificate the defendant was not duly authorized as special receiver of said railway company to negotiate any loan of money, and was not duly authorized to make, sign or deliver said note or certificate to said Barrett as such special receiver, and had no authority whatsoever to bind or obligate the funds of the special receiver by accepting said loan or advancement, or by signing or delivering said note or certificate; whereby it is alleged defendant is indebted to plaintiff, and is personally liable, in the full amount of said note or certificate, with interest from July 10, 1919, the date received, until paid; which sum, though often requested, he has not paid, to plaintiff's damages \$10,000.00.

In the written opinion of the judge of the circuit court the reason given for sustaining the demurrer is that the certificate may have been given before the receiver received the money, or it may have been advanced to him before the certificate was issued, and if the latter, it is clear, the opinion says, the purpose of the instrument was to give Barrett evidence of the fact that theretofore, for some reason not stated he had seen fit to advance said sum to pay interest on the first issue of receiver's certificates for the period stated, and that the amount advanced was due Barrett and should be paid to him out of the first funds available, and if so the plaintiff had no cause of action against defendant personally.

No brief or oral argument has been presented by counsel for plaintiff, nor is any authority cited in support of the ruling of the court upon the demurrer.

[1] The declaration in form is a nondescript and is very inartistically drawn. But when analyzed, its effect is to aver that defendant, pretending to act as special receiver, but without authority in the premises, borrowed from said Barrett the sum of \$1,500.00 to pay interest on special receiver's certificates, and that being without such authority, he became liable to the assignee

of the receipt declared on, as for money had and received for the use of Barrett and his assigns, for the sum so advanced. Unless in some way one so dealing with a special receiver acting without authority, and with knowledge of the fact, binds himself to look to the estate or property in the hands of the receiver for payment of the obligation, the contract is primarily the personal obligation of the receiver. In such cases he has no responsible agent, whom he can bind by his contract. The law applicable to executors, administrators and trustees in like cases applies. *Peoria Steam Marble Works v. Hickey*, 110 Iowa, 276, 81 N. W. 473, 80 Am. St. Rep. 296; *Foland v. Dayton*, 40 Hun. (N. Y.) 563; *Kain v. Smith*, 80 N. Y. 458; *Brandt v. Siedler*, 10 Misc. Rep. 234, 31 N. Y. Supp. 112; *Haupt v. Vint*, 68 W. Va. 657, 70 S. E. 702, 84 L. R. A. (N. S.) 518; *New v. Nicoll*, 73 N. Y. 127, 29 Am. Rep. 111; *Rogers v. Wendell*, 54 Hun. 540, 7 N. Y. Supp. 781, 8 N. Y. Supp. 515. In 1 Clark on the Law of Receivers, § 789(h), pp. 860, 861, summarizing the rule in this country, it is said:

"If the receiver, without the direct or explicit order of court, or without any implied power, yet under color of his office as receiver, enters into a contract with third parties, such contract is the contract of the receiver personally and individually, and he is primarily liable. If such contract is proper and beneficial to the estate, and if there are funds available, the liability may be paid by order of the court out of such available funds. If there are no available funds, the receiver may have to pay such liabilities himself."

No hardship is imposed upon the receiver by this rule, for if the contract has resulted beneficially to the estate in his hands, as the decisions say, he may report the matter and have the money paid out allowed him as a part of the expenses of his administration. *Peoria Steam Marble Works v. Hickey*, supra; *Joost v. Bennett*, 123 Cal. 424, 56 Pac. 43; *New v. Nicoll*, supra, 73 N. Y. 131, 29 Am. Rep. 111.

[2] But it is not alleged that the defendant was not authorized to borrow money and issue interest bearing receiver's certificates therefor. Without such direct averment, must we not on demurrer assume power in the receiver to issue such certificates and to borrow money thereon? If such certificates were authorized, the power, if not expressed, would be implied to make them bear interest, and if so, to pay interest thereon out of the funds in the receiver's hands available therefor. The certificate declared on shows on its face that Barrett had advanced \$1,500.00 to pay interest on the first issue of receiver's certificates, and that there was or would be due to him out of the first funds available the sum so advanced to pay interest. If there was power and authority in the receiver to issue and negotiate re-

ceiver's certificates, did that not amount to an agreement on the part of Barrett to look to the funds that might be thereafter available for payment of interest, and bring the contract within the exception to the general rule limiting liability of the special receiver, as stated in the authorities cited? We think the receipt must be so construed, and as protecting the special receiver from personal liability, provided, of course, the fact is, as presumed, that the receiver had authority to issue receiver's certificates bearing interest.

Such being our view of the case, we affirm the ruling of the circuit court.

LYNOH, J., absent.

(89 W. Va. 91)

IDLEMAN v. GROVES.

(Supreme Court of Appeals of West Virginia.
Sept. 20, 1921.)

(Syllabus by the Court.)

1. Pleading \S 193(1)—Declaration in trespass on the case for abduction is not demurrable because alleging incident facts and circumstances.

A declaration in an action of trespass on the case for the abduction of a child, about 18 months old, is not demurrable merely because it alleges the facts and circumstances incident to the commission of the wrongful act and the method of its commission, as by an assault by defendant and others co-operating with him pursuant to a conspiracy formed by them for the purpose.

2. Abduction \S 21—Declaration in trespass on the case for infant's abduction not defective, because not based on loss of service.

Nor is such a declaration necessarily defective by reason of the omission of an averment showing the basis of the action to be loss of the services of an infant child occasioned by its abduction and unlawful detention by defendant.

3. Abduction \S 21 — Elements of declaration for infant's abduction set out.

A declaration in such an action is sufficient if it shows cause for recovery on account of mental anguish, pain, and suffering on the part of the plaintiff occasioned by the wrongful detention of the child, thereby disqualifying him for the transaction of his ordinary business affairs, and on account of the cost and expenses incurred in litigation prosecuted by plaintiff to regain possession of the child.

4. Abduction \S 19—Statute held not to bar damages for infant's abduction by party previously adjudicated to have its custody.

Section 7, of chapter 82 of the Code of 1913 (sec. 3953), as amended by chapter 80, Acts 1921, does not appear to bar plaintiff's right to maintain the action, the right to its possession having been adjudicated in his favor in a proceeding instituted for the purpose.

Case Certified from Circuit Court, Grant County.

Action in trespass on the case by Milford Jesse Idleman against John Groves, for damages for abduction of a minor child. Demurrer to declaration sustained, and cause certified. Ruling reversed, demurrer overruled, and declaration held sufficient.

W. C. Grimes, of Keyser, for plaintiff.

E. L. Judy, Arch J. Welton, and I. D. Smith, all of Petersburg, and Taylor Morrison, of Keyser, for defendant.

LYNOH, J. The questions certified arise on a demurrer to the declaration in an action of trespass on the case. The plaintiff sued to recover damages for the abduction of his son, a child now about 18 months old, born in lawful wedlock between him and defendant's daughter, plaintiff's wife. The defects relied on as grounds for demurrer are: First, the averment of more than one cause of action in the declaration consisting of but one count; second, the want of authority to maintain the action when the abduction was consummated by an assault upon the plaintiff initiated by defendant pursuant to a conspiracy in which the mother of the child, her father, and others under his control were active participants; and, third, the failure to allege loss of the services of the child during the abduction period.

[1] The declaration does in detail aver the combination among the persons named therein for the purpose of forcibly depriving the plaintiff of the custody and control of the child then and theretofore in his lawful possession, and that, by assaulting and thereby inflicting upon him serious personal injuries, they succeeded in the accomplishment of the unlawful purpose contemplated by them. In other words, the declaration, when properly interpreted, avers but one cause of action—the abduction of the child. Allegations of the manner in which defendant and those who co-operated with him accomplished their purpose are merely explanatory of the incidents leading up to and culminating in the consummation of the wrongful act. Their only office is to show the circumstances in which the unlawful change in the custody of the child was brought about.

That the recovery so sought by plaintiff is confined to a single issue no more clearly appears elsewhere than in the closing part of the pleading itself; for it is there asserted in no uncertain language that, by the means employed, including the unlawful assault and the infliction of injuries, plaintiff wrongfully and unjustly was deprived of the society, possession, and control of the child until it was restored to him about two months later by an order in a judicial proceeding instituted by him for that purpose, wherefore, and because of the costs incurred and

money expended by plaintiff to recover possession of the child, he has been greatly injured and damaged, etc.

Obviously, plaintiff does not in this action seek redress for the personal injuries inflicted upon him. The gist of the action is not the assault and battery, but the unlawful interference with the exercise of a lawful right. As we view it, the declaration has for its sole object redress of one grievance—the abduction of the child.

The singleness and certainty of the pleading is apparent, notwithstanding allegations as to the combination to carry into effect the unlawful purpose, and as to the assault made upon the plaintiff to insure the success of that purpose. These are only the incidents, although somewhat directly connected with the commission of the wrongful act. We fail to see in what respect the declaration violates the rules of good pleading. Certainly it does not merely because it details the circumstances under which the wrong complained of was committed. They do not confuse the main issue, but rather tend to clarify and accentuate it. If irrelevant or incongruous, still they do not render the pleading defective. In that event they are to be treated as harmless or superfluous, as they in no wise affect the real merits of the controversy. But these averments, read together, are neither irrelevant nor inconsistent.

What has been said as to the first objection in effect answers and eliminates the second; that is whether plaintiff can maintain the action against defendant as an active participant with plaintiff's wife, she being a coconspirator. Though not necessary, it may not be amiss to cite *Rice v. Nickerson*, 9 Allen (Mass.) 478, 85 Am. Dec. 777, refuting the argument based upon the second objection; for the substance of the decision is that it is not a legitimate defense to an action for depriving plaintiff of the lawful custody of the child that defendant acted at the request of the child's mother.

[2, 3] The third ground—that is, the failure to aver loss of services—is also not fatal, though it may sometimes be prudent to insert it in declarations of this kind. The declaration does state facts sufficient to show that no substantial benefit could be derived from the services of the child 18 months old. Instead of its being a source of income, the expense incident to its maintenance, support, and training is a burden; a burden more than compensated by the comfort and pleasure of its presence as a member of the household, it is true. Besides, loss of service is a mere fiction—"an outworn fiction," according to *Hood v. Sudderth*, 111 N. C. 215, 16 S. E. 397; *Willeford v. Bailey*, 132 N. C. 402, 43 S. E. 928; *Kirkpatrick v. Lockhart*, 2 Brev. (S. C.) 276.

There may be circumstances in which a pleading should use the phrase omitted. Ap-

parently it was so used in *Taylor v. Chesapeake & Ohio Railway Co.*, 41 W. Va. 704, 24 S. E. 631. The wages of the son had, prior to his death, contributed to the support of the father's family, and the basis of the action was the loss of this contribution. As the child abducted by the defendant had no earning capacity, an averment of the loss of service would mean nothing, and plaintiff could not by proof show such loss had the declaration so averred. Would the action prove abortive because of such failure? An affirmative answer would be ludicrous.

At an early date the common law afforded the parent a right of action for the abduction of his child only when the child was an heir in whose marriage the plaintiff had valuable rights, and later because he lost the child's services.

"The modern American rule seems, however, to be that the parent may sue without alleging or proving loss of services, which seems to be an honest result." 1 Schouler, Mar., Div., Sep., & Dom. Rel. (6th Ed.) § 750.

In the same section the author further says:

"The modern authorities have advanced, and now the parent can recover damages for the unlawful taking away or concealment of a minor child, and is not limited to cases in which such child is the heir or eldest son—nor are the damages limited to the fiction of loss of services." The real ground of action is compensation for the expense and injury—for the wrong done him in his affections and the destruction of his household."

These grounds of relief by way of damages the declaration sufficiently states. As so set out, plaintiff has suffered great pain and mental agony, and was hindered and prevented from performing and transacting his necessary affairs and business during a greater part of that time (the absence of the child), and because of the abduction—

"was put to great costs, expenses, time and attorneys' fees—in and about endeavoring to secure possession, custody, care, control and education of the child," etc.

[4] What relevancy and bearing defendant's reliance upon section 7, c. 80, Acts 1921, has or can have upon the sufficiency of the declaration or upon the right of the plaintiff to maintain the action, it is difficult to perceive. The chapter amends and re-enacts sections 1, 3, and 7 of chapter 82 of the Code (secs. 3947, 3949, 3953), relating to guardians and wards. As so amended, section 1 confers authority upon the father or mother to appoint by will a guardian for his or her child, born or to be born, and for such time during infancy as he or she may direct, and section 3 like authority upon the county court to appoint a guardian where the minor has any estate therein, provided the father or mother has not done so; or, if there be no father or

mother living, then it (the county court) shall appoint as such guardian his nearest of kin residing in the county wherein such minor resides or has any estate, and competent to act as such guardian, and, if there be no father or mother or next of kin, the court shall appoint some suitable person guardian for such minor. Section 7 purports to give a guardian appointed pursuant to the terms of section 3 the custody of his ward and the possession, care, and management of his estate, real and personal, and out of the proceeds of the same provide for the maintenance and support of the ward; but the father or mother of such ward shall be entitled to the custody of the person of such minor, and to the care of his education, and, if living together, shall be joint guardians of their minor child or children, with equal powers, rights, and duties in respect to their custody, control, and of the services and earnings of such minor child or children, and neither shall have any right paramount to that of the other as to such custody, control, services, and earnings.

The plaintiff and his wife presumably are not living together, and were not when the circuit court restored to plaintiff the care and custody of their child. That right thereby became an adjudicated matter as between the father and mother, according to the declaration, and as to the merits, as the case now appears, the right to the custody of the child is foreclosed.

Our opinion, therefore, is that the circuit court erred in the ruling upon the demurrer, and that, instead of holding the declaration insufficient, it should have held it sufficient, and our order will so certify.

(89 W. Va. 84)

STATE v. MILLER.

(Supreme Court of Appeals of West Virginia.
Sept. 20, 1921.)

(Syllabus by the Court.)

1. Intoxicating liquors §134—Word "liquors," in prohibition statutes, is limited to beverages referred to therein.

The word "liquors," used in the prohibition statutes, is limited in its meaning, and includes only such beverages as are referred to in section 1 of that law.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Liquor.]

2. Indictment and information §19—Indictment in form prescribed by act is good on demurrer.

An indictment for a violation of the prohibition law in the form prescribed by section 3 of chapter 108 of the Acts of 1919, is good on demurrer.

3. Indictment and information §125(2)—Two or more offenses of same general nature may be joined in indictment.

Joinder of two or more offenses of the same general nature in an indictment is not good ground of demurrer.

(Additional Syllabus by Editorial Staff.)

4. Indictment and information §125(14) — Indictment for selling, giving, and storing liquor not duplicitous.

An indictment charging that defendant did "sell, give, offer, expose, keep, and store for sale and gift liquors" held not bad for duplicity, although defendant might be guilty of distinct offenses.

Case Certified from Circuit Court, Roane County.

Holl Miller was indicted for violation of the prohibition law. The demurrer to the indictment was overruled, and the case certified. Ruling on demurrer affirmed.

E. T. England, Atty. Gen., R. A. Blessing, Asst. Atty. Gen., and John W. Lance, Pros. Atty., of Spencer, for the State.

Thos. P. Ryan, of Spencer, for defendant.

RITZ, P. Defendant was indicted in the circuit court of Roane county upon the charge that he did unlawfully sell, give, offer, expose, keep, and store for sale and gift liquors. A demurrer to the indictment was overruled, and the questions arising thereon certified to this court.

The indictment is in the form prescribed by section 3 of chapter 108 of the Acts of 1919. The ground of the demurrer is that the indictment does not necessarily charge an offense, for the reason that the word "liquors," which the defendant is charged with having dealt in, is too uncertain to make him guilty of any crime under the law; and, second, that the indictment is bad for duplicity, in that several separate offenses are charged therein.

[1, 2] It is quite true that the word "liquors" used in this indictment in its broad sense may include other substances than those referred to in the statute, but this form of indictment is prescribed by the law itself. The word "liquors," used in the prohibition statutes, has a well-defined significance. Section 1 defines the term, and it says just what it means when used in that law. No matter what the word may signify in other connections, its meaning in the prohibition laws is clearly and definitely determined by the language of section 1. The Legislature determined to inhibit the manufacture and sale of a number of different beverages, and for convenience adopted one term which included all or any of them, and this is the use made of the word

"liquors" in the law, so that when the word "liquors" is used it is limited in its meaning to the things mentioned in section 1. By the very terms of section 1 it cannot be given any broader or narrower meaning. The defendant cites the cases of *State v. Durr*, 69 W. Va. 251, 71 S. E. 767, 46 L. R. A. (N. S.) 764, and *State v. Dennison*, 85 W. Va. 261, 101 S. E. 458, as authority for the proposition that one may defend against an indictment of this character by showing that the substance sold by him was not a spirituous or malt liquor and was not intoxicating. This is quite true, but when he shows this he shows that it was not a liquor under the prohibition act. In other words, he is not guilty because he did not deal in liquors as defined by the act.

[3, 4] The suggestion that the indictment is bad for duplicity is without merit. It is true that, if the defendant did sell, give, offer, expose, keep, and store for sale and gift liquors, he may be guilty of separate and distinct offenses; but it is well established in this jurisdiction that the joinder of two or more offenses of the same general nature in an indictment is not ground of demurrer. *State v. Calhoun*, 67 W. Va. 666, 69 S. E. 1098; *State v. Jarrell*, 76 W. Va. 263, 85 S. E. 525.

It follows that the demurrer to the indictment was properly overruled, and we answer the question certified accordingly.

LYNOH, J., absent.

(89 W. Va. 66)

VAN RAALTE CO. v. SOLOF BROS. CO.

(Supreme Court of Appeals of West Virginia.
Sept. 20, 1921.)

(Syllabus by the Court.)

1. Set-off and counterclaim §35(2)—Defendant cannot set off unliquidated damage claim arising from different transactions.

The general rule, in this state as elsewhere, unless controlled by statute, is that a defendant in an action at law can not set off against plaintiff's demand a claim for unliquidated damages arising out of a different transaction than the one sued on.

2. Set-off and counterclaim §35(2)—Difference between contract price and that paid on seller's breach is not "liquidated demand," and cannot be set off against seller's demand for price of other goods.

A claim of defendant for the difference between the contract price of goods sold but not delivered to him by the plaintiff and the price paid by him in the open market for like goods to take their place is not under the rule of our decisions a liquidated demand provable as a set-off against plaintiff's demand for the

price of other goods actually sold and delivered to him.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Liquidated.]

3. Set-off and counterclaim §35(2)—Plea that plaintiff is a nonresident will not support equitable set-off of liquidated damages against a demand in another transaction.

An averment in a plea that plaintiff is a nonresident of the state and that process in an action against him on an unliquidated demand cannot be served upon him here will not in law support a plea of equitable set-off of such unliquidated damages against plaintiff.

Case Certified from Circuit Court, Cabell County.

Action in assumpsit for goods sold by the Van Raalte Company against the Solof Brothers Company. Plea of set-off stricken, and case certified. Ruling of circuit court affirmed.

Simms & Staker, of Huntington, for plaintiff.

Vinson, Thompson, Meek & Renshaw, of Huntington, for defendant.

MILLER, J. In an action of assumpsit for the value of goods sold, the defendants sought by plea to offset two counterclaims for damages for alleged breaches of plaintiff's contracts to sell and deliver to defendants at prices stipulated in the contracts certain other goods which, because of such breaches, they had been obliged to purchase in the market at higher prices, whereby they were damaged to an amount largely in excess of plaintiff's demand against them. It is not alleged in the plea that these counterclaims arose out of the same transaction on which plaintiff sued, nor that plaintiff is insolvent, but the sole ground for equitable relief is that plaintiff is a non-resident corporation and that, for that reason, service of process can not be had upon it in this state.

The question certified is whether the plea presents a good defense of set-off to plaintiff's demand. The circuit court ruled that it did not, and struck out the plea.

[1] We think the court was clearly right. Defendants' counsel concede it to be well settled in this state and everywhere in general, unless a different rule has been established by statute, that a defendant in an action at law can not have set off against the plaintiff's demand a claim for unliquidated damages arising out of a different transaction than that sued on. Our decisions on this proposition are numerous. *Clark's Cove Guano Co. v. Appling*, 33 W. Va. 470, 10 S. E. 809; *Case Mfg. Co. v. Sweeny*, 47 W. Va. 638, 35 S. E. 853; *Ashland Coal & Coke Co. v. Hull Coal & Coke Corp.*, 67 W. Va. 503, 68 S. E. 124; *Dodge v. Brown*, 74 W. Va. 466, 82

S. E. 262; J. C. Orrick & Son Co. v. Dawson, 67 W. Va. 403, 68 S. E. 39; Cook Pottery Co. v. Parker, 86 W. Va. 580, 104 S. E. 51; Fairbanks v. Breckinridge, 84 W. Va. 233, 90 S. E. 398.

[2] The principal question presented by the plea is whether it amounts to a liquidated demand upon which an action of indebitatus assumpsit would lie, and provable as a set-off, or constitutes an unliquidated claim for uncertain damages for which no exact measure thereof can be applied. As said, the claim does not arise out of the same transaction as that sued on, but if the claim of defendants and the amount thereof is susceptible of accurate ascertainment, it might be interposed as defendants' plea undertakes to do by way of set-off. The plea says defendants were compelled to go into the market and buy goods to take the places of parts of the several lots contracted for, and were obliged to pay prices in excess of the price stipulated in the contract. In the recent case of Richardson Const. Co. v. Whiting Lumber Co., 116 Va. 490, 82 S. E. 87, the Virginia court would seem to have allowed a plea of set-off similar to the one involved here, on the theory that the damages claimed were susceptible of definite ascertainment. We do not think this decision is in accord with our own, nor with the weight of authority, nor with prior decisions of the Virginia court. In *Christian v. Miller*, 3 Leigh, 78 (30 Va.) 23 Am. Dec. 251, an action on a bond which included the price of corn, a claim of the same character—damages for failure to deliver the corn—the right of set-off was denied. Judge Tucker defined the character of the claim in that case as strictly one for unliquidated damages and not a proper subject of set-off. In *Pottery Co. v. Parker*, supra, we held that a demand for rent or royalty for the right to manufacture an article, and the rent or royalty was fixed by contract, constituted a liquidated demand which might be set off against defendant's notes, the plea alleging that the quantity manufactured, at the rate specified, was sufficient to have aggregated the sum sued for; but that the plea in that case claiming damages for the difference between the price at which it was averred the defendant agreed to manufacture and sell the goods and the price at which plaintiff sold them to others, being unascertainable by any facts alleged or by any known method of calculation, did not constitute a good plea of set-off. In *J. C. Orrick & Son Co. v. Dawson*, supra, one of the questions was whether defendant, in an action by plaintiff for a lot of cans sold him, could recoup damages for plaintiff's alleged failure to take and pay for certain canned goods sold it, defendant's claim not arising out of the same transaction as that sued on; and it was held that defendant's

claim was not a proper subject for recoupment.

[3] But does the fact alleged, that the plaintiff is a non-resident, and service in this state can not be executed upon it, give ground for relief, as defendants aver? Defendants' counsel contend that this fact constitutes good ground for equitable relief, aside from the ground of insolvency or any other equitable ground. The only authorities offered for this contention are *Ewing-Merkle Elect. Co. v. Lewisville Light & Water Co.*, 92 Ark. 594, 124 S. W. 509, 30 L. R. A. (N. S.) 21, 19 Ann. Cas. 1041, and a note to L. R. A. 1918B, p. 425. In Arkansas the same form of action applies to both law and equity cases. There the defendant interposed a cross-bill, alleging the non-residence of plaintiff as ground for relief in equity, and the defense was sustained. As the note in that case, 30 L. R. A. (N. S.) p. 21, will show, the authorities are in conflict as to whether non-residence of the plaintiff is a good ground for equitable relief. We need not go into this question, for we are in a court of law, and in no case cited or examined have we found that such equitable rights have been enforced in an action at law.

We affirm the ruling of the circuit court.

(89 W. Va. 87)

STATE ex rel. BOWEN v. KIRK et al.
(No. 4413.)

(Supreme Court of Appeals of West Virginia.
Sept. 20, 1921.)

(Syllabus by the Court.)

Prohibition §3(1), 5(4)—Will not lie to prevent preliminary examination because of former examination and discharge.

Prohibition does not lie to prevent a justice of the peace from holding a preliminary examination of one accused of crime, upon the ground that such accused party had been previously examined upon such charge and discharged therefrom by another justice. If such previous examination and discharge is a bar to a further examination upon the same charge, it should be taken advantage of upon the second hearing.

Petition by the State, on the relation of L. S. Bowen, for a writ of prohibition against R. C. Kirk, Justice of the Peace, and others. Writ denied.

E. L. Stone, of Charleston, and W. L. Higgins, of Huntington, for relator.

E. T. England, Atty. Gen., and R. D. Steed and Chas. Ritchie, Asst. Attys. Gen., for respondents.

RITZ, P. The petition in this case avers that on the 28th day of July, 1921, one E. A. Thornton made a complaint in writing,

duly sworn to before C. R. Clay, a justice of the peace of Marsh Fork district, in Raleigh county, charging that petitioner on the said 28th day of July did feloniously take, steal, and carry away \$1,800 from the store of McClung & Morgan Stores Co., and that on said day a warrant was issued upon said complaint by said justice; that petitioner was apprehended upon this warrant and brought before said justice on the 29th of July, and that on that day a full hearing of the matters charged in the complaint was had before said justice, the state and the petitioner each introducing a number of witnesses, and that the justice, after hearing all of the evidence offered, and after such full hearing, decided that there was not probable cause to hold petitioner upon said charge, and discharged him from custody; that on the 30th day of July, E. R. Dorsey appeared before R. C. Kirk, another justice of the peace of said county, and made a complaint in writing against the petitioner, charging him with the identical offense upon which complaint warrant was issued by said justice, and the said petitioner apprehended and produced for trial; that said R. C. Kirk did not appear for the trial, and the same was continued, and petitioner required to give bail in the sum of \$1,000 for his appearance before said justice on the 9th day of August for a hearing upon said warrant; that the said E. R. Dorsey, who made the complaint upon which the second warrant was issued, was an employé of the McClung & Morgan Stores Co., and testified on the hearing before the Justice of the Peace Clay on the 29th of July, above referred to. The petition further avers that petitioner is not guilty of the charge contained in said warrant; that a full and complete hearing was had thereof before C. R. Clay, a justice of the peace, as aforesaid, and that he was discharged therefrom, and that it is not competent for the respondent R. C. Kirk, justice of the peace, to hold him upon the warrant issued upon the second complaint, and prays that a writ of prohibition issue from this court prohibiting the said justice from further proceeding upon said warrant.

The petitioner insists that, having been discharged by one justice upon a preliminary hearing, he cannot be arraigned before another justice for another preliminary hearing upon the same charge; that, while the action of the justice is not conclusive of his guilt or innocence, still it is effective to prevent him from being subjected to an examination before another justice. Assuming for the sake of argument that the petitioner is correct in this assumption, is prohibition the remedy? The matter relied upon by him is in the nature of a plea of former acquittal. The justice has jurisdiction to issue a warrant upon a complaint charging one with an offense, and he has jurisdiction to conduct a prelim-

inary hearing in a case like this for the purpose of determining whether or not there is probable cause for holding the accused party to answer any indictment that might be returned by a grand jury. The defensive matter relied upon does not go to the jurisdiction of the justice to try for the offense charged, but simply denies the right of the justice to hold him, for the reason that he had been theretofore tried for the same offense. If the warrant had not charged the defendant with doing something which constituted an offense, then of course there would be an entire want of jurisdiction, and prohibition would lie to prevent the justice from trying him. In this case, however, the warrant charges an offense. The justice's jurisdiction to issue the warrant cannot be questioned. The matter relied upon does not impeach that jurisdiction, but simply goes to the authority to try him a second time for the same thing.

The determination of this question—assuming that it would be a good defense—involves the establishment of the identity of the accused, the identity of the offense, and proof of his former acquittal. All of these questions would have to be inquired into and determined in his favor. In the case of *Bracey v. Robinson*, Judge, 83 W. Va. 9, 97 S. E. 295, we held that a writ of prohibition would not issue to prevent a judge before whom an indictment was pending from proceeding with the case upon the ground that the defendant had theretofore been acquitted of the same offense, that this was matter of defense in that suit, and the court, having the case before it, had jurisdiction to try the issue arising upon a plea setting up such defense. While, of course, in this case it is not insisted that the discharge of the petitioner by one justice is a bar to any proceeding against him, still it is relied upon as barring any other justice from conducting a like examination, and the same principle is involved as that announced in *Bracey v. Robinson*, Judge, *supra*. In *Ex parte Page*, 77 W. Va. 467, 87 S. E. 849, the petitioner sought discharge by habeas corpus from imprisonment under a judgment rendered by a justice of the peace. The facts were that a warrant had been issued charging him with an offense. He appeared before the justice who issued this warrant, and the hearing thereon was continued to a subsequent day. Thereafter, and before the time fixed for such hearing, another justice issued a warrant against him for exactly the same offense, and tried and convicted him thereon. This court held that the pendency of the warrant before the first justice would be a bar to any proceeding before the second justice; but that this defense must be made upon the trial before such second justice.

It is argued here that, should the justice issuing the second warrant in this case refuse

to discharge the petitioner upon the showing that he had been theretofore tried before another justice, he would be without remedy by appeal, and would have to give bond for his appearance before the criminal or circuit court, or else be committed to jail; that there is no method provided for reviewing the action of a justice upon such a preliminary hearing. It is quite true that there is no method provided by statute by which the action of a justice committing a party to trial can be reviewed, but still, if a justice should, in flagrant violation of the law, hold one for trial and commit him to jail, there are many cases holding that the writ of habeas corpus is effectual to secure his discharge. *Ex parte Samuel*, 82 W. Va. 486, 96 S. E. 95. If it is shown beyond question and without controversy that the accused party should not be held, it may be said that a justice of the peace holding him under such circumstances would be exceeding his jurisdiction. *Ex parte Wilson*, 114 U. S. 417, 5 Sup. Ct. 935, 29 L. Ed. 89; *Ex parte Milligan*, 4 Wall. 2, 18 L. Ed. 281; *In re Snow*, 120 U. S. 274, 7 Sup. Ct. 556, 30 L. Ed. 658; *Ex parte Lange*, 18 Wall. 163, 21 L. Ed. 872; *In re Nielsen*, 113 U. S. 176, 9 Sup. Ct. 672, 33 L. Ed. 118. And in the case of *Ex parte Page*, 77 W. Va. 467, 87 S. E. 849, we held that, where a justice rendered a judgment which the law did not authorize, the petitioner would be discharged from imprisonment under that judgment upon a writ of habeas corpus.

We are of opinion that, if the matter relied upon by petitioner is a bar to a hearing upon the second warrant, he must present it to the justice before whom he is brought for such hearing. The writ of prohibition prayed for is denied.

LYNCH, J., absent.

(29 W. Va. 55)

HALL v. HARVEY COAL & COKE CO.

(Supreme Court of Appeals of West Virginia.
Sept. 20, 1921.)

(Syllabus by the Court.)

1. Appeal and error §47(3)—Amount sued for held amount in controversy notwithstanding verdict.

Where a demurrer is overruled and the jury, on the issue, finds a verdict of \$100 for plaintiff, but, instead of entering a judgment thereon and disposing of a motion for a new trial, the court certifies its action on the demurrer to this court for review, the amount in controversy is the sum sued for, and this court will take jurisdiction upon the question certified.

2. Mines and minerals §55(6)—Deed to minerals in place with mining privilege, without words waiving subjacent support, not construed to protect vendee against damages from removing coal.

A deed to coal and minerals in place, containing privilege of mining and removing, without words in either the granting clause or mining provision indicating an extinguishment or waiver of the right of subjacent support to the surface in case the coal is mined and removed, will not be construed to protect the vendee against damages to the surface caused by the mining and removal of the coal.

3. Mines and minerals §55(6) — Conveyance of minerals with mining right with covenants of general warranty does not extinguish vendor's right to subjacent support.

A conveyance of coal and all minerals, with the right of mining and removing said coal and all minerals, with covenants of general warranty of the coal and other minerals, does not evince the extinguishment of the right of the vendor to subjacent support to protect the surface of the land in its natural state in the event of the removal of the coal. Distinguished from *Griffin v. Coal Co.*, 59 W. Va. 490, 53 S. E. 24, 2 L. R. A. (N. S.) 1115.

(Additional Syllabus by the Editorial Staff.)

4. Pleading §216(2)—Papers attached to declaration cannot be considered on demurrer unless the parties have so agreed.

Papers attached to or made a part of a declaration or exhibited therewith cannot be considered on demurrer thereto, but where oyer of a deed made a part of the declaration was craved without objection from plaintiff and the parties, and the circuit court have tacitly agreed that the deed may be considered, it will be considered in reviewing the judgment on the demurrer to the declaration.

Case certified from Circuit Court, Fayette County.

Action by O. M. Hall against the Harvey Coal & Coke Company. Demurrer to the declaration overruled, and case certified. Affirmed.

C. R. Summerfield, of Fayetteville, for plaintiff.

Dillon & Nuckolls, of Fayetteville, for defendant.

LIVELY, J. A demurrer to the declaration was overruled, and the circuit court has certified its action in so doing to this court, and the sufficiency of the declaration is now under review.

Plaintiff filed its declaration in trespass on the case, alleging ownership of the surface of a tract of land, the coal and all minerals under which, prior to his purchase of the surface, had been sold by a former owner in the year 1898 to Harvey and Thurmond, with the right to mine and remove the same, the deed to which coal and all minerals is filed

with the declaration as a part thereof; that the defendant had wantonly and willfully removed all, or practically all, of the coal, without leaving sufficient coal in place, or without leaving in its place other permanent artificial support for preserving the surface or overlying strata in its natural condition, by reason whereof the surface began to sink in places, causing cracks, holes, and crevasses, and rendering the land unfit and useless for farming and grazing purposes, and causing damage to plaintiff of \$3,000.

[1, 4] Oyer was craved of the deed *filed as a part of the declaration*, whereupon it was produced and by order of the court *made a part of the declaration*, and then defendant demurred to the declaration, which demurrer was overruled, issue joined, and the case went to trial, resulting in a verdict in favor of the plaintiff of \$100. Motion by defendant to set aside the verdict followed, and the court, without passing upon the motion, and believing the question of the sufficiency of the declaration of vital importance, on its own motion certified its action in overruling the demurrer to this court for review, and stayed further proceedings.

Two deeds accompany the record, but as only one of them, the deed from Painter to Harvey and Thurmond in 1898, is referred to in the declaration, and that only could have been made a part of the declaration by oyer, it, only, will be considered on demurrer.

It is well settled that papers attached to or made a part of a declaration, or exhibited therewith, cannot be considered upon a demurrer to the declaration. Such documents are evidence in support of the averments of the declaration, and go to the jury. *Pingley v. Pingley*, 84 W. Va. 433, 100 S. E. 216. But inasmuch as oyer of this deed was craved without objection from plaintiff and the deed made a part of the declaration, defendant is entitled to whatever benefit he may derive therefrom. *Chitty on Pleading*, vol. 1, p. 431 (11th Ed.). It seems that the parties and the court have tacitly agreed that the deed may be considered upon the demurrer, and in this particular instance, for the purposes of this case, it will be so considered.

We are met at the threshold with a question of our jurisdiction to entertain this case under section 1, c. 135, Code 1918,¹ which provides for certification of questions arising upon the sufficiency of a summons or return of service, or challenge of the sufficiency of a pleading in any case within the jurisdiction of this court. It is urged that this court is not called upon to pass on the sufficiency of a pleading, but to construe a deed and to determine from it the right of defendant to remove the coal as lessee of Harvey and Thurmond, without leaving support sufficient to sustain the surface in its natural state. As above stated, plaintiff filed this deed as a

part of his declaration, and it was made and considered so by the court upon oyer without objection on the part of plaintiff, and he should not now complain of what he has done. Besides the declaration sets out that Painter, a former owner of the land, had, before plaintiff obtained title to the surface, conveyed "the coal and other minerals" underlying the same to Harvey and Thurmond. The declaration, while averring the ownership of the coal and minerals in others, in partial conformity with the deed, does not set out the clause or provision in the deed therefor by which the purchasers have the mining rights for "removing said coal and all minerals from said land," a privilege and right which would necessarily follow from the sale and conveyance of the coal and minerals. If there was not an implied right to mine and remove the coal and minerals, the purchase would be of little value. It is the law of necessity. The sale of land lying in the interior of and surrounded by the grantor's land implies a right of way to the grantee over the grantor's land for ingress and egress. The parties may stipulate the kind of way, its location, width, etc., so as to save possible disputes and resorts to the courts. In this deed the parties have incorporated therein a specific agreement for what the law of necessity impliedly grants, to be exercised in a particular, specified manner. The provision in the deed for mining and removing the coal does not materially affect the granting clause of the coal practically set out and averred in the declaration, and the demurrer could well be considered and disposed of without resort to the deed.

It is also urged that, inasmuch as the verdict has been rendered for \$100, the amount in controversy is too small for appeal to this court, and no question on a pleading can be certified unless the case is within the appellate jurisdiction of the Supreme Court. But what is the amount in controversy? Does the verdict of the jury upon which the court has taken no action fix the amount in controversy? "All courts deny to a verdict the legal effect of a judgment." *Hannah v. Bank*, 53 W. Va. 86, 44 S. E. 154. The amount in controversy as to plaintiff is the sum for which he sues though judgment be rendered for a less sum or judgment be for the defendant. As to the defendant, it is the amount of the judgment as of its date. This is well settled. The cases cited by plaintiff, including *Rymer v. Hawkins*, 18 W. Va. 309, *Faulconer v. Stinson*, 44 W. Va. 546, 29 S. E. 1011, and *Greathouse v. Sapp*, 26 W. Va. 87, are cases where judgments or decrees were rendered for less than the jurisdictional amount, and the appellant was defendant below. Here neither party is appealing, but the circuit court, on its own motion and in its discretion, has certified its decision for re-

¹ Code Supp. 1918, § 4981.

view. Pending the motion for new trial, nothing is settled. The circuit court may of its own motion set aside the verdict. In the present status of this case the amount in controversy is the ad damnum stated in the writ and declaration.

[2, 3] We come now to the question certified. Does the declaration and deed state a good cause for recovery? Defendant insists that the answer is in the negative under the decision of this court in *Griffin v. Coal Co.*, 59 W. Va. 480, 53 S. E. 24, 2 L. R. A. (N. S.) 1115. That case recognizes the rule well settled in England and the majority of the states that where one person owning the whole fee conveys the mineral therein, reserving to himself the surface, the grantee, in removing the mineral, is bound to furnish subjacent support for the surface in its then natural state, either by leaving sufficient of the ground to remain, or by substituting therefor adequate artificial support, unless there are contractual provisions either in the conveyance or otherwise to the contrary. In construing the deed from Griffin to Camden the court held that the vendor had contracted away the subjacent support to the vendee, because in granting mining privileges he had given the right to the vendee to excavate and remove *all* of the coal. Much stress is laid upon the word "all" as used in that deed, and the court virtually holds that without the word "all," evincing a waiver of subjacent support by the grantor, he would not have parted with the right of subjacent support. Judge Cox, in his concurring opinion, says:

"The plaintiff granted all the coal, and the ownership of the surface and of the underlying coal was severed, creating a separate estate in each. If the deed said nothing more, the owner of each would be bound by the rule, *sic utere*, etc. If the deed said nothing more, I would without hesitation hold that the owner of the surface would be entitled to support, and that the owner of the coal could not so use it by removing all of it as to injure the surface. The deed does not stop with the grant of all the coal. It contains the express additional grant, on the part of the plaintiff, to the grantee, of the right to enter upon and under said land and to mine, excavate, and remove all of said coal."

In the case of *Kuhn v. Fairmont Coal Co.* (C. C.) 152 Fed. 1013, instituted in the United States Court for the Northern District of West Virginia after the decision in the *Griffin Case*, but based on a sale of coal made before the decision in the *Griffin Case*, the Supreme Court of the United States, in 215 U. S. 349, 30 Sup. Ct. 140, 54 L. Ed. 228, decided that the *Griffin* decision was not a rule of property and therefore not binding on the federal courts in the *Kuhn Case*; and the Circuit Court of Appeals, 179 Fed. 191, 102 C. C. A. 457, 66 W. Va. 711, Judge Pritchard rendering the decision, said:

"We are not unmindful of the fact that the decisions of the courts of England and many of the courts of this country as respects this question are not in harmony with the decisions of the courts of West Virginia. Nevertheless, we find ourselves impelled to the conclusion that this difference is on account of the peculiar facts involved in this case, and not because of the propositions of law announced by the courts to which we refer."

It is then stated that, inasmuch as the decision in the *Griffin Case* would be a rule of property as between citizens of West Virginia, and if the Circuit Court of Appeals should not follow the *Griffin Case*, a different rule of property would be established for persons not resident of West Virginia and who might sue in the federal courts concerning property in West Virginia, thus bringing about confusion and injustice, and—

"on that account we would be inclined to adopt the rule of the West Virginia Supreme Court of Appeals, even if, in view of the peculiar provisions of the conveyance by which the land in controversy was transferred, we do not find ourselves in accord with that tribunal." *Kuhn v. Fairmont Coal Co.*, 66 W. Va. p. 711, 179 Fed. 191, 102 C. C. A. 457 (appendix).

As before stated, the *Griffin Case* turned upon the use of the word "all" in the mining clause, which gave the vendee the right "to mine, excavate and remove *all* of said coal." In this case the language is different. The granting clause is: "Do bargain, sell, grant and hereby convey the coal and all minerals in and upon the hereinafter described tract," and the mining clause reads, "do also grant the right of mining, and removing the said coal and all minerals from said land," and the warranty clause is "that they will warrant, with general warranty of title, the said coal, and other minerals, with the rights and privileges aforesaid hereby granted." Here, the word "all" does not modify "coal." The main and controlling subject about which the parties were contracting was the coal, but all minerals of whatever kind were also included, with the right to mine and remove, such as gold, silver, gas, petroleum, and the like. Not only the coal was purchased but all minerals also. We think a proper construction of this deed, viewing the entire language, and not any segregated words or clauses, evinces the intention of the parties to sell and purchase, not only the coal, but all other minerals in the land with the right to mine and remove the same. It is easily distinguished from the *Griffin Case*.

Godfrey v. Weyanoke Coal and Coke Co., 82 W. Va. 665, 97 S. E. 186, has no application here. In that case there was an express agreement that the vendee should have the right to mine the entire amount and body of the coal, without being in any way liable for any damage or injury which might be done to the land.

From what has been said, we do not find sufficient language in the deed under consideration which would deprive the grantor of his right to subjacent support in the removal of the coal by the grantee. The right of the grantee so to do is not expressed so plainly as to preclude doubt.

The demurrer to the declaration was properly overruled, and we so answer the question certified.

Affirmed.

LYNCH, J., absent.

(89 W. Va. 49)

LEACH v. WEAVER et al.

(Supreme Court of Appeals of West Virginia.
Sept. 20, 1921.)

(Syllabus by the Court.)

1. Appeal and error \S 843(4)—Where case is certified on overruling of general demurrer, it will be affirmed on finding bill sufficient in any particular.

Where a general demurrer has been interposed to a bill and overruled, and the question of the ruling thereon is certified to this court for review, on the lower court's own motion, the appellate court, upon finding the bill sufficient in any one particular, will affirm without inquiry as to the sufficiency of the bill in other particulars.

2. Taxation \S 734(7) — Misdescription of amount of land sold will not alone invalidate tax sale.

Where there is a return of a delinquent list of lands properly assessed for taxation, giving the correct name of the owner, the true location of his tract, but describing it as containing 19 acres, whereas the true number of acres owned is 13½ acres, and the delinquent list and return thereof is, in other respects, in conformity with the statute, such discrepancy in the acreage alone will not invalidate a tax deed to the interest of the owner in such tract, made in pursuance of a regular tax sale.

Case certified from Circuit Court, Barbour County.

Suit by Ora A. Leach against Alva D. Weaver and others. Demurrer to bill overruled, and case certified. Affirmed.

J. Hop Woods, of Philippi, for plaintiff.
George & Wilcox, of Philippi, for defendant.

LIVELY, J. Demurrer to the bill was overruled and the court has certified its decision in so ruling to this court for review.

The bill is to cancel a tax deed and remove it as a cloud on plaintiff's title. Ora Leach, the plaintiff, has a deed to and possession of 23 acres and about 88½ poles of land on Laurel creek of valley river, in

Philippi district of Barbour county, the title to which was deraigned from John W. Male, who, in 1903, owned a tract of 190 acres, out of which the land in controversy was carved. John W. Male conveyed 29 acres, 88½ poles, to Amanda Male on May 4, 1904, who, in the winter of 1909, conveyed 6 acres to three grantees (2 acres to each), leaving remaining 23 acres and 88½ poles. On June 16, 1909, she conveyed out of the remaining acres a 10-acre tract to John H. Male, which left her at that time 13 acres, 88½ poles. On September 25, 1909, she conveyed all of this land back to John W. Male, describing it as the same land which was deeded to her on May 4, 1904, by John W. Male. On March 23, 1910, John W. Male conveyed this land to Aaron Male, describing it as the land deeded to him by Amanda Male. On April 13, 1910, Aaron Male deeded this same tract to Arch Male, describing it as the land deeded to him by John W. Male March 23, 1910. By a joint deed, August 1, 1912, Arch Male, Sr., and John H. Male (their wives joining therein) conveyed two tracts of land to Arch Male, Jr., and Hulda Male (his wife); the first tract described being that deeded by Arch Male, Sr., and wife, and designated as the same land conveyed by John W. Male to Aaron Male on March 23, 1910, containing about 14 acres; and the second tract, which is designated as being conveyed to the grantee by John H. Male and wife is described as the same land conveyed by Amanda to said John H. Male on June 16, 1909, and is described by metes and bounds, and contains 10 acres.

The tax delinquency, which resulted in the tax deed in question, occurred in the year 1912, when Arch Male is shown on an excerpt of the delinquent list for that year as delinquent in the payment of taxes on a tract of 19 acres lying on Laurel creek. Plaintiff derived title to his land through Arch Male, Jr., who on November 7, 1914, conveyed his two tracts, containing 24 acres more or less, to Elias Gall, who afterwards, on November 13, 1916, conveyed the land designated as composed of two tracts, one containing 13 and 23/100 acres, and the other 10 acres, to the plaintiff.

The tract of land returned delinquent for nonpayment of the taxes of 1912 in the name of Arch Male, and as containing 19 acres on Laurel creek, was sold by the sheriff in 1914, and purchased by T. H. Proudfoot for \$4.45, who assigned the benefit of his purchase to Wm. T. George, to whom a tax deed was made by the county clerk on December 22, 1915, and who afterwards conveyed the land to defendant A. D. Weaver on December 13, 1917. The tax deed made to Proudfoot contains the same description, metes, and bounds as the 29 acres and 88½ poles conveyed by John W. Male to Amanda Male, dated the 4th day of May, 1904, and therefore

includes the three tracts of 2 acres each conveyed by Amanda Male in the winter of 1909 to three grantees, Stella Male, Amanda Norris, and Lucinda Croston, and also includes the 10-acre tract conveyed by Amanda Male to John H. Male, and afterwards conveyed by him to the predecessor in title of the plaintiff on August 1, 1912. The tax deed evidently takes in too much territory, as shown by the bill and exhibits. It will be seen from an inspection of the deed from Arch Male, Sr., to Arch Male, Jr., dated August 1, 1910, that the grantor only claimed to have about 14 acres by virtue of the deed to him from Aaron Male. Again it will be seen from an inspection of the excerpt from the land book of 1912, Exhibit No. 1, with the bill, that John H. Male had his 10 acres on Laurel creek, deeded to him by Amanda Male, assessed to him, and on which the taxes for that year were evidently paid. The excerpt from the delinquent list, Exhibit No. 2, shows that he was not delinquent for that year. There is a presumption that a person has paid his taxes until it is otherwise shown. *Cunningham v. Brown*, 39 W. Va. 588, 20 S. E. 615. The same may be said of the owners of the three 2-acre tracts included in the boundaries of the tax deed. But these owners are not parties, and are not complaining of the cloud, if any, upon their titles. From the allegations of the bill, and from the exhibits, it is shown that the tax deed, which includes in its metes and bounds the John H. Male 10-acre tract now owned by the plaintiff, is a cloud upon that title. Is this sufficient to sustain the bill? It does not appear on what grounds the circuit court overruled the demurrer.

[1] A proceeding of this kind is to test the sufficiency of a pleading. And where the appellate court finds one part of the bill sufficient where there had been a general demurrer which was overruled, it will affirm the decision without inquiry as to the sufficiency of the other parts. *Wheeling v. Telephone Co.*, 82 W. Va. 208, 95 S. E. 653.

[2] But the specific questions certified by the court for answer are:

"(1) Does the fact that the delinquent, Arch Male, had but 13½ acres of land, whereas he was returned delinquent for 19 acres of land in the year 1912, invalidate the deed to W. T. George, executed by the clerk of the county court of Barbour county?

"(2) Does section 25, c. 31. (section 1084), Code, cure such defect in the assessment as propounded in question No. 1?"

The other points raised by counsel for defendant on the demurrer seem not to have been of sufficient importance or difficulty to influence the discretion of the trial judge and to cause him to certify them for review. The certification is on the court's own motion, and not on the joint application of the parties.

We are cited to *Cunningham v. Brown*, 39 W. Va. 589, 20 S. E. 615, to sustain the proposition that the misdescription of the quantity of land owned by Arch Male (19 acres instead of 13 acres, 88½ poles) is fatally defective, and avoids the tax deed. That case was where the 34 acres owned by Elizabeth Cunningham were omitted from the assessment for the year 1883, in her name, but, without her knowledge or notice, included as an undistinguished part of a larger tract of 65 acres, and assessed in the name of John Cunningham, a former owner, returned delinquent in his name as a 65-acre tract, and sold as his. The following year her 34-acre tract was placed on the land book in her name, and was back-taxed for the year 1883. The land having been assessed and returned delinquent in the name of another with an acreage nearly twice as large as that owned by her, she could have had no notice, and the tax deed was not made valid by the curative section (now section 25, c. 31, Code). Moreover, the court held that her 34-acre tract not having been returned delinquent in her name for the year 1883, there was nothing to rebut the presumption that she had paid her taxes for that year.

We are also cited to *Metz v. Starcher*, 60 W. Va. 657, 56 S. E. 196, 116 Am. St. Rep. 925, which holds that there must be a delinquent list returned in order that irregularities, errors, and mistakes therein can be cured by the curative section. The heading of the paper purporting to be a delinquent list was obscured by a pasteboard securely fastened to the paper by metallic rivets, concealing the entire heading required by the statute, except a few words, and it was decided that such paper in such condition was not a delinquent list. That case has no application here.

In the case at bar there is an assessment in the proper name of the owner, Arch Male, and a delinquent list showing delinquency in Arch Male for the year 1912. It is true that the bill alleges that the delinquent list is defective because "no certificate such as is required by law is made by the sheriff of said county to said delinquent list," as appeared from an excerpt from the delinquent list filed as an exhibit. Just what is meant by "no certificate" we are unable to say. Possibly it means the oath required to be appended under section 21, c. 30 (section 1093), Code. But it will be observed that the excerpt only is before us, and not the complete delinquent list. It is not averred that no such affidavit appears on the delinquent list as returned. The only question here is whether the fact that Arch Male was returned delinquent for 19 acres instead of for 13½ acres would invalidate the tax deed. It refers solely to the discrepancy in the amount of acreage charged from what should have been charged (his true acreage),

as shown by the delinquent list. Section 25, c. 31, Code, provides:

"And no irregularity, error or mistake in the delinquent list, or the return thereof; or in the affidavit thereto * * * shall, after the deed is made, invalidate or affect the sale or deed."

It also provides:

"If more than one tract of land be charged as one, or the quantity thereof * * * be misstated, all such right, title, interest and estate as is hereinbefore mentioned, shall nevertheless pass to and be vested in the grantee in such deed."

But if there was no statute curing misstatement of the quantity, could Arch Male have been misled by the fact that his land was described as containing 19 acres? The assessment and delinquent lists, respectively, show that he was assessed and returned delinquent in his own proper name for a tract of land on Laurel creek where he owned his 13½ acres, and we think the discrepancy in the acreage charged is not such an irregularity as to materially prejudice or mislead even if the curative statute did not so state. He had notice of the assessment of his land, and the excess acreage charged to him on the assessment, and its appearing on the delinquent list was sufficient to arrest his attention and impel an investigation. We have held in numerous cases that a departure from or inaccuracy in the name of the person assessed and delinquent is not sufficient to render void the tax deed. See *Jarrett v. Kimbrough*, 105 S. E. 918, where the name on the delinquent list and proceedings was "Norena Lambert" instead of Norma E. Lambert; *Friedman v. Craig*, 77 W. Va. 223, 87 S. E. 381, where the owner's name on the delinquent list appeared as "Joseph Fredman" instead of Joseph Friedman. However, there are other cases involving assessments where there have been such glaring errors in the names of the persons assessed, that they have been held to be fatal. *Male v. Moore*, 70 W. Va. 448, 74 S. E. 685, where the assessment was

made to "Hoonbrook" when the owner's name was Hornbrook; *Collins v. Reger*, 62 W. Va. 195, 57 S. E. 743, where the assessment was in the name of "Martha Hedrick" instead of Martha Helmick.

These cases serve to illustrate that, if the departure or inaccuracy is only such as would put the owner on inquiry, or that a reasonable person would not be misled or deceived, then there is no fatality to the tax deed. These holdings are illuminating on the question here involved (inaccuracy in the acreage charged and returned delinquent), even if the curative statute did not expressly cure inaccuracies in the quantity of a tract. But the curative section expressly says that, if the quantity of land charged be misstated, nevertheless the title of the owner shall pass by the tax deed. That clause controls this case. The acreage need not be truly stated. It would be impossible and impracticable to do so in all cases. See *Coal Co. v. Burgess*, 86 W. Va. 16, 102 S. E. 690.

In *Cain v. Fisher*, 57 W. Va. 492, 50 S. E. 752, 1015, we held that, where the record of the sale and recital in the deed were not in accord, the purchaser at the tax sale took the entire interest of the delinquent in the lot of land, all of the lot, although it was charged on the land book and sold by the sheriff as a part of the lot (section 25, c. 31, Code), operating to cure inaccuracy in the description. And where the assessment and sale of a town lot, designated by number, was made, and the tax deed included a part of the lot designated and part of an adjoining lot owned by the delinquent, the deed was upheld under the curative section. *Robey v. Wilson*, 84 W. Va. 738, 101 S. E. 151.

We are of the opinion that the incorrect acreage set out in the delinquent list of 1912, being 19 acres instead of 13½ acres (the true amount), in the name of Arch Male, and alleged to have been owned by him at that time, does not alone invalidate the tax deed executed by the county clerk to defendant George, and so answer the specific question certified.

Affirmed.

(182 N. C. 122)

In re SERMONS' LAND. (No. 183.)

(Supreme Court of North Carolina. Oct. 12, 1921.)

1. Mortgages \S 367—Bidder at foreclosure sale acquires no title before confirmation and may secure release for fire loss.

In view of C. S. \S 2591, relating to foreclosure of mortgages or deeds of trust and sale of the land, a bidder at a mortgage foreclosure sale before confirmation acquired no interest in the property itself; and, where in the 10 days allowed for additional bids before becoming final there is a loss to the property by fire, the bidder is entitled to release.

2. Mortgages \S 340—Assignment of mortgagee's interest and power of sale held to confer power of sale on foreclosure to the assignee.

Where an assignment on the back of a land mortgage and under seal transfers both mortgagee's interest and the power of sale, such assignment and deed confer on the assignee the right of foreclosure.

Appeal from Superior Court, Craven County; Devin, Judge.

In the matter of the sale of Sermons' Land under mortgage by the Farmers' & Merchants' Bank of Kinston, N. C. On motion to relieve bidder from obligation to buy land which motion the clerk denied and entered an order confirming the sale. On bidder's appeal the judge reversed the clerk's action and directed a resale by the bank, and the assignor of the mortgage excepts and appeals. Cause dismissed.

Motion to relieve a bidder from obligation to buy land. Heard on appeal from clerk of the superior court before his honor, Devin, Judge, holding the courts of the Fifth judicial district on May 24, 1921.

From the facts properly presented it was made to appear that R. L. Sermons and wife having executed a mortgage with power of sale to H. L. Sermons, of date September 12, 1919, to secure three promissory notes aggregating \$8,200, the mortgagee, for valuable consideration, duly assigned said notes and mortgage and the land conveyed to Merchants' Bank of Kinston, N. C., by assignment under seal, written on back of said mortgage, as follows:

"For value received, I hereby transfer and assign all my right, title, interest and estate in and to the within mortgage and the property conveyed therein to the Farmers' & Merchants' Bank of Kinston, N. C., including the power of sale therein contained. This December 12, 1919."

Default having been made in the payment of said note and requirements of the mortgage, the said bank sold same by proper advertisement in said county on the 18th day of April, 1921, at which Clarence Oettinger

became the last and highest bidder in the sum of \$4,500, and said sale was immediately reported to the clerk of superior court of the county.

It appears further that within the 10 days, where it is provided by statutes that such a sale "should not be deemed closed" (C. S. \S 2591), the dwelling house on the lot, amounting to a third or more of its value, was accidentally destroyed by fire, whereupon the bidder, Clarence Oettinger, filed his petition before the clerk alleging the facts and asking that sale be rescinded and the applicant be relieved from his bid. The clerk being of opinion against the applicant entered his judgment as follows:

"This cause coming on to be heard and being heard upon the petition and affidavit of Clarence Oettinger, and the court finding that the building described in the petition was a material part of the value of the premises and was destroyed by fire as set out in the affidavit, but the court being of the opinion that the destruction of said house by fire does not affect or release the petitioner's liability on his said bid and that it has no jurisdiction and is not vested with power to set aside the sale and to direct a resale, denies the petition, confirms the sale, and directs the assignee of the mortgage to collect the purchase money and execute deed to the purchaser."

On appeal by the bidder from the order, his honor, Judge Devin, reversed the action of the clerk and entered judgment as follows:

"This cause came on to be heard before W. A. Devin, Judge, upon the appeal of Clarence Oettinger, petitioner, from an order of the clerk of the superior court of Craven confirming a sale and denying petitioner's plea to withdraw his bid therein.

"This was a proceeding before the clerk in relation to sale of land under mortgage made by the Farmers' & Merchants' Bank, assignee of mortgage. After due advertisement, sale was made under power contained in the mortgage and reported to the clerk. At the sale the petitioner became the last and highest bidder for the land at the price of \$4,500. A material inducement to the sale and one relied on by the petitioner was the statement at the sale that a valuable dwelling house was situated on said land. After said sale and within ten days thereof and before confirmation, the dwelling house on said land was, without fault on part of petitioner, accidentally destroyed by fire. Thereupon petitioner filed his plea asking that he be allowed to rescind his bid and that the sale be not confirmed.

"The facts set forth in the petition are found by the clerk to be true, and his findings are approved by the judge.

"It therefore appearing by the admitted facts that a substantial part of the property, to wit, a third or more in value, was destroyed after sale and before confirmation, and that such fact was a material inducement for petitioner's bid and a substantial part of the consideration thereof, and that the property has been physi-

cally changed before confirmation, that the court is of the opinion that before confirmation no title had passed to petitioner and that his rights were only those of a preferred bidder, and that the loss sustained by the destruction of a portion of the property ought not to fall upon the petitioner when he had neither possession to enable him to protect it, nor title to permit him to insure it, and had only the uncertain right of a preferred proposer and the assignee of the mortgage unable to make title to the petitioner for all the property advertised and bid off by him, the court should not now confirm the sale and order him to pay the full purchase price. For these reasons the order of the clerk herein is overruled and a resale of the property according to law directed to be made."

To this judgment the assignor of the mortgage excepts and appeals to the Supreme Court. Notice waived, etc. Appeal bond given.

It is further stated in the record that upon the foregoing appeal being prayed there was no request for a stay bond by the applicant and none was fixed by the judge. Thereafter the land was advertised and sold again on the 1st day of August, 1921, when and where the former bidder, Clarence Oettinger, again became the last and highest bidder in the sum of \$2,500, which bid was reported to the clerk, and after a delay of 10 days from the filing of the report, order was made that a deed be executed. No increased bid had been made.

R. A. Nunn, of Newbern, for H. L. Sermons,

Cowper, Whitaker & Allen, of Kinston, and Guion & Guion, of Newbern, for appellee.

HOKE, J. (after stating the facts as above). [1] Chapter 54, § 2591, Consolidated Statutes, is as follows:

"In the foreclosure of mortgages or deeds of trust on real estate, or in the case of the public sale of real estate by an executor, administrator, or administrator with the will annexed, or by any person by virtue of the power contained in a will, the sale shall not be deemed to be closed under 10 days. If in 10 days from the date of the sale, the sale price is increased ten per cent. where the price does not exceed five hundred dollars, and five per cent. where the price exceeds five hundred dollars, and the same is paid to the clerk of the superior court, the mortgagee, trustee, executor, or person offering the real estate for sale shall reopen the sale of said property and advertise the same in the same manner as in the first instance. The clerk may, in his discretion, require the person making such advance bid to execute a good and sufficient bond in a sufficient amount to guarantee compliance with the terms of sale should the person offering the advance bid be declared the purchaser at the resale. Where the bid or offer is raised as prescribed herein, and the amount paid to the clerk, he shall issue an order to the mortgagee or other person and require him to advertise and resell said real estate. It shall only be required to give fifteen days' notice of a resale. Resales may be had as often as the bid may

be raised in compliance with this section. Upon the final sale of the real estate, the clerk shall issue his order to the mortgagee or other person, and require him to make title to the purchaser. The clerk shall make all such orders as may be just and necessary to safeguard the interest of all parties, and he shall keep a record which will show in detail the amount of each bid, the purchase price, and the final settlement between parties. This section shall not apply to the foreclosure of mortgages or deeds of trust executed prior to April first, nineteen hundred and fifteen."

The section enters and must be allowed controlling effect upon every deed of trust or mortgage with power of sale executed since the date specified (see *White v. Kincaid*, 149 N. C. 415, 63 S. E. 109, 23 L. R. A. [N. S.] 1177, 128 Am. St. Rep. 663), and provides and intends to provide that during the 10 days as stated in the first clause the bidder acquires no interest in the property itself, but he acquires a position similar to a bidder at a judicial sale and before confirmation. This, in our opinion, follows not only as the natural meaning of the words used that the sale shall not be deemed closed under 10 days, but the position is fully confirmed by the further provision of the law that during said 10 days the matter is kept open for receipt of increased bids, and in case the stipulated increase is made, the property shall be readvertised and a second sale had; this being clearly the meaning of the law and the position of the purchaser. It is the accepted law in this state that a bidder at a judicial sale before confirmation acquires no interest in the property itself, but his bid is considered only a proposal to buy which the court may accept or reject in its discretion. In *Upchurch v. Upchurch*, 173 N. C. pp. 88-90, 91 S. E. 702, the court said:

"His offer is considered only as a proposition to buy at the price named, the court reserving the right to accept or reject the bid."

And in *Harrell v. Blythe*, 140 N. C. 415, 53 S. E. 232, quoted with approval in the *Upchurch Case*, the position is stated as follows:

"Where land is sold under a decree of court, the purchaser acquires no independent right. He is regarded as a mere preferred proposer until confirmation, which is the judicial sanction or the acceptance of the court, and until it is obtained, the bargain is not complete."

Under the facts presented, therefore, the bidder during the 10 days, covered by the statute, acquired no interest in the property, and in such case it is very generally held that where, pending a contract for sale of improved real estate, the buildings thereon are damaged by fire, the loss, as a rule, must fall upon the owner, and if the destruction wrought is such as make a material change in the property or substantially impair its

value, specific performance will not be enforced at the instance of the vendor and the bidder will be relieved of his obligation. By the weight of authority on the subject, when there exists a binding and enforceable contract to convey, the vendor being in the present position to make title, the purchaser is regarded as the owner, and the loss must fall on him. But where the vendor has not yet obtained a title, or where the bargaining between the parties has not been such as to give the proposed purchaser any interest in the property, or the contract is otherwise incomplete, the loss, as stated, falls on the vendor, and, under the circumstances indicated, he may not insist on performance. *Sutton v. Davis*, 143 N. C. 474, 55 S. E. 844; *Phinizy v. Guernsey*, 111 Ga. 346, 36 S. E. 796, 50 L. R. A. 680, 78 Am. St. Rep. 207; *Huguenin v. Courtenay*, 21 S. C. 403, 53 Am. Rep. 688; *Eppstein v. Kuhn*, 225 Ill. 115, 80 N. E. 80, 10 L. R. A. (N. S.) 117; *Lombard v. Chicago Sinai Congregation*, 64 Ill. 477; *Christian v. Cabell*, 22 Grat. (63 Va.) 82; *Blew v. McClelland*, 29 Mo. 304; *Pomeroy on Contracts*, §§ 434, 435; 29 *American & Eng. Enc.* (2d Ed.) pp. 712, 713. In the citation to 29 A. & E., supra, it is said:

"To the general rule that the purchaser must bear all losses there is one well-recognized exception, that if the loss occurs at a time when for any reason the contract lacks completion the vendor being in such case the owner in equity must be responsible for the loss. Thus where the loss occurs before the vendor is in a position to convey a good title, it will fall on the vendor. So also where the vendee has an option to withdraw from the contract. But to make the vendor bear the loss, he must be in some fault other than mere delay in making the deed where he has never been requested to make it."

And the principle as stated has been directly applied to the case of a bidder at a judicial sale and before confirmation. 4 *Edwards' Chancery* (N. Y.) p. 702; *Ex parte Minor*, 11 Ves. Jr. 559; 32 *Eng. Repts.* p. 1205; 24 *Cyc.* p. 34, and cases cited in note 54. As has been heretofore stated, during the 10 days where the statutes provide that the sale shall be considered unclosed and open for further bids, the applicant in the instant case is in a position exactly similar, and the building having been destroyed during that period, making a diminution in value of \$2,000 in a \$4,500 sale. We think his honor correctly ruled that the proposed purchaser should be relieved and a resale had under the powers contained in the deed. As well said by the presiding judge in entering his judgment to that effect:

"It therefore appearing by the admitted facts that a substantial part of the property, to wit, a third or more in value, was destroyed after sale, and that such fact was a material inducement for petitioner's bid and a substantial part of the consideration thereof, and that the

property has been physically changed before confirmation, the court is of the opinion that before confirmation no title had passed to petitioner, and that his rights were only those of a preferred bidder, and that the loss sustained by the destruction of a portion of the property ought not to fall upon the petitioner when he had neither possession to enable him to protect it, nor title to permit him to insure it, and had only the uncertain right of a preferred proposer."

[2] While we hold that the same should be set aside at the instance of the bidder, we are of the opinion that on the record neither the clerk nor the judge on appeal from him had jurisdiction or power on the bidder's mere application to make any orders affecting the rights of the parties in the premises. The power of foreclosure by advertisement and sale of the mortgagee or trustee fills a useful and important place in our business life and should not be interfered with except to the extent expressly provided by law. The statutes, section 2591, as we have seen, in express terms provides that any and all sales of this character shall remain "unclosed for ten days," but it confers no power on the clerk to make any orders in the matter except in case of an increase of bid, nor is any report required to be made in any other instance. That and that alone is the basis for his interference in sales of this kind. It might be well in the case presented the law should give the clerk jurisdiction to make the order that justice and right would require. But thus far the statutes have not done so, and we are not at liberty to go beyond the statutory provision. We consider it not improper to say, however, that as the parties have gone on and had another sale in which the same purchaser became the last and highest bidder, with or without orders of the clerk, this was the proper course to pursue, and if the facts are as now admitted, no court would make other disposition of the matter.

And inasmuch as the assignment written on the back of the mortgage and under seal transfers both the interest of the mortgagee and the power of sale as well as the property contained in the mortgage, such assignment and deed clearly confers the right of foreclosure on the bank, the assignee. *Well & Bros. v. Davis*, 168 N. C. 298, 84 S. E. 395. The case is thus distinguished from *Williams v. Teachey*, 85 N. C. 402, and that class of cases, in which it was held that as the assignment did not purport to pass the property itself, the power of sale and right of foreclosure remained in the mortgagee. Being of the opinion that on the record and a proper interpretation of the statutes the clerk and the judge on appeal from him are without jurisdiction to make orders and decrees in the matter, we must hold that the appeal and other proceedings be dismissed. But we have deemed it not improper to ex-

press an opinion on the facts contained in the record, a course pursued by the court in exceptional instances where the importance and general interest in the question presented make it desirable. *Gilbert v. Shingle Co.*, 167 N. C. 287-290, 83 S. E. 337; *Milling Co. v. Finlay*, 110 N. C. 411, 15 S. E. 4; *State v. Wyld*, 110 N. C. 500, 15 S. E. 5.

This will be certified that the cause be dismissed.

Dismissed.

(182 N. C. 166)

UNION TRUST CO. v. WILSON. (No. 256.)

(Supreme Court of North Carolina. Oct. 12, 1921.)

1. Pleading \S 214(1)—Demurrer admits material facts pleaded.

A demurrer admits material facts alleged in pleading demurred to.

2. Pleading \S 192(6)—Demurrer containing extraneous facts in its support bad.

A demurrer setting up extraneous facts in support thereof, not appearing on the face of the complaint demurred to, should be overruled, since it is the office of the demurrer merely to raise questions of law as to the sufficiency of the pleading, to be determined under the facts alleged in the pleading.

3. Pleading \S 214(3)—Allegation that plaintiff was an innocent holder of note admitted by demurrer.

Where complaint in action on notes alleged plaintiff to be an innocent holder, demurrer thereto on the ground that plaintiff is not an innocent holder held properly overruled, since the allegation of complaint as to plaintiff being an innocent holder was admitted by the demurrer.

4. Parties \S 7(2)—Transferee of notes as trustee for others could sue thereon.

Under O. S. \S 449, authorizing a person with whom or in whose name a contract is made for the benefit of another to sue without joining with him the person for whose benefit the contract is made, one to whom notes were transferred as trustee for others could sue thereon.

Appeal from Superior Court, Wake County; Connor, Judge.

Action by the Union Trust Company against J. F. Wilson. From judgment overruling demurrer to complaint, defendant appeals. Affirmed.

This action was brought to recover the amount of two negotiable promissory notes executed by the defendant, each of them in the sum of \$5,000 (dated March 30, 1920), and payable to the order of the maker 12 months after their date, and indorsed by the defendant, the maker thereof, in blank and before maturity and delivered to the Har-

nett County Trust Company. It is alleged in the complaint:

"That thereafter before maturity, for valuable consideration and without notice of any defect or infirmity in or respecting said notes, the Harnett County Trust Company, of Lillington, N. C., purchased and became the holder in due course of said notes."

It is further alleged that thereafter, for value and before maturity of the notes, plaintiff became the bona fide holder, in due course, of the same by transfer from the said Harnett County Trust Company, and was at the commencement of this action the bona fide holder thereof in due course, for full value and without notice. That the said notes are past due and unpaid, and that defendant is indebted to the plaintiff thereon in the sum of \$10,000, with interest from March 30, 1920, for which sum plaintiff demands judgment.

The agreement referred to in the complaint states that the Harnett County Trust Company agreed with plaintiff and the holders of certain certificates of deposit in the Harnett County Trust Company to the amount of \$68,000; that the latter would assign and deliver to the plaintiff the said certificates to be held in trust by it for the benefit and use of the parties named in the agreement, and, when they are delivered to the trustee, the Harnett County Trust Company should transfer and deliver to the said trustee certain notes, particularly described in the agreement which were acquired and held as aforesaid, in due course, for value, and without notice, by it to a corresponding amount; that the trustee should collect the notes so delivered to him, with power to sue for the same, if necessary, and employ counsel at a reasonable rate of compensation for that purpose and when all the notes are collected, or compromised and settled by the trustee with the consent of the certificate holders, and after deducting necessary expenses incurred by him in the execution of his trust, including his fees and allowances as may be approved by the clerk of the superior court of Wake county the trustee shall distribute the balance of the funds so collected by him to and among the certificate holders aforesaid; that the two notes, the subject of this action, were included in those acquired by the trustee in the manner above stated, the Harnett County Trust Company being the holder in due course thereof when they were transferred before their maturity to the trustee, and having no notice of any defect or infirmity therein, or any equity in favor of defendant existing in respect thereto.

The defendant demurred as follows:

"(1) Because it appears from the complaint and exhibits that the notes sued on in this action are the property of the Harnett County Trust Company that issued its time deposit certificate for said notes.

"(2) That defendant has started his suit against said Harnett County Trust Company in the county of Franklin, said suit having been started on February 5, 1921, and said action is now pending in said county of Franklin for the purpose of vacating and setting aside said notes for fraud, and for the fact that said Harnett County Trust Company was not an innocent purchaser for value without notice, and a holder in due course.

"(3) That said complaint and exhibits show a combination between said Harnett County Trust Company and the holders of its certificates of deposit, when not one cent has ever been paid by said Trust Company, nor have they surrendered their title to property in said notes, if they have any; but it appears that plaintiff is only a collecting agent and attorney for said trust company.

"(4) That the holders of said certificates of deposit are parties to this action by and through their agent and attorney, the plaintiff herein, when they have no cause of action whatever against this defendant.

"(5) It appears that plaintiff company is not a holder in due course or an innocent purchaser for value without notice, but merely an agent to collect the Harnett County Trust Company claims, if it indeed has any."

The court overruled the demurrer, and defendant appealed.

W. M. Person, of Louisburg, for appellant.
J. M. Broughton, of Raleigh, for appellee.

WALKER, J. (after stating the facts as above). [1] It is an established principle, not now open to question, that a demurrer by a defendant admits as true every material fact alleged in the complaint which is properly pleaded (*Crane Co. v. L. & T. Co.*, 177 N. C. 346, 99 S. E. 8; *Merrimon v. Paving Co.*, 142 N. C. 539, 55 S. E. 366, 8 L. R. A. [N. S.] 574), and this is equally true of a demurrer to an answer, or other pleading. The demurrer, in this instance, calls to its aid facts stated therein which do not appear on the face of the complaint and is generally denominated a "speaking demurrer." In *Von Glahn v. De Rossett*, 76 N. C. 292, 294, Chief Justice Pearson so characterizes it in this passage taken from his opinion:

"The second ground of demurrer is subject to another objection. It is a 'speaking demurrer,' as styled by the books. That is, in order to sustain itself, the aid of a fact not appearing upon the complaint is invoked. Whether there be any fund left on hand at the expiration of the charter of the bank is a question of fact that cannot be inquired into upon demurrer, which raises only an issue of law in regard to the cause of action set out in the complaint."

And to like effect is 6 Enc. of Pl. & Practice, p. 297, where it is said by the author, citing the authorities:

"It is not the office of the demurrer to set out facts; it involves only such facts as are alleged in the pleading demurred to, and raises only questions of law as to the sufficiency of the pleading, which arise upon the face thereof. It is a fundamental rule of pleading that

a demurrer will only lie for defects which appear upon the face of the pleading to which it is opposed, and must be decided without evidence aliunde, unless (as said in some cases) by consent of the parties. A speaking demurrer—that is, a demurrer which is founded on matter collateral to the pleading against which it is directed—is bad, and as such will be overruled. It is also a well-settled principle that, when a pleading is demurred to, resort cannot be had to other pleadings for the purpose of supporting or resisting the demurrer, but the demurrer must prevail or fall by the face of the pleading to which it is directed."

81' Cyc. 322, holds that—

"Only facts appearing on the face of the pleading demurrer to will be considered on demurrer. New facts cannot be set up by the demurrant as a ground for demurrer. Such a demurrer is called a 'speaking demurrer,' and should be overruled. So the scope of the demurrer cannot be extended to cover facts not appearing on the face of the pleading demurred to."

Illustrations of a speaking demurrer will be found in the following cases: *Express Co. v. Briggs*, 1 Ga. App. 294, 57 S. E. 1066; *Peale v. Ware*, 131 Ga. 826, 63 S. E. 581; *L. & N. R. Co. v. Holland*, 132 Ga. 173, 63 S. E. 898. Some of the other cases in this state are *Davison v. Gregory*, 132 N. C. 389, 43 S. E. 916; *Wood v. Kincaid*, 144 N. C. 393, 57 S. E. 4; *Kendall v. Highway Com'rs*, 185 N. C. 600, 81 S. E. 995; *Besselieu v. Brown*, 177 N. C. 65, 97 S. E. 743, 2 A. L. R. 862. We held in *Wood v. Kincaid*, supra:

"A demurrer is an objection that the pleading against which it is directed is insufficient in law to support the action or defense, and that the demurrant should not therefore be required to further plead. It is not its office to set out facts, but it must stand or fall by the facts as alleged in the opposing pleading, and it can raise only questions of law as to their sufficiency. It is a fundamental rule of law that a demurrer will only lie for defects which appear upon the face of the alleged defective pleading, and extraneous or collateral facts stated in the demurrer cannot be considered in deciding upon its validity. A demurrer averring any fact not stated in the pleading which is attacked, commonly called a 'speaking demurrer,' is never allowable"—citing 6 Pl. and Pr. 298 et seq.; *Von Glahn v. De Rossett*, 76 N. C. 292.

We also held in *Besselieu v. Brown*, supra (opinion by Justice Hoke), that—

"Where the complaint in an action by the receiver of an insolvent corporation against its directors alleges a good cause of action for damages arising from their negligence in managing the corporate affairs, a demurrer may not be aided by allegations of facts not therein appearing, for such would be a speaking demurrer, condemned both under the common-law and Code systems of pleadings."

A good statement of the law on this question will be found in *So. Express Co. v. Briggs*, supra, where it was said that a

speaking demurrer is one that introduces some new fact or averment necessary to support the demurrer, and which does not distinctly appear on the face of the pleading against which it is directed. *Peale v. Ware*, supra, held that a demurrer negating a fact material to the cause of action is faulty, and should be overruled.

[2, 3] If the demurrer in this case is examined in the light of the foregoing authorities, it will appear that it clearly comes within the condemnation of the rule we have stated, and which has long been a settled one. The first ground of demurrer is untenable, as it does not appear from the complaint and exhibits, "that the Harnett County Trust Company is the owner of the notes sued on in this action," but the contrary appears, the Harnett County Trust Company having parted with its interest, as alleged in the complaint, and for a valuable consideration, to the plaintiff as trustee for the certificate holders. The second ground of demurrer, in direct violation of the rule, sets up extraneous facts in support of itself, such as are not alleged in the complaint, but are allunde. It does not appear from the complaint, nor otherwise except by allegations of the demurrer, that defendant has brought an action in Franklin county to set aside the notes mentioned in this suit. We have already disposed of the remaining ground of objection, viz. that plaintiff is not an innocent holder. It is alleged in the complaint that he is, and the demurrer in law admits it.

The third ground of demurrer is equally untenable, because it states facts not alleged in the complaint, and cannot therefore be considered under the rule of the law as to speaking demurrers.

[4] The fourth ground of demurrer contains an erroneous statement of fact, as the holders of the certificates are not parties to this action, the plaintiff suing alone, as the trustee of an express trust, and within the meaning of the statute (Consol. Statutes, § 449), the designation "includes a person with whom, or in whose name, a contract is made for the benefit of another." *Wynne v. Heck*, 92 N. C. 414; *Willey v. Gatling*, 70 N. C. 410; *Martin v. Mask*, 158 N. C. at page 443, 74 S. E. 343, 41 L. R. A. (N. S.) 641.

The last ground assigned in the demurrer must be held as invalid, because the demurrer admits, as a fact, the allegation in the complaint that the plaintiff is the holder of the notes, in due course, for value, and without notice of any equity or infirmity attaching to them in favor of the defendant, who is the promisor in both notes, and it appears from the complaint, according to the allegations thereof, which are to be taken as admitted by the demurrer (*Bank v. Mfg. Co.*, 176 N. C. 318, 97 S. E. 1; *Ollis v. Drexel Furniture Co.*, 173 N. C. 542, 92 S. E. 371) that the plaintiff is not suing as agent, but as a

trustee of an express trust, which includes within its meaning, as we have already stated, a person with whom, or in whose name, a contract is made for the benefit of another.

This disposes of all the grounds of demurrer adversely to the defendant, and accordingly there was no error in the judge overruling the same.

Affirmed.

(182 N. C. 120)

TAYLOR v. POSTAL LIFE INS. CO. et al.
(No. 174.)

(Supreme Court of North Carolina. Oct. 12, 1921.)

1. Pleading §218(3)—In case of misjoinder of parties and causes, demurrer will be sustained; separation not being permissible.

Where there is a misjoinder of both parties and causes of action, a demurrer to the pleading will be sustained, and a separation or division in such a case is not permissible, under C. S. § 516.

2. Set-off and counterclaim §29(2)—In action on a life insurance policy, counterclaim held not on independent matter.

In an action against a life insurance company and others to recover on policy on the life of plaintiff's deceased brother assigned to plaintiff, a counterclaim by the widow of insured, asking for an accounting with plaintiff as to land alleged to have been purchased by the brothers in common and taken in plaintiff's name under agreement that it would be conveyed to the deceased in consideration of the assignment of the policy; was not on unrelated or independent subject-matter.

Appeal from Superior Court, Pitt County; Horton, Judge.

Action by W. A. Taylor against the Postal Life Insurance Company and others to recover on an insurance policy on the life of plaintiff's brother, J. C. Taylor, in which the deceased's widow asked for accounting and adjustment of matters between the deceased and plaintiff. Demurrer to counterclaim for misjoinder of parties and causes overruled, and the defendants paid the amount of the policy into court, and plaintiff appeals. Affirmed.

The widow of deceased denies the right of plaintiff to receive the proceeds of said policy of insurance and has set up by way of cross-action and counterclaim that the plaintiff and his brother purchased certain lands in common and that in their partnership dealings the policy in question was assigned upon condition that the said W. A. Taylor would convey to J. C. Taylor two tracts of land held by him in trust for their mutual benefit. Defendant further alleges that plaintiff neglected to make such conveyance

during the lifetime of her husband and that he now refuses to carry out his part of the contract. Wherefore she asks for an accounting and an adjustment of these matters before plaintiff is allowed to collect said insurance.

Plaintiff demurred to the counterclaim upon the ground of a misjoinder of parties and causes of action. His honor overruled the demurrer, and by consent permitted the insurance company to relieve itself from further liability by paying the amount of its policy into court, and it was ordered that said funds be held by the clerk to await the final determination of the issues raised by the pleadings.

Skinner & Whedbee, of Greenville, for appellant.

Julius Brown, of Greenville, for appellees.

STACY, J. [1] It has been held with us in a uniform line of decisions that, where there is a misjoinder of both parties and causes of action in the same pleading, a demurrer for this reason will be sustained, and that a separation or division in such a case is not permissible under C. S. § 516. *Rose v. Warehouse Co.*, 108 S. E. 389, at present term; *Roberts v. Mfg. Co.*, 181 N. C. 204, 106 S. E. 664, and cases there cited.

[2] But, as said in *Quarry Co. v. Construction Co.*, 151 N. C. 345, 66 S. E. 217:

"If the grounds of the bill be not entirely distinct and wholly unconnected, if they arise out of one and the same transaction or series of transactions, forming one course of dealing and tending to one end, if one connected story can be told of the whole, then the objection cannot apply. *Bedsole v. Monroe*, 40 N. C. 313.

"The plaintiff may unite in the same complaint several causes of action when they arise out of the same transaction or transactions connected with the same subject of action, the purpose being to extend the right of the plaintiff to join actions, not merely by including equitable as well as legal causes of action, but to make the ground broad enough to cover all causes of action which the plaintiff may have against the defendant arising out of the same subject of action, so that the court may not be forced 'to take two bites at a cherry,' but may dispose of the whole subject of controversy and its incidents and corollaries in one action. *Hamlin v. Tucker*, 72 N. C. 502."

Applying these principles, we do not think the causes of action set out in the defendant's answer and counterclaim are so unrelated and independent of each other as to make the pleading defective for multifariousness. All the matters sought to be adjudicated arise out of the same transaction, or series of transactions which make one composite whole. The final adjustment of the insurance money is linked with the settlement of these items and with the estate. Un-

der C. S. § 507, such causes may be united in the same complaint. *Oyster v. Mining Co.*, 140 N. C. 135, 52 S. E. 198; *Fisher v. Ins. Co.*, 138 N. C. 224, 50 S. E. 659.

Therefore, upon authority, we think the action of his honor in overruling the demurrer and refusing to strike out the defendant's further defense and counterclaim must be sustained.

Affirmed.

(182 N. C. 126)

WILLIAMS et al. v. COMMISSIONERS OF FRANKLIN COUNTY. (No. 250.)

(Supreme Court of North Carolina. Oct. 12, 1921.)

Taxation \Leftrightarrow 476—County commissioners, having made horizontal reduction in assessed valuation, precluded from proceeding under other methods of revising valuation under statute providing for use of other method in lieu of method first used.

Where county commissioners made a horizontal reduction in assessed value of real estate at its meeting held on Tuesday following the first Monday in April, under Pub. Laws 1921, c. 38, § 28(a), and certified its recommendation to and obtained the approval of the state tax commissioner, and did not, prior to July 15th, report to state tax commission any increases or reductions in the valuation of specific property, under section 28(b), they could not thereafter revise the valuation of specific parcels of property under section 28(c), authorizing the commissioners, "in lieu of the remedies provided" under subsections (a) and (b), to appoint board of review to revise assessed valuation, and to make a complete abstract of revised assessment to state tax commission not later than July 15th, in view of section 28(d).

Appeal from Supreme Court, Franklin County; Bond, Judge.

Action by J. R. Williams and others, taxpayers of Franklin County, to restrain the Board of County Commissioners of Franklin County from revaluation and raising the levy of taxes after the date prescribed by law. The restraining order was granted. The motion to dissolve was refused, and the restraining order was continued to the final hearing. Appeal by defendants. Affirmed.

W. H. Yarborough and Ben T. Holden, both of Louisburg, for appellants.

W. M. Person, of Louisburg, for appellees.

CLARK, C. J. The defendant board of commissioners of Franklin county, in accordance with the provisions of Laws 1921, c. 38, met on Tuesday after the first Monday in April, 1921, and after inquiry and investigation as to the value of the real estate in said county, recommended the value be re-

duced by a horizontal reduction of 40 per cent. applicable to the whole county. Their recommendation was certified to the state tax commission under section 28(a) and approved by the state tax commissioner June 15, 1921; was the same day certified to the defendant board of county commissioners. Thereafter on the second Monday in July, 1921, the defendant county commissioners met as a board of equalization for the purpose of hearing complaints and equalizing values in the various localities. There being a number of complaints, the commissioners, in order to ascertain more fully the values in the different localities, passed a resolution to inspect such parcels of real estate in company with the various tax listers or other freeholders residing in their respective townships, and after making such investigations the commissioners on July 28 issued 904 notices to taxpayers in 2 townships in which they had made an increase of approximately a million and a half dollars in valuation to another township in which they had made an increase of \$10,000, and to taxpayers in the 3 towns of Youngsville, Franklin, and Louisburg in which there had also been increases in taxation, to show cause against the increase on August 2, but no notices were sent out to any taxpayers in any other townships. There are 10 townships in Franklin county. Why this discrimination does not appear.

The ground upon which Judge Devin granted the restraining order and Judge Bond refused to dissolve the same and continued the restraining order to the final hearing and upon which this court is asked to affirm rests chiefly, if not entirely, upon the proposition that the county commissioners acted without authority in attempting to revalue the property in the parts of the county above designated at a time when they were functus officio.

Laws 1921, c. 38, § 28(a), authorizes the board of county commissioners on Tuesday after the first Monday in April, 1921, acting as a board of review, to make a horizontal reduction throughout the county, if, in their judgment, they find that the assessed value is in excess of the actual value. At such meeting the board of commissioners made a horizontal cut of 40 per cent. as above stated, which was certified to the state tax commission "not later than April 20, 1921"; and the state tax commission approved said horizontal reduction, and certified their approval to the county commissioners "not later than June 15," as the statute provides. This section further provides that this horizontal reduction "shall be the values at which the property shall be assessed for taxation unless and until the same have been changed and revised by the state tax commission, and certified to the board of county commissioners of such county, which shall be done not lat-

er than July 1, 1921." This was certified as above stated on June 15.

Section 28(b) of said chapter 38 further provides that the county commissioners shall have authority to hear specific complaints of overvaluation or undervaluation of any particular tracts of land if the complaint is made and the reassessment and reappraisal by the board was made during the month of May. This was not done during May as to any of the property affected by the revaluation as to which this injunction is served.

Said section 28 (b) further provides that the county commissioners may appoint the county auditor or any resident freeholder of the county to investigate and report upon all such specific complaints, and provides:

"The county board of commissioners shall thereupon approve or revise such recommendations, and shall, not later than the fifteenth day of July, 1921, make report to the state tax commission of the increases and reductions in the valuation of specific properties made under authority of this section."

Said chapter 38, § 28 (c), provides that—

If the board of commissioners at their regular meeting on first Monday in April, 1921, "shall be of the opinion that the valuation of real estate in such counties is so unequal as between the owners of real property in such county as to require a more general revision of assessments than is practicable to be made under the provision of subsections (a) and (b) of this section"—that is, by horizontal reduction as was made, and by specific complaint which should have been filed in May—"or the value of real property as heretofore appraised in such county as a whole is in excess of the present actual value of such property, it may by resolution so find and order that such revision be made. In the event such order is made, it shall be in lieu of the remedies provided in subsections (a) and (b) of this section, and the board of county commissioners shall appoint a board of review, composed of three resident freeholders, who have general knowledge of the value of real estate in such county, and such board of review may appoint such number of assistants as in their judgment is necessary to complete such revision, not later than the first day of July, 1921."

Then follows the manner in which they should execute their duties, which as above provided should be completed "not later than the first day of July, 1921." This section further provides:

"A complete abstract of such revised assessment, by townships, giving average value per acre, and value of town lots, and the value as a whole, shall be made to the board of county commissioners of such county and to the state tax commission, not later than the fifteenth day of July, 1921, and shall be subject to the authority of the state tax commission as the state board of equalization, so as to preserve a proper equalized value of real property in the several counties."

Section 28 (d) provides that—

"The report of the board of county commissioners, made pursuant to section 28(b), and the abstracts as reported by the board of review, under section 28(c) shall be the basis for the assessment of taxes, unless and until the same are changed by the tax commission on or before the first day of September, 1921, and the said state tax commission, shall, on or before the first day of September, 1921, certify down to the board of county commissioners of the several counties its findings and conclusions upon said report and abstracts."

It will be seen by perusal of the above provisions of the statute that section 28 (a) authorized the county commissioners on the first Tuesday after the first Monday in April to make a horizontal reduction of the valuation throughout the county and report the same to the state tax commission not later than April 20, 1921, and that said commission shall act upon said report, and that said values shall be the values assessed for taxation unless changed by the state tax commission, who shall certify down their action not later than July 1, 1921. The action of the county commissioners in making a 40 per cent. reduction was approved and certified to defendants June 15.

Then section 28 (b) provides that during May specific complaints may be made as to the valuation of any particular tract of real estate, after the general equalization order provided for in the preceding section shall have been made, and the board during the month of May may act upon such complaints and shall report any modifications thereby made in the general order and shall report such modifications "not later than July 15" to the tax commission.

That not having been done, the attempt of the board on the 2d of August, 1921, to make increases of over one and a half million dollars in the valuation for taxation of the property of 904 taxpayers in 3 townships and 3 towns was without authority of law, and the restraining order was properly granted by Judge Devin, and the refusal to dissolve the same by Judge Bond must be affirmed.

The defendants, however, contend that they acted under section 28(c), which authorized the county commissioners when they "shall be of the opinion that the valuation of real estate in such county is so unequal as between the owners of real property in such county as to require a more general revision of assessments than is practicable to be made under the provisions of subsections (a) and (b) of this section"—that is, by a general horizontal reduction and by specific complaints—they "may by resolution

so find and order that such revision be made. In the event such order is made, it shall be in lieu of the remedies provided in subsections (a) and (b) of this section." It is therefore an alternative remedy which the commissioners might have elected to adopt at their meeting on Tuesday after the first Monday in April. But having adopted the other system of "horizontal reduction and specific complaints," they could not in July proceed to act under subsection (c). Even if they could do so, it would be necessary for them to set aside their horizontal reduction of 40 per cent. as to the entire county, though it had been approved by the state tax commission, and then proceed under subsection (c) in lieu thereof.

There is this further insuperable objection that if subsection (c) had chosen as the alternative to the "horizontal reduction and specific complaints" the Legislature provided that proceedings thereunder should be completed "not later than July 1, 1921," and that the county commissioners should make their report of such revision under subsection (c) to the tax commission "not later than July 15, 1921," and that body should certify down their action on or before September 1, 1921.

On Tuesday after the first Monday in April, the board of commissioners had their election to proceed by a general horizontal reduction and specific complaints, which they did, and which has been approved by the state tax commission.

Or, they might have chosen then to have proceeded under subsection (c) under which the work could be completed "not later than July 1," and reported "not later than July 15" to the tax commission, which was practicable.

They chose the first method. When, becoming dissatisfied with that, they attempted in August to proceed under subsection (c), they had no authority to set aside the horizontal reduction which had received the approval of the state tax commission, for they were functus officio, and it was too late because the statute was specific that the revision should be complete "not later than July 1" and reported to the state tax commission "not later than July 15."

There are some circumstances under which a requirement that a certain act shall be done on a date named may be treated as directory, but that is not possible when the statute conferring a power provides that it shall be performed "not later than" the time specified.

The order appealed from is affirmed.

(182 N. C. 140)

DRAINAGE COM'RS OF MATTAMUSKEET DIST., IN HYDE COUNTY, v. DAVIS, Sheriff. (No. 25.)

(Supreme Court of North Carolina. Oct. 5, 1921.)

1. Drains \S 88—Sheriff entitled to only 2 per cent. commission for collection of drainage assessments; "taxes;" "taxes, licenses, or privileges."

A drainage district not being a political subdivision of the state, as is a county or township, nor a special tax district, as are school districts, and drainage assessments, under Pub. Laws 1911, c. 87, § 12, being subordinate to the lien of taxes, such assessments are not "taxes, licenses, or privileges," within C. S. § 8042, granting sheriffs 5 per cent. of all taxes, licenses, and privileges collected by them for state, county, township, school district, "or other purposes whatsoever," but local assessments, imposed, not as public burdens for general revenue, but with reference to special benefits to the property assessed, so that, while a sheriff, by the general policy of the state to pay for services rendered, is entitled to commissions on the collection of drainage assessments, even though Pub. Laws 1909, c. 442, § 36, providing that officers performing services for which compensation is not specially provided shall receive pay therefor as in other like cases, was repealed by Pub. Laws 1917, c. 152, § 2, his compensation for collecting drainage assessments, whether for maintenance or construction purposes, in view of C. S. § 5349, authorizing the board of drainage commissioners to levy maintenance assessments on lands benefited in the same manner and proportion as the original construction assessments were made, and Pub. Laws 1911, c. 87, §§ 8-12, directing the collection of construction assessments by the same officer and in the same manner as state and county taxes, is limited to 2 per cent. of the amount of the "drainage tax" collected, as authorized by C. S. § 5369; the expression "or other purposes whatsoever," in section 8042, referring to "taxes" like those previously enumerated, not for special benefits to land, but for defraying the cost of government, and section 5369, allowing 2 per cent. "for collecting drainage assessments as hereinbefore described," being a legislative construction of section 5369, as including the maintenance assessments provided for in section 5349 preceding.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, License; Privilege; Tax—Taxation.]

2. Statutes \S 220 — Legislative construction may be called in aid, though court not bound thereby.

Though the court is not bound by a legislative construction of a statute, it can be called in aid and considered with the other facts.

Appeal from Superior Court, Hyde County; Bond, Judge.

Controversy submitted without action between the Drainage Commissioners of Mat-

tamuskeet District, in Hyde County, and Thos. D. Davis, Sheriff. Judgment for defendant, and plaintiffs appeal. Modified and affirmed.

This is a controversy between the board of drainage commissioners of Mattamuskeet district, in Hyde county, and Thos. D. Davis, sheriff of said county, submitted without action upon agreed facts. It is admitted that plaintiff is a duly constituted drainage corporation, and that defendant was sheriff of Hyde county during the years 1917, 1918, and 1919, and charged with the duty of collecting assessments for construction and maintenance of the drainage system levied in said drainage district. No controversy exists as to compensation for collecting assessments levied for payment of bonds issued for construction work, but it arises only with respect to commissions on the assessments levied annually for maintenance.

By chapter 509, Laws 1909, the State Board of Education, by virtue of its ownership of Mattamuskeet Lake and other lands near it, was authorized to join in the petition to establish the drainage district, the corporate name of which was "Board of Drainage Commissioners of Mattamuskeet Lake." Section 3. The Board of Education did join in the petition (Carter v. Com'rs, 156 N. C. 183, 72 S. E. 380), and subsequently sold to the Southern Land Reclamation Company (Carter v. Com'rs, supra; Caravan v. Com'rs, 161 N. C. 100, 76 S. E. 681; Gibbs v. Com'rs, 175 N. C. 5, 94 S. E. 695; Mann v. Mann, 176 N. C. 353, 97 S. E. 175).

The drainage district has issued bonds and levied assessments to maintain the district. No question is presented as to the legality of the bond issues or the maintenance assessments. The defendant, being the sheriff and tax collector of Hyde county, whose compensation is not fixed by salary, collected all these assessments for the years 1917, 1918, and 1919, gave bond for their collection, has paid the same to the treasurer of the county; his accounts have been audited, and for his services and responsibility he retained—and his act in this respect was approved by the court below—the commissions fixed by law, as he contends. It is admitted in paragraph 8 of the facts agreed that the defendant, as sheriff, collected the maintenance assessments and accounted for the same less his commissions. It is to recover these retained commissions that this action is brought. The contention of the plaintiff is that "no provision is specifically made for any compensation or commission to the sheriff for the collection of maintenance assessments, and that defendant is not entitled to any commission on this maintenance fund." The power to make the assessments is not denied; the obligation resting upon the sheriff to collect is not denied; nor is it

denied that the sheriff's failure to collect would subject him to liability. The specific and only question involved here, and for the court's consideration, is: Was the sheriff of Hyde county entitled to receive commissions on collections of assessments levied exclusively for maintenance purposes by the commissioners of said drainage district for the years 1917, 1918, and 1919, and, if any, then what commissions? The sheriff has collected and paid to the treasurer of the county these maintenance assessments, less his commission. The plaintiffs insist that the sheriff is obliged to make these collections without compensation, and is suing to recover the commissions unlawfully retained by the sheriff.

The plaintiff, board of commissioners, contends that he was not entitled to such commissions. The defendant, sheriff, contends that he was entitled to 5 per cent. commissions. The court below held with defendant, and gave judgment accordingly. Plaintiffs excepted and appealed.

Spencer & Spencer, of Swan Quarter, and Small, MacLean, Bragaw & Rodman, of Washington, N. C., for appellants.

Mann & Mann, of Swan Quarter, and Manning, Bickett & Ferguson, of Raleigh, for appellee.

WALKER, J. (after stating the facts as above). The Mattamuskeet drainage district was created and organized under chapter 442, Laws 1909. The provisions of chapter 509, Laws 1909, are not material here. After the completion of the improvement, it came under control of the board of drainage commissioners upon whom was expressly imposed the duty to keep it in good repair, for which purpose the Commissioners were authorized to "levy an assessment on the lands benefited . . . in the same manner and in the same proportion as the original assessments were made." Laws 1909, c. 442, § 29; C. S. § 5349.

It will be noted that in the General Drainage Act of 1909, c. 442, the first section which authorizes an assessment to provide funds for any work in the district, is section 29, giving the power to levy assessments for maintenance, "in the same manner and in the same proportion as the original assessments were made. It is clear that the expression "original assessments" refers to those made for construction work, or to pay bonds issued for construction work, as provided for in sections 31, 32, 34 of chapter 442, Acts 1909. These sections provide for collection of assessments for construction work "by the same officers as the state and county taxes are collected." Laws 1909, c. 442, § 34. The Legislative Act of 1909 is silent on the subject of compensation to the sheriff or tax collector charged with the duty of collecting these assessments.

That the Legislature could impose the duty

to collect this fund upon the sheriffs and tax collectors without permitting them to charge a commission thereon seems to have been settled. *Commissioners v. Stedman*, 141 N. C. 448, 54 S. E. 289; *Fortune v. Commissioners*, 140 N. C. 322, 52 S. E. 950. It is evident that in the legislative mind was the purpose and intent that this beneficent law designed to reclaim vast areas of naturally fertile lands for the uses of mankind, and to promote the health of the people, should be economically administered, and that the amount to be raised by assessments should be available for the public benefit, planned, and contemplated, without diminution by incidental expenses in payment of commissions to existing or future office holders, for whom already was provided compensation sufficient to allure. The law being written as recited, sheriffs and tax collectors were without express authority to have deducted any commissions from these assessments, but in the act can be found clearly implied authority to this effect. The Legislature of 1911 amended the General Drainage Act of 1909. Laws 1911, c. 67. The act of 1911 does not change section 29 of chapter 442, Acts 1909; but does strike out sections 31, 32, 33, and 34 of the act of 1909, and insert new sections in lieu thereof. Acts 1911, c. 67, §§ 8, 9, 10, 11, and 12. These new sections provide for the collection of assessments for construction, or the payment of principal and interest on construction bonds issued, and direct that these assessments shall be collected by the same officers and in the same manner as state and county taxes are collected. Acts 1911, c. 67, §§ 8, 12.

Next in order comes section 13 of the act of 1911, for the first time making express provision for any commission or fee, as follows:

"Sec. 13. That the fee allowed the sheriff or other county tax collector for collecting the drainage tax as prescribed in section thirty-four of chapter four hundred and forty-two of the Public Laws of one thousand nine hundred and nine shall be two per cent. of the amount collected, and the fee allowed the county treasurer for disbursing the revenue obtained from the sale of the drainage bonds shall be one per cent. of the amount disbursed: Provided, no fee shall be allowed the sheriff or other county tax collector or county treasurer for collecting or receiving the revenue obtained from the sale of the bonds provided for in section thirty-four of chapter four hundred and forty-two of the Public Laws of one thousand nine hundred and nine, nor for disbursing the revenue raised for paying off the said bonds: Provided, further, that in those counties where the sheriff or tax collector and treasurer are on a salary basis, no fees whatever shall be allowed for collecting or disbursing the funds of the drainage district."

[1, 2] The plaintiffs contend, and we think properly so, that the enactment of the law of 1911 (section 13, c. 67) leads to the conclu-

alson that it was the legislative intent that no longer, if before it had been relied on, should there be any warrant for the contention that the provisions of section 5245 of the Revisal of 1905 (now section 8042 of Consolidated Statutes) applied to drainage assessments, entitling sheriffs or tax collectors to 5 per cent. commissions on assessments collected, but that the compensation to be paid for collection and disbursement should be limited to that prescribed in the act of 1911, to wit: That, for collecting the larger assessments required for construction work, the sheriff should receive 2 per cent. of the amount collected, and that for disbursing the proceeds of a bond sale the treasurer should receive a commission of 1 per cent. But we consider the inference as clear that it was the legislative intent that, for collecting the small annual assessments for maintenance, there should be commissions allowed, though not as much as 5 per cent. But more of this hereafter.

The judgment rendered decrees that defendant, Davis, as tax collector for Hyde county, is entitled "out of the funds collected by him (from assessments) for maintenance of the said drainage district, the same compensation provided by law for collection of 'state, township, school districts or other purposes whatsoever,'" making express reference to section 5245, Revisal of 1905. Upon what theory can this judgment be wholly sustained?

Section 5245 of the Revisal (now section 8042 of Consol. Statutes) was a part of the chapter of the Revisal of 1905 dealing with taxes. This provision is brought forward in Consol. Statutes of North Carolina under the chapter entitled "Taxation." The language of section 5245 of the Revisal of 1905 referred to in the judgment is that "the sheriffs and tax collectors shall receive 5 per cent. on all taxes, licenses and privileges collected by them for state, county, township school district, or other purposes whatsoever," as already stated. Prior to 1905 the commissions allowed to sheriffs for collecting county taxes were fixed at the same per cent. as for the collection of public taxes payable to the treasurer of the state. Code 1883, § 723. The commissions deductible in settlement of state taxes were 5 per cent. on the amount collected. Acts 1903, c. 251, § 92. In 1904 a controversy arose in Iredell county as to whether the sheriff was entitled to commissions on the school tax collected. *Board of Education v. Board of Com'rs*, 137 N. C. 63, 49 S. E. 47.

The Legislature of 1905 thereafter wrote into the law the language:

"That the sheriffs and tax collectors shall receive 5 per cent. on all taxes, licenses and privileges collected by them for state, county, township school district, or other purpose whatsoever." Acts 1905, c. 590, § 91; Acts 1907, c. 253, § 91; Revisal of 1905, § 5245; O. S. c. 131, § 8042.

But drainage districts such as this one are not political subdivisions of the state, as is a county or township; neither are they special tax districts, as are the school districts. These assessments are not "taxes, licenses, or privileges," even though they be so styled by the Legislature itself. They are local assessments, "and made with reference to special benefits derived from the property assessed for the expenditures, while taxes are public burdens, imposed as burdens for the purpose of general revenue." *Shuford v. Com'rs*, 86 N. C. 552; *Sanderlin v. Luken*, 152 N. C. 738, 68 S. E. 225; *Com'rs v. Webb*, 160 N. C. 594, 76 S. E. 552. By the very language and provisions of the act under which these assessments may be levied, they are subordinate, as liens, to the lien of taxes. Acts 1911, c. 67, § 12. Can it be seriously contended that by that act the Legislature of 1905 had in contemplation the collection of these assessments for maintenance of drainage canals, which were unknown in their present form in North Carolina until 1909? Only upon that theory can the inference be drawn that this general act of 1905 extends so far.

It is the rational view that we must look to the Acts of 1909 and 1911, which relate to these drainage districts, and which expressly or impliedly specify the compensation of sheriffs and treasurers, to ascertain the legislative intent. We think that they, when taken together, and so construed, provide that commissions shall be deducted for collection of maintenance assessments, at the rate of 2 per cent.—not 5.

In this respect the case at bar differs from the case of *Board v. Commissioners*, supra, in that in the latter case nowhere was any express provision for any compensation to the sheriff for collecting the school tax.

The defendant contends, and we think this is his main reliance, that the general statute allowing the sheriff commissions for collecting taxes provides in Revisal 1905, § 5245:

"The sheriffs and tax collectors shall receive five per cent. on all taxes, licenses and privileges collected by them for state, county, township, school district, or other purpose whatsoever, up to * * * fifty thousand dollars, and upon all such sums so collected by him in excess thereof he shall receive two and one-half per cent. commission."

This provision is repeated in section 101, c. 234, Laws 1917, and in section 101, c. 92, Laws 1919 (section 8042, C. S.). The primary purpose of these sections was to fix the sheriff's commissions for collecting taxes, in the strict and technical sense of that word. *Com'rs v. Stedman*, 141 N. C. 448, 54 S. E. 269. Defendant contends that there is no provision of the drainage acts which forbids the application of this general provision. It will be noted that the phraseology is somewhat comprehensive, "all taxes collected for state, county, * * * school district, or

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other purposes whatsoever." (Italics ours.) But this view drawn therefrom does not commend itself to our favorable consideration. As we have shown, these collections were not of taxes, but of assessments proper. The distinction between the two is plainly marked by the law. While in the two acts of 1909 and 1911 the words "assessments" and "taxes" are indifferently used, they both were manifestly intended to describe the same thing, namely, the sums imposed upon the lands receiving benefits from the drainage for the purpose of paying the costs and expenses thereof, and, in no proper sense, are they "taxes," that word having a well-defined and perfectly well-understood meaning, being levies made, not for special benefits accruing to the particular owner of land, or to the land itself, but for defraying the costs and expenses of government, being, strictly speaking, public burdens.

The statute to which defendant refers, and which allows 5 per cent. on taxes collected, is to be found only under the general title of "Taxes and the Collection of Them," or under "Revenue." The argument based upon these considerations is therefore entirely inadmissible, and we must look to the drainage acts for light upon the subject, and be governed by their provisions. Section 36 of the act of 1909, if it had been retained, would have settled the question easily and most satisfactorily, but it was repealed by the Acts 1917, c. 152, § 2, though we do not think it was intended to be repealed so far as the compensation of officers and employees of the drainage commission were concerned, but only in other respects, and that a repeal of the provisions of that section, that officers and others performing service where compensation is not specially provided for, shall receive pay therefor for their work as in other like cases, was inadvertently included in the repealing section of the later law. But we will treat it as wholly repealed by the act of 1917, and even in that view there is plenty left to show an intent of the Legislature to make an allowance to the sheriff for the collection of assessments for maintenance, and that the same should be the percentage allowed in case of assessments for construction, under section 34 of the act of 1909, as that is the closest analogy, the two services being surely of a like kind, and not only that, but of the same kind, or, in other words, identical. As we have said, these assessments for maintenance, it is true, are sometimes called "drainage taxes," but this is a misnomer merely, for drainage assessments were clearly in the mind and contemplation of the Legislature, and sometimes they are so properly designated in the two Acts. We cannot adopt defendant's construction of Revisal of 1905, § 5245, which provides that sheriffs and tax collectors shall receive 5 per cent. on all taxes, licenses, and privi-

leges collected by them for state, county, township, school districts, or *other purposes whatsoever.* (Italics ours.) The expression "or other purposes whatsoever" refers to taxes of a like kind, or public taxes proper, and not to these assessments. That section of the Revisal (section 5245) is to be found in chapter 110, entitled "Revenue," which refers to the revenue received from taxation for public purposes.

We are led to conclude that the sheriff is entitled to some commissions on the collection of drainage assessments by the consideration of the established policy of this state prevailing for many years, which is that officers and other persons rendering services to the state in any official, or even unofficial, capacity have been uniformly paid for such services, either by salary, fees, or in some other form, and the state has not required that such services be rendered gratuitously, but has acted upon the just principle that, not only is the laborer worthy of his hire, but that he should be paid a just compensation for his work. The sheriff is required to give bond for the collection and safe custody of funds derived from these assessments, and to make prompt settlement for the same. He performs the same work as he did in the collection of organization or construction assessments, and the statute provides (Acts 1909) that those overdue shall be collected and disbursed in the same manner, and by the same officers, as the state and county taxes. Section 29 of that act continues the control of the drainage commissioners for maintenance and repairs, and authorizes the levy of an assessment for such purposes in the same manner and in the same proportion as the original assessments were made. It may be that in certain very exceptional cases the statutes do not provide specifically for compensation to an officer for particular services rendered, and, too, because, as contended by plaintiff, his salary, if one is received, or his fees, or the pay for his other work, may have been regarded as quite sufficient compensation for the performance of all his official duties; but such cases, if they exist, are rare, and do not embody the general and uniform rule, but, as exceptions, they tend to prove it. Then again, section 13 of chapter 67, Laws 1911, is brought forward as section 5369 of Consol. Statutes, which provides that 2 per cent. shall be allowed the sheriffs "for collecting the drainage assessments as hereinbefore described," and it refers not only to the assessments for construction but to those for maintenance, and is a legislative construction of the drainage statutes as to the compensation of the sheriff. We are not bound by a legislative construction, as interpretation of a statute is a judicial function, and for the court alone, but it can be called in aid by us and considered with the other facts. *Gill v. Com'rs*, 160 N. C. 176,

76 S. E. 203, 43 L. R. A. (N. S.) 293; Abernethy v. Com'rs, 169 N. C. 631, 86 S. E. 577; Hannah v. Com'rs, 176 N. C. 395, 97 S. E. 160.

This brings us to consider an important and exceedingly relevant passage in the plaintiff's brief, which appears to be in harmony with our view, though not a full concession of it, and which is stated alternatively therein to his first contention, and it is that the sheriff may be entitled to compensation at the rate of 2 per cent., though rejecting, as we do, the defendant's view, that these assessments are "taxes," which they are not in any proper sense, and entitle him to 5 per cent. on the amount collected.

In his brief, the plaintiff says substantially, and this is the passage to which we have referred, that in no event could the defendant have been entitled to a commission of more than 2 per cent., but if the court should be of opinion that it was not intended by the Legislature to impose the duty of collecting these assessments for maintenance without providing compensation to the sheriffs and tax collectors, then the only reasonable theory is that the provisions of chapter 67, § 13, of Laws 1911, contemplated that but 2 per cent. should be charged upon any drainage district fund collected, as well the maintenance assessments as the construction or bond assessments. This for the reason that the acts of 1909 and 1911 provide that maintenance assessments shall be levied in the same manner and in the same proportion as original assessments were made, and, while not so expressly provided, the inference is essential that they were to be collected by the same officers, and every provision for the collection of these original assessments requires that it be done by the sheriffs and tax collectors. This view that the 2 per cent. only can be collected is supported by the fact that the act of 1909 and the act of 1911 nowhere make any distinction between the maintenance assessments and original assessments; and the theory finds further support in the fact that in bringing forward this section 13 of chapter 67, Laws 1911, the Legislature of 1919, in Consol. Statutes, § 5369, construes these fees of 2 per cent. to sheriffs and tax collectors to be "for collecting the drainage assessments as hereinbefore prescribed," which includes the maintenance assessment for which provision is made in Consol. Statutes, § 5349, preceding. We concur in this view of the plaintiff, as the alternative to plaintiff's contention in the first part of its brief, and in its argument here, which first contention we must reject.

We believe that this is the correct solution of the question as to the sheriff's commissions raised in the case, as that question is stated by both of the parties (though its correctness is not admitted), and we accordingly adopt it. This view has the merit of being

a fair and just one, and best accords with the intent of the Legislature in all the enactments upon the subject, when they are considered together, as they should be, being in pari materia.

This case was argued with Drainage Commissioners v. Credle, 109 S. E. 88, and Same v. Brinn, 109 S. E. 90, but as the latter involve different questions, they will be discussed and decided in separate opinions, being essentially different cases.

The judgment will be modified by inserting 2 per cent. in the judgment for 5 per cent., as provided therein, and as thus modified it is affirmed.

Plaintiff will pay two-fifths and the defendant three-fifths of the costs in this court. Modified and affirmed.

(182 N. C. 133)

FAISON et al. v. MARSHBURN. (No. 225.)

(Supreme Court of North Carolina. Oct. 12, 1921.)

Brokers ⇨ 52—Broker cannot recover commission from purchaser where sale not completed.

Where sale of land was not consummated, and the owner of land does not insist or demand that the purchaser comply with his bid, and does not tender a deed, the broker negotiating the sale cannot recover his commission from the purchaser by an action against him brought in the name of the owner and the broker.

Appeal from Superior Court, Duplin County; Bond, Judge.

Action by J. F. Faison and J. J. Matthis against S. T. Marshburn. Judgment of nonsuit, and plaintiff Matthis appeals. Affirmed.

Civil action to recover broker's commissions upon an alleged sale of real estate. The complaint is as follows:

"The plaintiffs, complaining of the defendant, come and allege:

"(1) That heretofore, prior to October 29, 1919, the plaintiffs caused a certain tract of land, belonging to the plaintiff, J. F. Faison, and lying in Warsaw township, Duplin county, N. C., to be surveyed and platted into various lots and parcels of land; and thereafter, on October 29, 1919, after due advertisement, said lands were offered for sale, on the premises, to the highest bidder, upon the terms of one-fourth cash, and the balance to be paid in one, two, and three years from date, said deferred payments to be represented by purchase-money notes, and secured by mortgage deed upon the lands so purchased.

"That a plat of said lands is hereto attached, marked Exhibit A and made a part of this article.

"(2) That on the date aforesaid, to wit, October 29, 1919, said lands were duly sold upon the premises, at which time and place the defendant, S. T. Marshburn, purchased lot No. 1,

and lot No. 2, according to said plat, containing 41.33 and 41.73 acres, respectively, at an agreed price of \$142.50 per acre.

"(3) That at the time of said sale, it was publicly announced by the auctioneer that the terms of sale were as heretofore alleged, and that said sale was made according to the plat hereto attached, and above referred to.

"(4) That at the time of said purchase the defendant executed a written contract, in words and figures as follows:

"This is to certify that I have this day bought through the Fort Realty Company of Raleigh, N. C., lot No. 1 and No. 2, 83.06A, as shown by the map of J. F. Faison, at \$142.50, for which I promise to pay for on the terms announced at sale.

"Witness my hand and seal, this October 29, 1919.

"[Signed] S. T. Marshburn. [Seal.]

"(5) That the plaintiffs have offered to execute and deliver to the defendant a good and sufficient deed for said lots, and have demanded of him the payment of one-fourth part of the purchase price, and requested him to execute and deliver to them his promissory notes, secured by a mortgage deed, in accordance with his said contract; and the defendant has failed and refused, and still fails and refuses, to pay to the plaintiffs any part of said money, except the sum of \$50, which was paid on the day of sale.

"(6) That the total purchase price of said lands, as agreed upon, amounted to \$11,836.05, of which sum \$50 has been paid.

"(7) That under the terms of agreement between the plaintiff, J. F. Faison, and the plaintiff, J. J. Matthis, the said J. F. Faison was to receive \$125 per acre from said sale, and the balance was to belong to the plaintiff, J. J. Matthis; that, after deducting the \$50 hereinbefore referred to, the balance due and owing to the plaintiff, J. J. Matthis, on account of said contract, is \$1,403.05, which amount is now justly due and owing to him by the defendant.

"Wherefore the plaintiff, J. J. Matthis, demands judgment against the defendant for the sum of \$1,403.05, together with the costs of this action to be taxed by the clerk."

J. F. Faison, the owner of the land, testified as follows:

"I have never signed a deed, because I never got the cash payment; I have never tendered the defendant Marshburn a deed to the lands in controversy. I am not bringing any suit against the defendant, Marshburn, nor asking for any relief against the defendant, and the option that I gave Matthis is now out. I think Matthis made a profit on the other land sold that day."

At the close of plaintiff's evidence and upon motion of counsel for defendant, his honor entered judgment as of nonsuit. Plaintiff, J. J. Matthis, excepted and appealed.

Faison & Robinson, Grady & Graham, and Fowler & Crumpler, all of Clinton, and Stevens, Beasley & Stevens, of Warsaw, for appellant.

H. D. Williams, of Kenansville, and D. L. Carlton and R. D. Johnson, both of Warsaw, for appellee.

STACY, J. We fully concur with his honor below that, upon the evidence, J. J. Matthis is not entitled to recover of the defendant, Marshburn, and further, that the complaint fails to allege facts sufficient to constitute a valid cause of action.

It will be observed that J. F. Faison, the owner of the land, is not insisting or demanding that the defendant comply with his bid. No deed has been tendered, and he expressly states that he is not asking for any relief in this action. The broker is seeking to recover his commissions out of the prospective purchaser without any sale having been consummated. His agreement was with Faison, the owner of the land, not with the defendant. The case in many respects is not unlike *Aycock v. Bogue*, 108 S. E. 434, at the present term, except there the broker sued the owner, and here he has brought suit against the bidder who never became a purchaser.

Upon the record, and as now presented, we are of opinion that the judgment of nonsuit must be sustained.

Affirmed.

(182 N. C. 129)

BATTS v. SULLIVAN. (No. 222.)

(Supreme Court of North Carolina. Oct. 12, 1921.)

1. Insurance \S 115(4) — Statutory provision that title to crops are vested in landlord until rents are paid does not divest tenant of insurable interest.

Although under C. S. \S 2355, the possession and title to all crops raised by tenant or cropper in the absence of a contrary agreement are deemed to be vested in the landlord until the rent and advancements have been paid, this does not divest the tenant of an insurable interest in the crops before division.

2. Insurance \S 580(1) — Tenant has right against landlord to money paid on his insurance policy on crops.

Where a tenant insures his interest in the undivided crop without the landlord's knowledge, and the property is destroyed, the tenant has the right to all of the insurance money as against the landlord.

Appeal from Superior Court, Lenoir County; Bond, Judge.

Action by Hattie E. Batts, as guardian, against Bryant Sullivan. Verdict and judgment for defendant, and plaintiff appeals. No error.

Civil action brought by plaintiff, the landlord, against defendant, tenant upon her farm, to recover for certain advancements made during the year 1919.

The single point presented on this appeal grows out of a dispute as to what disposition or division, if any, should be made between the landlord and tenant of the proceeds of a fire insurance policy taken out by the tenant to protect his interest in the tobacco crop while stored in the plaintiff's packhouse. The tobacco in question had been raised by the defendant as tenant on the lands of the plaintiff. It had been harvested, cured, and stored in her barn, but there had been no division of the crop. The landlord was entitled to one-third of said tobacco, and the tenant the remaining two-thirds.

The defendant, without the knowledge or consent of the plaintiff, and at his own expense, purchased a policy of fire insurance to protect his interest in said tobacco. While this policy was in force, the plaintiff's packhouse and its contents, including the undivided tobacco, was destroyed by fire. The defendant collected the insurance. The check was made payable to both parties, and plaintiff alleges that by agreement the money was to be divided according to their respective interests in the property, but the jury have found otherwise, and the alleged agreement is not a material or controlling point in the case.

The plaintiff contends that she is entitled to one-third of the insurance money because she owned an undivided one-third interest in the property destroyed. His honor held that, as the insurance contract was purchased to protect the interest of the tenant, he alone was entitled to the proceeds derived therefrom, and so charged the jury. Plaintiff excepted and assigns this as error.

From a verdict and judgment in favor of defendant, the plaintiff appealed.

Rouse & Rouse, of Kinston, for appellant.
Shaw & Jones, of Kinston, for appellee.

STACY, J. It will be observed at the outset that the controversy here presented is between the landlord and the tenant; and the validity of the insurance policy is in no wise involved. This has been paid, and the insurance company is not a party to the proceeding. The case arises out of a contest over the question as to whether the landlord, by virtue of her legal title and interest in the tobacco, is entitled to any portion of the insurance money.

[1] It is true that under our statute (C. S. § 2355) the possession and title to all crops raised by a tenant or cropper, in the absence of a contrary agreement, are deemed to be vested in the landlord until the rent and advancements have been paid. *State v. Austin*, 123 N. C. 749, 81 S. E. 731; *Boone v. Darden*, 109 N. C. 74, 13 S. E. 728; *Smith*

v. Tindall, 107 N. C. 88, 12 S. E. 121. But this perforce does not divest the tenant of an insurable interest in the crops before division.

"It is well settled that any person has an insurable interest in property by the existence of which he will gain an advantage, or by the destruction of which he will suffer a loss, whether he has or has not any title in, or lien upon, or possession of, the property itself." *Harrison v. Fortlage*, 161 U. S. 57, 16 Sup. Ct. 488, 40 L. Ed. 616; *Eastern R. Co. v. Relief F. Ins. Co.*, 98 Mass. 423.

"It may be stated as a general proposition, sustained by all the authorities, that whenever a person will suffer a loss by a destruction of the property he has an insurable interest therein." *Gilman v. Dwelling House Ins. Co.*, 81 Me. 488, 17 Atl. 544; *Getchell v. Mercantile, etc., Ins. Co.*, 109 Me. 274, 83 Atl. 801, 42 L. R. A. (N. S.) 135, Ann. Cas. 1913E, 788.

And to the same effect are our own decisions; *Gerringer v. N. C. Home Ins. Co.*, 133 N. C. 407, 45 S. E. 773; *Grabbs v. Mut. Fire Ins. Ass'n*, 125 N. C. 389, 34 S. E. 503, and cases there cited.

[2] It is also a well-recognized principle, and uniformly upheld by the decisions, that the different interests in the same property, such as that held by a mortgagor or lienor, on the one hand, and that of a mortgagee or donee, on the other, and such kindred relations, are each separately insurable.

"Wherever property, either by force of law or by the contract of the parties, is so charged, pledged, or hypothecated that it stands as a security for the payment of a debt, or the performance of a legal duty, each of the parties, the owner of the lien and the person against whose property it exists, has an insurable interest in the property—the one, that the security shall remain sufficient; the other, that it may be kept unimpaired and the property restored to his use or enjoyment in whole or in part, after the incumbrance is relieved. And each may insure his separate interest at one and the same time without incurring the imputation of double insurance, provided the applications and policies are the individual and separate acts of each." *Commercial Fire Ins. Co. v. Capital City Ins. Co.*, 81 Atl. 320, 8 South. 222, 60 Am. Rep. 162; *May on Insurance*, §§ 80 to 87, inclusive; *Flanders on Fire Insurance*, 342 et seq.; *Insurance Co. v. Stinson*, 103 U. S. 25, 26 L. Ed. 473; *Cone v. Niagara Ins. Co.*, 60 N. Y. 619; *Cumberland Bone Co. v. Andes Ins. Co.*, 64 Me. 466; *Franklin Fire Ins. Co. v. Coates*, 14 Md. 285; and *Carter v. Humboldt Fire Ins. Co.*, 12 Iowa, 287.

In the last case it was said:

"Any interest is insurable if the peril against which insurance is made would bring upon the insured, by its immediate and direct effect, a pecuniary loss."

In *Insurance Co. v. Reid*, 171 N. C. 513, 88 S. E. 779, a case involving the rights of

mortgagor and mortgagee, this doctrine is clearly stated as follows:

"It is well recognized that a mortgagee and mortgagor may each insure the mortgaged property for his own benefit, and where a mortgagee has taken out such insurance at his own expense, without stipulations in favor of the mortgagor or conditions of any kind imposing an obligation or duty on the mortgagee to protect the property for the mortgagor's benefit, such mortgagee, in case of loss of the property by fire or damage thereto, is not accountable to the mortgagor for the amount collected from the insurance company, either on the debt or otherwise." *Leyden v. Lawrence*, 79 N. J. Eq. 113, 81 Atl. 121; *Ins. Co. v. Woodbury*, 45 Me. 447; *Fire Ins. Co. v. Bohn*, 48 Neb. 743, 67 N. W. 774; *Gillespie v. Ins. Co.* 61 W. Va. 169, 56 S. E. 213, 11 L. R. A. (N. S.) 143; *Ins. Co. v. Ins. Co.*, 55 N. Y. 343, 14 Am. Rep. 271; 1 *Jones on Mortgages* (4th Ed.) § 420.

In *Ins. Co. v. Woodbury* the principles referred to are stated as follows:

"(a) If a mortgagee insures his own interest without any agreement between him and the mortgagor, and a loss accrues, the mortgagor is not entitled to any part of the sum paid on such a loss to be applied to the discharge or reduction of his mortgage debt."

"(b) When the mortgagee effects insurance at the request and cost and for the benefit of the mortgagor as well as his own, the mortgagor has the right in case of loss to have the money applied in discharge of his indebtedness."

Applying these principles, we think his honor's charge to the jury with respect to the insurance money was correct in the light of the facts appearing on the record.

Of course, if the insurance policy had been procured for the mutual or joint benefit of the landlord and the tenant, a different question would be presented; but this is not our case. *King v. State Mutual Fire Ins. Co.*, 7 Oush. (Mass.) 1, 54 Am. Dec. 683, and note.

After a careful examination of the defendant's exceptions, we have been unable to find any error committed on the trial; and this will be certified to the superior court.

No error.

(151 Ga. 845)

HOWARD v. STATE. (No. 2145.)

(Supreme Court of Georgia. Sept. 24, 1921.)

(Syllabus by the Court.)

1. Criminal law § 13—Part of statute relating to speed of automobiles held indefinite and void.

The language employed in section 10 of the act of Nov. 30, 1915 (Acts Ex. Sess. 1915, p. 107), relating to the regulation of motor vehicles and motorcycles and their rate of speed upon the highways of this state, and providing

that a motor vehicle shall not be operated upon any public street or highway "at a speed greater than is reasonable and safe," is so indefinite as to render that part of the statute void. Moreover, since the decision of this case by the Court of Appeals, the portion of the statute above referred to has by this court been held to be unconstitutional and void.

2. Unnecessary to consider definiteness of unconstitutional statute.

Inasmuch as this court has held the third paragraph of section 10 of the act of 1915 (Acts Ex. Sess. 1915, p. 112) above referred to, unconstitutional, upon the ground that legislation upon this subject was not included in the Governor's call for the special session, it is unnecessary to decide whether it is also void upon the ground of indefiniteness and vagueness.

(Additional Syllabus by Editorial Staff.)

3. Criminal law § 172(1)—Charge referring to unconstitutional statute held to confuse jury.

In a prosecution for manslaughter, an instruction of the court embodying parts of Acts Nov. 30, 1915 (Acts Ex. Sess. 1915, p. 112), § 10, relating to regulation of motor vehicles and their rate of speed, which had been held to be invalid, was prejudicially erroneous as tending to confuse the jury.

Certiorari from Court of Appeals.

David Howard was convicted of involuntary manslaughter, and the judgment was affirmed in the Court of Appeals (108 S. E. 683), and he brings certiorari. Reversed.

Branch & Howard, of Atlanta, for plaintiff in error.

Geo. M. Napier, Sol. Gen., and Alonzo Field, both of Atlanta, for the State.

BECK, P. J. David Howard was indicted for the offense of murder, it being alleged in the indictment that he did, on the 20th day of May, 1919, unlawfully, and with malice aforethought, kill one Hubert Cochran, by driving an automobile against and over the said Cochran. He was tried under this indictment, and convicted of the offense of involuntary manslaughter in the commission of an unlawful act; and thereupon he made a motion for a new trial, which was overruled, and the case was carried by writ of error to the Court of Appeals. That court affirmed the judgment of the trial court, and a writ of certiorari to that judgment was sued out, bringing the case here for review.

[1, 3] 1. One of the grounds of the motion for a new trial in this case assigns error upon the following part of the court's charge:

"The law provides that no person shall operate a motor vehicle or motorcycle upon any public street or highway at a speed greater than is reasonable and safe, not to exceed a

speed of 30 miles per hour, having due regard for the width, grade, character, and common use of such street or highway, or so as to endanger life, limb, or property in any respect."

In the case of *Empire Life Ins. Co. v. Allen*, 141 Ga. 413, 81 S. E. 120, this court had before it for consideration and determination the validity of section 5 of the act of 1910 (Acts 1910, p. 90), which contains certain provisions regarding the operation of automobiles, making it unlawful for any person to "operate a machine on any of the highways of this state * * * at a rate of speed greater than is reasonable and proper, having regard to the traffic and use of such highway, or so as to endanger the life or limb of any person or the safety of any property," and the violation of this provision was made punishable as a misdemeanor. The court there held that the part of section 5 of the act of 1910 quoted above was too indefinite to form the basis of a criminal action, whether it might stand as a rule of civil conduct or not. That ruling is applicable to the charge under consideration here; for the provision in the statute enacted at the extraordinary session of the Legislature on November 30, 1915, upon the subject of the speed limit and control on the highways, is as follows:

"No person shall operate a motor vehicle or motorcycle upon any public street or highway at a speed greater than is reasonable and safe, not to exceed a speed of 30 miles per hour, having due regard for the width, grade, character, traffic, and common use of such street or highway; or so as to endanger life, limb, or property in any respect whatever."

Instead of employing the expression, "at a rate of speed greater than is reasonable and proper," used in the act of 1910, the Legislature, at the extraordinary session of 1915, used the language, "at a speed greater than is reasonable and safe," substituting the word "safe" for the word "proper." See Acts Ex. Sess. 1915, p. 107, § 10. The language of the two acts is substantially the same; and under the ruling construing section 5 of the act of 1910, referred to above, and holding it invalid because of its indefiniteness, the provision in the statute of 1915 now under consideration, and containing the quotation above quoted, must also be held to be invalid because of indefiniteness. The instruction of the trial court embodying the part of the statute here held to be invalid was therefore error. Nor can we hold that it was not hurtful error, as one of the material issues under the evidence in the trial of this defendant was whether he was doing an unlawful act at the time the automobile driven by him struck and killed the decedent. If the language of the statute is so indefinite as to make it void, then the instructions could only confuse the jury, and tend to prevent a clear understand-

ing of what particular act would or would not be criminal. The part of the statute held to be invalid should not be given in charge to the jury in the trial of a criminal case involving issues like the present one, as it cannot help the jury to determine the criminality of the acts charged, and can only tend to confuse them. In the case of *Hayes v. State*, 11 Ga. App. 371, 75 S. E. 523, the court said, speaking through Judge Pottle:

"What rate of speed is reasonable and proper? Who should determine this question? What is this test as to the rate of speed which can be employed, and how is the driver of an automobile to know when he is driving at a rate of speed prohibited by the act? Manifestly this question cannot be determined by the consequences which ensue from driving a machine. The law must so definitely and certainly define the offense that a person of reasonable understanding can know at the time of the commission of the act that the law is being violated. One jury might say that a certain rate of speed was reasonable and proper. Another jury might reach exactly the opposite conclusion from exactly the same state of facts and the same circumstances. One court might hold, upon a review of the facts, that the rate of speed used was in violation of the act, and another court might rule otherwise. We appreciate thoroughly the difficulty in prescribing the maximum rate of speed which can be employed in all cases, but this furnishes no reason why, in the language of the Supreme Court of the United States, the Legislature should be permitted to set a dragnet and leave the courts to determine who shall be detained in the net and who should be set at liberty."

Of course we are not holding that the inhibition in the statute of 1910 against exceeding a speed of 30 miles per hour was void for indefiniteness, but what is said above relates to the other language of the void statute embodied in the charge. Moreover, since the decision of this case by the Court of Appeals, so much of the statute of 1915 under consideration as relates to the regulation of the speed, etc., of motor vehicles and motorcycles has been declared to be void upon the ground of its unconstitutionality. *Jones v. State*, 151 Ga. —, 107 S. E. 765.

[2] 2. Error was also assigned upon the following charge of the court:

"A further provision of the law as to signaling is, 'Upon approaching or passing any person walking in the roadway, traveling any public street or highway, or any horse or other draft animal being led, ridden, or driven thereon, or upon any bridge or crossing at an intersection of public streets or highways' (but the court instructs you that there is no question of a public crossing, highway, or bridge in this case), 'the operator of a motor vehicle or motorcycle shall at all times have the same under immediate control.'"

Inasmuch as the judgment of the trial court is reversed because of the court's giving the first charge above set out, it is un-

necessary to consider whether or not this last excerpt from the charge is erroneous because the statutory provision therein quoted is void because of indefiniteness, since the charge is based upon the third paragraph of section 10 of the act of 1915, which in the case of *Jones v. State*, supra, is also held to be unconstitutional and void.

It is unnecessary to deal with the other grounds of alleged error.

Judgment reversed.

All the Justices concur.

(152 Ga. 100)

SMITH v. PARLIER. (No. 2348.)

(Supreme Court of Georgia. Sept. 24, 1921.)

(Syllabus by the Court.)

1. Easements ¶21—Right of private way given by parol by grantor does not pass to purchaser from grantor without notice.

Where a grantor of land enters into a collateral parol agreement with a grantee, to the effect that the latter shall have a private right of way over other lands of the former, the burden of such collateral agreement does not pass to an assignee of such other lands, where such assignee is a purchaser of the land for value and without notice, actual or constructive, of the collateral agreement. *Hancock v. Gumm*, 151 Ga. —, 107 S. E. 872.

2. Easements ¶6 — Private way gained by prescription.

"To acquire a prescriptive right to a private way over land, it is necessary to show the uninterrupted use of a permanent way, not over 15 feet wide, kept open and in repair for seven years. It is not sufficient to show that those claiming the prescription have been accustomed for more than seven years to pass over the land, changing the way as they saw fit, to avoid obstructions or for convenience." *Short v. Walton*, 61 Ga. 28; *Nashville, etc., Ry. Co. v. Coats*, 133 Ga. 820, 66 S. E. 1085; *Johnson v. Sams*, 136 Ga. 448, 71 S. E. 891; *Rodgers v. Stroud*, 141 Ga. 559(2), 81 S. E. 873.

3. Easements ¶61(6)—Interlocutory injunction amounting to direction to remove fence erroneously granted.

"Where in an equitable petition the sole prayer for injunction was that the defendant should be enjoined from maintaining an obstruction across a private right of way, which obstruction consisted in a fence completed before the filing of the petition, it was erroneous to grant an interlocutory injunction mandatory in its character, and amounting to a direction to the defendant to remove the fence." *Simmons v. Lindsay*, 144 Ga. 845, 88 S. E. 199.

4. Private way not established.

At the hearing of the petition for interlocutory injunction, the sole prayer of which was to enjoin the obstruction of an alleged private way, the judge applying the principles ruled in the first and second notes was authorized, under the pleadings and evidence, to find that

the plaintiff did not have any private right of way over the defendant's land. Even if the plaintiff had such right of way, injunction was not an available remedy after the fence had been constructed.

5. Injunction properly refused.

The judge did not err in refusing an interlocutory injunction.

Error from Superior Court, Floyd County; *Moses Wright*, Judge.

Action by *Hugh Smith* against *William Parlier*. From judgment denying an interlocutory injunction, plaintiff brings error. Affirmed.

M. B. Eubanks, of Rome, for plaintiff in error.

Denny & Wright, of Rome, for defendant in error.

ATKINSON, J. Judgment affirmed. All the Justices concur.

(152 Ga. 61)

PURCELL et al. v. PILGRIM. (No. 2179.)

(Supreme Court of Georgia. Sept. 14, 1921.)

(Syllabus by the Court.)

1. Injunction ¶152 — Permanent injunction improperly granted at interlocutory hearing.

In a suit for specific performance and injunction, a judgment was rendered at an interlocutory hearing, granting a permanent injunction. Error was assigned upon the judgment. The case being for decision by the entire bench of six Justices, all of the Justices agree that the judge was not authorized at such hearing to grant a permanent injunction; but the court is equally divided upon the question whether the judge was authorized, under the pleadings and evidence, to enjoin the defendants until the final trial, *FISH, C. J.*, and *ATKINSON and HILL, JJ.*, being of the opinion that such an injunction was authorized, and *BECK, P. J.*, and *GILBERT and GEORGE, JJ.*, being of the opinion that such an injunction was not authorized. It is therefore ordered that the judgment of the trial court stand affirmed by operation of law, with direction that the judgment be so modified as to make the injunction temporary.

2. Specific performance ¶108—Operation of space in building for pool tables temporarily restrained pending suit.

The exception is to a judgment granting an injunction at an interlocutory hearing in the case of *J. M. Pilgrim* against *S. E. Purcell* and *J. A. Sudderth*, being a suit for specific performance of a contract, and for injunction. Under the pleadings as amended and the evidence (some of the evidence being conflicting) the judge was authorized to find the following: *M. S. Sulunius* obtained a lease on a certain lot at *Chamblee, Ga.*, and constructed a building thereon. *Sulunius* executed to the de-

fendant S. E. Purcell a lease to the building for a term of 12 months, with power to sublet. Purcell occupied the rented property and used it as a store for sale of tobacco, cigars, soft drinks, lunches, fruit, candy, and military supplies. During such occupancy Purcell executed a written lease for a term of 11 months (being the balance of his own term) unto D. G. Jacobs, for described floor space in the front part of the building, for the purpose of maintaining therein a billiard and pool room. The operation of such room would attract customers for Purcell's business, and the lease required the operation of at least three tables, to be installed within a stated time. The lease was signed by Purcell and Jacobs, and it gave the latter power to sublet or assign without written consent of the former. Jacobs paid in advance the stipulated rent for one month, as required by the contract. At the time the lease was executed, a billiard and pool room was being operated in an adjoining building by J. M. Pilgrim, the plaintiff. Two days after execution of the lease, Jacobs executed a written transfer thereof for a valuable consideration unto Pilgrim. On the day of the transfer and repeatedly thereafter Pilgrim offered to install billiard and pool tables in the space according to the contract expressed in the lease, but Purcell refused to furnish him with a key or to admit him in the rented space for the purpose of installing tables in pursuance of the contract. A few days after the transfer, and after the time specified in which the tables should be installed, Purcell installed pool tables in the rented space, and continued thereafter to operate them himself and in connection with J. A. Sudderth. The introduction of Sudderth was the result of an undertaking between Purcell and Sudderth to get rid of Pilgrim, who had already instituted suit against Purcell to enjoin him from operating the tables in the rented space. With the above object in view, Purcell and Sudderth went through the form of a sale of Purcell's entire business to Sudderth; and these two, after informing Sulunius of the injunction suit, induced him to go through the form of accepting a surrender of the lease to Purcell and executing another on similar terms to Sudderth. After the above described transactions both Purcell and Sudderth continued in the physical operation of the business. Pilgrim's object in purchasing the transfer from Jacobs was to conduct a billiard and pool room in the rented space for the profits to be derived therefrom, and also to save his existing business in the adjoining building from the damage that it would suffer from competition with Jacobs operating a similar business in the space leased from Purcell. Under the circumstances, the injury to Pilgrim's existing business on account of the competition carried on by Purcell and Sudderth in the rented space, and the loss of profits that Pilgrim would have made from the business he intended to carry on in such space, was substantial, but incapable of ascertainment. In granting the injunction it was "ordered and adjudged that the defendants, S. E. Purcell and J. A. Sudderth, their agents and employees, be and they and each of them are hereby enjoined and restrained from using any part of the premises described in the original petition as amended * * * for the purpose of carrying on and maintaining or operating a pool and billiard saloon," etc.

Error from Superior Court, De Kalb County; J. B. Hutcheson, Judge.

Action by J. M. Pilgrim against S. E. Purcell and others. Judgment for plaintiff, and defendants bring error. Modified and affirmed by divided court.

Alonzo Field, of Atlanta, for plaintiffs in error.

R. B. Blackburn, of Atlanta, for defendant in error.

PER CURIAM. [1, 2] The case being for decision by the entire bench of six Justices, all of the Justices agree that the judge was not authorized at such hearing to grant a permanent injunction; but the court is equally divided upon the question whether the judge was authorized, under the pleadings and evidence, to enjoin the defendants until the final trial, FISH, C. J., and ATKINSON and HILL, JJ., being of the opinion that such an injunction was authorized, and BECK, P. J., and GILBERT and GEORGE, JJ., being of the opinion that such an injunction was not authorized. It is therefore ordered that the judgment of the trial court stand affirmed by operation of law, with direction that the judgment be so modified as to make the injunction temporary. The views of the Justices are stated below.

ATKINSON, J. Each instrument of the chain of leases extending from Sulunius to Pilgrim conferred express power to sublet, and there was no objection to any subtenant until after the chain had been completed and Pilgrim's interest as a sublessee had attached. After such interest had attached, Sulunius, having notice thereof, could not, by accepting surrender of Purcell's lease and executing a new lease to Sudderth as a part of an enterprise between Sudderth and Purcell to circumvent Pilgrim, divest the interest of Pilgrim, or defeat his right to conduct the contemplated business specified in his lease. Under such circumstances, Sudderth, being in league with Purcell, would stand in no better position than Purcell; and Pilgrim, being transferee of Jacobs, would stand in the same position as Jacobs, the immediate lessee of Purcell. Pilgrim's right under his lease was to conduct a billiard and pool room in definite space in the store of Purcell. This was necessarily a right to exclusive use of such space, because the nature of the business would not permit a similar business by the lessor or any one else in the identical space, and the grant of such use by Purcell implied a covenant of quiet enjoyment as against himself and all persons claiming under him. Notwithstanding such implied covenant, Purcell committed a breach of it and proceeded with Sudderth, in manner hereinbefore indicated, to occupy the rented space and conduct therein a billiard and pool room. The question arises, Was the judgment of the

trial court authorized to the extent of temporarily enjoining Purcell and Sudderth from conducting a billiard and pool room in the space leased to Pilgrim? Civil Code, § 5490, recognizes and declares the principle that equity by writ of injunction will restrain any act by a private individual which is illegal or contrary to equity and good conscience, and for which no adequate remedy is provided by law. In *Kenny v. Oollier*, 79 Ga. 743 (2), 8 S. E. 58, it was held:

"Where there is a contract at a specific sum for the rent of premises for one year, from and after a future day, in an action thereon by the tenant against the landlord for not admitting him into possession, the measure of damages is the excess in the value of the term over the amount agreed to be paid as rent. If no excess, nominal damages only are recoverable. Anticipated profits from a business intended to be carried on by the tenant upon the premises are not recoverable."

For the breach of the covenant by refusing admittance to Pilgrim and continuously operating a billiard and pool room in the leased space, Pilgrim had a remedy at law against Purcell and Sudderth for damages; but was that remedy adequate? It is said in 14 R. C. L. 344, § 46:

"A remedy at law, to exclude appropriate relief in equity, must be complete and the substantial equivalent of the equitable relief. It is not enough that there is a remedy at law. It must be plain and adequate, or, in other words, as practical and as efficient to the ends of justice and its prompt administration as the remedy in equity."

The principle thus stated was recognized and applied in *Western Union Telegraph Co. v. Rogers*, 42 N. J. Eq. 311, 11 Atl. 18. The syllabus in that court was:

"R., owning or controlling a hotel at Long Branch, made a written contract, giving the complainants the exclusive right to have and operate a telegraph office therein during the season of 1884, with the same right for each succeeding season, unless a specified written notice to the contrary should be given. No such notice has been given. Held, that this court would enjoin R. from allowing a rival telegraph company to operate a competing office in the same hotel during the season of 1885."

It was contended that injunction should not issue, because the plaintiff had an adequate remedy at law, and further because the damages were not irreparable. The opinion dealt with both of these contentions, saying:

"The principal defense by way of answers and argument is that for this manifest and confessed breach of the agreement with the complainant the complainant has an adequate remedy at law. In other words, it is insisted that the transaction exhibits nothing more than the ordinary violation of a contract, the damages for which are easily ascertainable, and are therefore a proper subject to be submitted to a jury. This insistence then amounts

to this: That it is the duty of this court to allow parties to violate their agreements at will, and those who participate in such violation to enjoy the fruits thereof, and oblige the injured party to carry on a litigation at law for redress of his wrongs. I do not think this court is so helpless in such case. I think it proper for this court in such case to aid the party who has the first and unquestioned right, and to oblige the interfering party to carry the litigation at law for damages for breach of contract.

"Again, it is urged that the complainant cannot be heard in this court, because the court never exercises jurisdiction unless it appears that the damages threatened are irreparable. This, it is true, is one well-settled rule; but another is equally well settled, viz. that the party will not be driven to his legal remedy where it may appear that that remedy will prove inadequate. In this case there can be no doubt but that the complainant could at law recover; but recover what? Most likely not more than six cents, or some other merely nominal sum. Now, I think, no thoughtful person will insist that such result would be adequate. There is enough in the case to show that the complainant has many offices, of which this is one, and that this one is part of a system of telegraphing for commercial and other business interests; and that while this one is a part, it is but a small part—a very small part, indeed. Yet, however small, it has rights therein; but because so small in itself, it would be impossible for any jury, the most fair-minded and enlightened, to ascertain the damages. It is not like the breach of an agreement to deliver grain or any other article of sale, the value of which is easily determined. Suppose the injunction be not allowed, how then can the complainant fix his damages at law beyond that which is merely nominal? He cannot take last year's transactions as a guide, for none can determine from those, since it is plain that the number of telegrams sent from, or received at, a given point depends, not only upon the number of persons desiring to be accommodated and the activity of business generally, but also upon the extent and variety of connections. Nor can the damages be fixed by the amount of business done by the defendant, the Baltimore & Ohio Telegraph Company. It could be said, on the one hand, that it has greater facilities for business, and on the other, less.

"But I think these observations are enough to show the application of the rule of law as now given. Kerr on Inj. 200, says: 'By the term "irreparable injury" it is not meant that there must be no physical possibility of repairing the injury; all that is meant is that the injury would be a grievous one, or at least a material one, and not adequately reparable by damages at law; and by the term "the inadequacy of the remedy by damages," is meant that the damages obtainable at law are not such a compensation as will, in effect, though not in specie, place the parties in the position in which they formerly stood. * * * The fact that the amount of damage cannot be accurately ascertained may constitute irreparable damage. * * * It is no objection to the exercise of the jurisdiction by injunction that a man may have a legal remedy. The question in all cases is whether the remedy at law is, under the circumstances of the case, full and

complete.' Again, 1 Joyce on Inj. 75: 'When the construction of a contract is clear and the breach clear, it is not a question of damage, but the mere circumstance of the breach of contract affords sufficient ground for the court to interfere by injunction.' See, also, *Id.* 503, 554. See, also, 2 Joyce on Inj. 852; *Great Northern Ry. Co. v. Manchester Ry. Co.*, 5 De G. & Sm. 138; 2 Joyce on Inj. 1035."

The case of *Justices v. P. R. Co.*, 11 Ga. 246, was a suit for injunction to prevent destruction of certain tollgates maintained on a plank road by the complainants. The trial judge in effect granted a temporary injunction, and the judgment was affirmed. In the course of the opinion Nisbet, J., said:

"It is well understood that equity will not interfere in a case of a mere trespass. As a general rule, it leaves the party to his legal remedy. But if there is anything special in the case, anything which renders the remedy at law impossible or incomplete—impossible, for example, when the trespasser is insolvent, or incomplete, when, from its nature, it is impossible to prove the damage which grows out of the trespass—chancery will put forth its restraining hand, and by a decree, compel the wrongdoer to desist. The injury done to this company is not alone the destruction of their tollgate. If that was all, the value of the gate would be the criterion of damages; and, that being susceptible of proof, a court of law could give redress. If that were the case, we would dismiss this bill. The tollgates are the authorized means by which the company collects its revenue—the means by which the stockholders are to receive the profits on their money—the means by which the grant in their charter is made available. It does not matter that there are other means by which they would be enabled to collect tolls. It is sufficient that they believe that gates are the best means for them, and that their charter authorizes their use. What then is the injury? It consists in preventing them from collecting tolls—in realizing the profits which their road may make upon the stock—in short, it defeats the privileges and immunities of their charter, and nullifies the legislative grant. How is such injury to be proven? Who will prove what will be the income of this road for a day, or a week, or a year? How could the value of the grant be sworn to by any witness? Or how would it be possible to prove what would be the actual diminution of the tolls, occasioned by a demolition of the tollgates, for any specified time? It could not be done. The remedy at law would be, for that reason, to say the least of it, exceedingly uncertain and incomplete."

It will be perceived that the action at law for damages was held to be inadequate on account of the impossibility of estimating the amount of tolls that might be collected and the consequent loss of profits. In *Gray Lumber Co. v. Gaskin*, 122 Ga. 342, 349, 50 S. E. 164, 167, it was said:

"Inability to correctly estimate the damage after all evidence obtainable has been produced makes a case of irreparable damages, but difficulty in collecting evidence as to damage would not. 'A trespass is irreparable

when, from its nature, it is impossible for a court of law to make full and complete reparation in damages.' *Justices v. P. R. Co.*, 11 Ga. 250."

In the case under consideration the measure of damages in an action at law would be so restricted as to exclude Pilgrim from the right to recover profits from his contemplated business, on account of the legal impossibility of estimating the amount of his earnings; and for similar reasons he could not recover at law for the damage to his existing business in the adjoining building, produced by the competing billiard and pool room conducted by Purcell and Sudderth in the leased space in Purcell's store. Under the circumstances, the remedy at law, in an action for damages would not be the substantial equivalent of the remedy afforded by equity in a suit for specific performance and injunction, and consequently would not be adequate within the meaning of the principle upon which injunctions are granted.

FISH, C. J., and HILL, J., concur in the foregoing views.

BECK, P. J., and GILBERT and GEORGE, JJ., are of the opinion that an interlocutory injunction was unauthorized under the pleadings and evidence. Briefly stated, the facts in the case are as follows: Purcell, who was himself a lessee, executed a lease for the remainder of his term, to D. G. Jacobs, to certain floor space in the premises for the purpose of conducting therein a billiard parlor. The lease from Purcell to Jacobs provided that the latter might sublet the space or assign the lease without the written consent of Purcell. Thereafter Jacobs transferred his lease for a valuable consideration to Pilgrim. At the time of the execution of the lease Pilgrim was operating a billiard parlor in an adjoining building. Purcell refused to admit Pilgrim into possession, and Pilgrim filed a petition in equity to enjoin Purcell (and another alleged to have been in collusion with him) from using the floor space for the purpose of conducting a billiard parlor. The judge of the superior court enjoined the defendants as prayed, and three of the Justices of the Supreme Court favor an affirmance of that judgment upon the ground that—

"The measure of damages in an action at law would be so restricted as to exclude Pilgrim from the right to recover profits from his contemplated business, on account of the legal impossibility of estimating the amount of his earnings; and for similar reasons he could not recover at law for the damage to his existing business in an adjoining building, produced by the billiard and pool room conducted by Purcell [and the defendant alleged to be in collusion with him] in the leased space in Purcell's store."

Where the lessor himself refuses to allow the lessee to take possession at the com-

mencement of the term, the lessee may, it is agreed, recover damages from the lessor. Ordinarily the measure of damages for the lessee's exclusion from the premises is the amount by which the rental value of the premises exceeds the rent to be paid. The lessee is entitled to recover the value of the leasehold estate, less the rent reserved. The lessee may also recover special damages which can be regarded as directly resulting from the lessor's breach of agreement, express or implied, to give possession. It is generally held, however, that conjectural profits which the lessee might have made from the occupation of the premises are not recoverable. 1 *Tiffany on Landlord and Tenant*, 547, § 85. *Jones on Landlord and Tenant*, § 371. In this state it has been directly decided, in such a case, that—

"The measure of damages is the excess in the value of the term over the amount agreed to be paid as rent. If no excess, nominal damages only are recoverable. Anticipated profits from a business intended to be carried on by the tenant upon the premises are not recoverable." *Kenny v. Collier*, 79 Ga. 743(2), 8 S. E. 58.

In the case cited, this court, speaking through Chief Justice Bleckley, said:

"If anything is speculative, remote, and contingent, it is the net income from a business never begun, upon premises never occupied, during a period of time but partially elapsed. * * * The measure of damages for not admitting a lessee or tenant into possession at the beginning of the term is the excess in the value of the term over the amount stipulated as rent. This is the general rule. * * * The general rule does not deny profits, but confines the recovery to profits arising from the contract itself, the measure of which is the difference between cost and value. If there be no difference, or if the cost be in excess of value, nominal damages only will be recoverable. That anticipated profits from a business intended to be carried on by the plaintiff upon the premises cannot be allowed is as well settled as anything can be in an age of legal skepticism."

Kenny v. Collier, supra, was decided by a full bench of three Justices, and is binding as authority. The decision in that case can be reversed only upon review and by the concurrence of at least five Justices. It is therefore as well settled as anything can be in an age of legal uncertainty that generally anticipated profits from a business "never begun, in premises never occupied, during a period of time but partially elapsed," are speculative, contingent, and remote. The rule is based upon the soundest principles. A rule of damages which would embrace all the consequences, however remote, contingent, or speculative, which might be shown

to have resulted from a failure to perform a stipulated duty, would seriously hinder the operation of business and make ordinary commercial intercourse impossible. What damages will be considered the natural and proximate consequence of the injury, or of the breach of duty, and what damages will be considered remote, contingent, and speculative, is one difficult of decision; but *Keuny v. Collier*, supra, disposes of the difficulty in the instant case. Equity follows the law. Remote, contingent, and speculative damages resulting from the breach of contract, which cannot be recovered at law because remote; contingent, and speculative, can furnish no ground for the intervention of a court of equity upon the theory that such damages, if recoverable, would be incapable of exact computation. Compare *Silver v. Sparta*, 107 Ga. 275, opinion, at bottom of page 280, 33 S. E. 31. In the instant case Purcell is not alleged to be insolvent. There is no proof of his insolvency. Having elected to breach his contract, he must suffer the legal consequences. He is solvent and able to respond. No injunction can be allowed upon the ground that the plaintiff lessee could not estimate the amount of his earnings. If he could estimate them, he could not have them.

Was the injunction authorized upon the theory that Purcell could not "recover at law for the damage to his existing business in the adjoining building produced by the competing billiard and pool room conducted by Purcell (and the other defendant) in the leased premises in Purcell's store"? Did Purcell engage to protect the business of Pilgrim? He expressly stipulated in his lease that the floor space should be used for the purpose of conducting a billiard and pool room. He did not make the lease directly to Pilgrim. At the date of the execution of the lease Pilgrim was conducting a billiard and pool room in an adjoining building. It turned out that Purcell's lessee assigned the lease to Pilgrim. Can it be said that Purcell contemplated the protection of Pilgrim's business, when, by the terms of his lease, he required the operation of a business in direct competition with Pilgrim's business? Contracts in the nature of contracts in restraint of trade are not favored; and no implied covenant binding Purcell not to engage in any particular business for the protection of one who chanced to become the owner of the lease executed by him can be read into the lease. Particularly is this true when the lease, as stated above, called for the establishment of a business to be carried on in direct competition with Pilgrim's existing business. In no view of the case, as we think, was the interlocutory injunction authorized.

(152 Ga. 98)

HARBER et al. v. HARBER. (No. 2274.)
(Supreme Court of Georgia. Sept. 24, 1921.)

(Syllabus by the Court.)

1. Dower ⇨10—"Dower" defined.

"Dower is the right of a wife to an estate for life in one-third of the lands, according to valuation, including the dwelling house (which is not to be valued unless in a town or city), of which the husband was seized and possessed at the time of his death, or to which the husband obtained title in right of his wife." Civ. Code 1910, § 5247.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Dower.]

2. Wills ⇨88(2)—Intention test as to character of instrument; "deed;" "will."

"In all cases to determine the character of an instrument, whether it is testamentary or not, the test is the intention of the maker, from the whole instrument, read in the light of the surrounding circumstances. If such intention be to convey a present estate, though the possession be postponed until after his death, the instrument is a deed; if the intention be to convey an interest accruing and having effect only after his death, it is a will." Civ. Code 1910, § 3828.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Deed; Will.]

3. Dower ⇨44—Husband may convey land for purpose of defeating dower.

"There being in this state no statute inhibiting the sale of land by the husband to defeat his wife's right of dower, save as to lands to which the title came through her, an actual sale and conveyance, though made for the purpose of defeating dower, will be upheld in favor of the purchaser against the widow's claim after her husband's death." *Flowers v. Flowers*, 89 Ga. 632, 15 S. E. 834, 18 L. R. A. 75.

(a) In this respect a voluntary conveyance stands upon the same footing and has the same effect as a conveyance based on an actual sale. *Pruett v. Cowsart*, 136 Ga. 758, 72 S. E. 30. In the case last cited, it was held, in part, that a voluntary conveyance by a husband, of land in which he had an undivided interest as an heir of a former wife, would defeat the claim of dower asserted by a second wife after his death, notwithstanding that such conveyance recited that a part of its consideration was that the grantor was to remain in possession of the land and receive the benefits therefrom as long as he lived.

4. Dower ⇨44—Conveyance of land to children held to defeat wife's right of dower.

On August 24, 1918, G. W. D. Harber, a widower 65 years of age, married May Harber, a widow 44 years old. At the time of the marriage Harber had a large estate, consisting of both realty and personalty, and 9 children by a former wife, who died about one year previously to the second marriage. Under such circumstances Harber made a will in January, 1917. Being subsequently informed by his

attorney at law that his will could not defeat the right to dower in the real estate of which he might die seized and possessed, Harber proceeded, for the avowed purpose of preventing his widow (should his wife survive him) from taking dower in his lands, to convey all of it separately to his children. There were 10 deeds executed and delivered at different dates between March 21 and April 12, 1919. The deeds were in the form of warranty deeds, some of which purported to convey the fee to the first taker; some provided a life estate in the first taker, with remainder over; some were to trustees for the use of persons not sui juris; all but one contained substantially the clause: "The grantor is to have the full control of the above-described lands, and is to receive the rents and profits from the same for and during his natural life, and at his death the grantees above named are to do as they see fit with said land or the rents and profits from the same; while the fee-simple title to the above tracts of land is passed by this deed, the enjoyment of the same is postponed until after the death of the grantor." Each deed recited as the consideration "\$5 and love and affection." After all of the deeds were executed and delivered, Harber executed another will dated May 14, 1919. Item 2 of this will provided: "I give and bequeath unto my wife, May Harber (she being my second wife), during her lifetime or widowhood only, the income or interest from twelve thousand dollars, and at her death or marriage the corpus or principal to revert back to my children mentioned in item 12 of this my will. This twelve thousand dollars is to be invested by my executors hereinafter named in good stocks, bonds, or real estate, and I desire my executors to confer with her about what property she would prefer it to be invested in; however my executors are not bound to invest said sum in such property that she may prefer; this to be in full of all claims of every kind that she may have against my estate in way of dower or child's part, and she is not to account for any money or property I have already given her." Item 10 provided: "In view of the fact that I have heretofore deeded certain real estate to certain of my children, as will appear from the deeds, in order to do equity between all the grantees in said deeds, I desire and direct the value of \$40 per acre be placed on all the lands so deeded, except the Barber and Eberhart places, and that the values of the Barber place shall be \$100 per acre and the Eberhart place shall be \$65 per acre, and that the grantees under said deeds shall contribute to each other on the above basis, so that they shall all receive equal values under said deeds." Harber died on February 11, 1920, and his widow claimed a right to dower in all the land described in the several deeds, on the basis that the deeds were fraudulent and void as against her; and being so, Harber died seized and possessed of the lands within the meaning of the law of this state relating to dower, so that she acquired a dower interest in the land. *Held*, applying the foregoing principles of law to the evidence submitted on the hearing before the judge, there being no evidence tending to show that the voluntary conveyances were parts of a mere colorable transaction, and not intended to convey in present the title and

ownership of the grantor to the grantees, with the right of possession postponed until after the death of the grantor, the judge erred in granting an interlocutory injunction restraining the grantees in the conveyances from selling or encumbering the lands.

5. Admissibility of evidence immaterial.

The foregoing rulings are controlling without regard to the admissibility of certain evidence which the court admitted.

Error from Superior Court, Hall County;
J. B. Jones, Judge.

In the matter of the estate of G. W. D. Harber, deceased. Suit by May Harber against W. J. Harber, and owners, for injunction, and to establish right to dower in certain lands. From a judgment for plaintiff, W. Y. Harber and others bring error. Reversed.

W. W. Stark and E. C. Stark, both of Commerce, and A. C. Wheeler, of Gainesville, for plaintiffs in error.

H. H. Perry and W. A. Charters, both of Gainesville, for defendant in error.

ATKINSON, J. Judgment reversed.
All the Justices concur.

(152 Ga. 172)

GEORGIA SOUTHWESTERN & G. R. CO. v. GEORGIA-ALABAMA POWER CO. et al. (No. 2354.)

(Supreme Court of Georgia. Oct. 1, 1921.)

(Syllabus by the Court.)

1. Exceptions, bill of ~~12~~—Bill of exceptions not dismissed because brief of evidence was not brought to Supreme Court.

In a suit for damages and to enjoin a continuing nuisance, where the defendant's answer raised several issues of fact on which evidence was introduced at an interlocutory hearing, a bill of exceptions assigning error on the judgment refusing to enjoin temporarily the alleged nuisance, in which it is stated that the judgment was based on the sole ground that "the injunction prayed for would be mandatory in its nature, and no injunction can be granted plaintiff which is not mandatory," and that as to all other matters he held with the plaintiff, and the bill of exception states that "no evidence was introduced by either side as to what acts defendants would have to perform if the injunction were granted," and that "none of the evidence introduced before said judge is material to elucidate the error complained of in this bill of exceptions," the bill of exceptions will not be dismissed, on motion of the defendant in error, on the ground that the brief of the evidence submitted at the interlocutory hearing was not brought to the Supreme Court. Civ. Code 1910, § 6140; Lamar v. Gardner, 113 Ga. 781, 39 S. E. 498. In such case the allegations in the petition and admis-

sions in the answer may be considered as a basis for the judge's decision, and the question as to the correctness of the judge's ruling that the injunction prayed for would be mandatory will be decided on the basis of the pleadings.

2. Injunction ~~5~~—Injunction prayed for held not mandatory in its nature.

Where a power company maintains a dam equipped with floodgates across a stream, which causes water to overflow and pond under a bridge of a railroad company further up the stream, continuance of which will injure the supporting piers of the bridge and render it unsafe, and the depth of the water is such as to render impossible the making of repairs or the renewal of the piers, an order restraining the power company from continuously maintaining the overflow under the railroad bridge so high as to prevent the railroad company from making reasonable and necessary repairs to the piers would not amount to a mandatory injunction, although in order to obey such restraining order it might be necessary for the power company to open the floodgates in the dam at intervals for the purpose of enabling the railroad company to make reasonable and necessary repairs to the bridge. Goodrich v. Georgia R. Co., 115 Ga. 340, 41 S. E. 659; Macon, Dublin & Savannah R. Co. v. Graham, 117 Ga. 555, 43 S. E. 1000; Mackenzie v. Minis, 132 Ga. 323, 63 S. E. 900, 23 L. R. A. 1003, 16 Ann. Cas. 723; Oostanaula Mining Co. v. Miller, 145 Ga. 90, 88 S. E. 562; Sweetman v. Owens, 147 Ga. 436, 94 S. E. 542.

3. Error—refusing injunction.

Under the admissions of the pleadings, the judgment would have been authorized to grant an injunction of the nature stated in this note; and it was erroneous to hold as a matter of law that an injunction that was not mandatory could not be granted, and on such basis alone to refuse any injunction.

Gilbert and George, JJ., dissenting.

Error from Superior Court, Dougherty County; John R. Wilson, Judge.

Action by the Georgia Southwestern & Gulf Railroad Company and others against the Georgia-Alabama Power Company and others. From judgment for defendants, the named plaintiff brings error. Reversed.

W. H. Beckham, of Albany, R. J. Bacon, of Baconton, and R. H. Ferrell and Pope & Bennet, all of Albany, for plaintiff in error.

Milner & Farkas, of Albany, for defendants in error.

ATKINSON, J. Judgment reversed. All the Justices concur, except HILL, J., absent, and—

GILBERT and GEORGE, JJ. (dissenting.) This was a suit for injunction. The answer of the defendant did not admit facts which would have authorized the grant of an interlocutory injunction. The interlocutory injunction was denied, and the judge in his or-

der based his refusal of the injunction upon the ground that the injunction sought was mandatory. The exception is to the refusal to grant the interlocutory injunction. The error assigned depends upon a consideration of the evidence introduced upon the hearing; and since no attempt has been made to bring the evidence to this court, it results that the judgment should be affirmed. If the evidence had been brought to this court, and if upon a consideration of the evidence it appeared that the plaintiff was entitled to the injunction either as a matter of law or in the discretion of the court, it would follow, under the decision in *Head v. Bridges*, 72 Ga. 30, and other like cases, that the judgment refusing the injunction should be reversed. In the absence of any brief of evidence, this court is unable to say that an injunction would have been authorized in any event; and therefore the question as to whether the relief prayed was mandatory in character is necessarily an abstract question, which may never arise in the case; and neither party should be concluded upon that question in the present state of the record.

(152 Ga. 106)

McHENRY v. McHENRY et al. (No. 2200.)

(Supreme Court of Georgia. Sept. 26, 1921.)

(Syllabus by the Court.)

1. Remainders ⚡17(4)—Venue ⚡22(3)—Defendants held properly joined and sued in proper county.

Under the allegations in the petition it appears that both of the defendants had such an interest in the litigation as to render them proper and necessary parties to the proceeding for equitable relief; and, as substantial relief was prayed against one of the defendants residing in the county where the suit was brought, the court of that county had jurisdiction also of the codefendant.

2. Wills ⚡88(3)—Instrument held a deed.

The court below properly construed the instrument, which is the basis of the defendant's claim of right and interest in the property in controversy, to be a deed.

3. Estoppel ⚡29(1)—Life tenants of corporate stock estopped to deny instrument to be deed.

Under the facts of the case the life tenants were estopped from denying that the instrument referred to was effective to convey the interest sought to be set up and established.

4. Demurrer; ruling.

The other grounds of the demurrer were properly overruled.

5. Life estates ⚡15(2)—Substituted corporate stock became part of corpus.

"The natural increase of the property belongs to the tenant for life. Any extraordinary

accumulation of the corpus—such as issue of new stock upon the share of an incorporated or joint-stock company—attaches to the corpus and goes with it to the remainderman." Civ. Code 1910, § 3687. In applying this statute to the evidence in the case it is held that what is known as the Massachusetts rule upon this subject prevails in this state; and while the trial judge, to whom the entire case was referred upon the trial without the intervention of a jury, sought to apply this rule, he erred in the material ruling of holding that a decree in a case in the Supreme Court of New York, to which the present plaintiffs were not parties, was a final determination of the character of numerous items in the statement of the property constituting the estate in which the plaintiffs here claim a remainder interest. The character of the items referred to should have been determined by the trial judge under the law and the evidence in the case, and the court erred in holding that the decision of the Supreme Court of New York was a conclusive adjudication as to the items making up the account, as the plaintiffs in the instant case were not parties to that case; and, moreover, it does not appear from this record that the decree or judgment referred to as conclusive was introduced in evidence, and therefore properly before the court for consideration.

6. Disposition on appeal.

As the case, under the foregoing ruling, is remanded for a new trial, in case the evidence upon the next trial fails to show that Mrs. W. S. McHenry was appointed administratrix of W. S. McHenry, then she cannot be proceeded against as the administratrix of her deceased husband, and the suit can only proceed against her upon the other allegations of her being the widow and the sole heir of W. S. McHenry, together with the allegations of her having taken charge of the property.

Error from Superior Court, Morgan County; J. B. Park, Judge.

Action by Z. H. McHenry and another against Mrs. W. S. McHenry and others. From an adverse judgment, the named defendant brings error. Reversed.

The plaintiffs, Zoe Harriotte McHenry and Marion Louise Hickey (formerly McHenry), who are the only children of John G. McHenry, the defendants in error in this court, brought a petition against John G. McHenry, of Morgan county, and Mrs. W. S. McHenry, of Floyd county, this state. By amendment John G. McHenry was made a party defendant both in his individual capacity and as the surviving administrator of the estate of Mrs. Marion McHenry Bozeman, and Mrs. W. S. McHenry was made a party defendant both in her individual capacity and as the personal representative of the estate of W. S. McHenry. Petitioners sought to have their rights as remaindermen in certain stock ascertained and declared. The character of this stock and the source and origin of plaintiffs' claim of title are also set forth in the

(198 S.E.)

petition. Plaintiffs sought injunctive relief to restrain the defendants from selling, transferring, or disposing in any manner of the stock described in the petition, or altering its status. In an amendment the plaintiffs further prayed that the rights of petitioners be ascertained and declared in the assets received by W. S. McHenry and J. G. McHenry from the estate of Marion McHenry Bozeman and from the committee of her property, the New York Trust Company, and in certain other property involved in the transaction. There was a prayer for injunction and receiver, and also a prayer for general relief.

It is alleged in the petition that John G. McHenry is the surviving administrator of the estate of Mrs. Marion Bozeman, deceased; that he and W. S. McHenry, the husband of Mrs. W. S. McHenry, were appointed and qualified as such administrators in 1918; that W. S. McHenry died intestate thereafter, in April, 1919, without descendants, leaving the defendant Mrs. W. S. McHenry his sole heir at law; that Mrs. McHenry as such widow and sole heir at law had taken possession of all the estate of W. S. McHenry without administration; that Mrs. Marion Bozeman, who before her marriage was Marion McHenry, the sister of John G. and W. S. McHenry, in the year 1886 obtained, from the grandmother of the three, certain shares of stock in a corporation of the state of Alabama, then known as Elyton Land Company, the same owning the lands on which the city of Birmingham was afterwards largely built; that "dissatisfaction existing in the family thereabout, the same was adjusted and settled by an agreement respecting the stock, which was embodied in a certain deed of conveyance of said stock, whereby the rights therein both of their grandmother, Mrs. Eliza Stokes, and said Marion McHenry, John G. and W. S. McHenry, and their children were fixed and declared." This deed reads as follows:

"Georgia, Morgan County. Know all men by these presents, that I, Marion McHenry, of said county and state, for and in consideration of the natural love and affection I have for my brothers, William S. McHenry and John G. McHenry, Jr., both of the county and state aforesaid, do hereby give, grant, and convey to them in severalty, and not as joint tenants, twelve and a half shares of the stock of Elyton Land Company of the state of Alabama, now standing in my name on the stock of said company, the same having been given and transferred to me by my grandmother, Eliza Stokes, of said county of Morgan and state of Georgia, with the understanding that one-third part of all the dividends declared on said stock should be paid to the said Eliza Stokes as long as she may live, and no longer. And I hereby declare that in making this conveyance, the right of said Eliza Stokes to receive the one-third of said dividends during her life is secured and

to be respected; and should I die before my said grandmother, her right to one-third of the dividends on said stock shall not be impaired. I convey hereby to each of my said brothers, William S. and John G., Jr., six and one-fourth shares of the stock of said company provided I die without leaving a child or children living at my death to receive one-third part of the said six and one-fourth shares so given, as to reduce each brother's part to four and a fraction shares, and the other equal part to the amount last mentioned to become the property of whomsoever by law would be entitled as my heir or heirs in fee. But should I die leaving no such child or children living, who would be entitled to inherit the said one-third part of said twelve and a half shares of said stock, then the whole of said stock or shares is hereby conveyed in equal part to my said brothers separately for life, and to such child or children as he may leave living at his death to take his share in remainder in fee simple. Should either of my said brothers die leaving no child or children at his death to take his part of said shares in remainder, then the survivor of my said brothers to take the parts of both whatever these amount to, with remainder over to such child or children as the survivor may have living at his death in fee. But in making this conveyance it is agreed by the said Marion McHenry and her said two brothers that she hereby reserves to herself the full and absolute right to receive, use, and appropriate all dividends that may be declared during her life upon the twelve and a half shares of said stock, in the same manner as she has heretofore done, that is, allowing one-third of said dividends to be paid to the said Eliza Stokes and the said Marion receiving two-thirds so long as her said grandmother may live, and afterwards the entire dividends to the exclusion of all persons.

"In witness whereof after making the erasures in line one on the second page, and in the interlineation on said page in line eight and thirteen, I have hereunto set my hand and seal this 11 day of December, 1886." "Marion McHenry (Seal)" Executed in the presence of F. C. Foster, Joshua Hill, Thos. B. Baldwin, Ordinary Morgan Co., Ga. Recorded Dec. 11, 1886, C. W. C. W. Baldwin, Clerk."

The original deed, it is alleged, went into the hands of W. S. McHenry; and plaintiffs pray that the said McHenry be required to produce the same in court at the trial of the case. Plaintiffs contend that by the terms of this deed, after the death of Mrs. Eliza Stokes, which occurred in the year 1888, Mrs. Marion Bozeman was to have the dividends from the stock during her life and in the event she died without children, as she did on the 27th day of September, 1917, the stock was to pass to John G. and W. S. McHenry for their lives, and should either die leaving no child or children, then the survivor was to take the whole for life, with remainder over to such child or children in fee as such survivor might have living at his death; and they further contend that, John G. McHenry having survived his brother W. S. McHenry, the latter having died without

leaving child or children, they, the petitioners as the children of the said John G., are the presumptive remaindermen of said stock. The petitioners further show, by the allegations of the petition as amended, that in March, 1888, the Elyton Land Company divided among its stockholders, including said Mrs. Bozeman, certain stock which it owned and held, and by virtue of said division transferred to Mrs. Bozeman $14\frac{1}{2}$ shares of stock of the Birmingham Trust & Savings Company, a corporation of Alabama, hereinafter referred to as the Birmingham Trust Company. This stock remained in the control and possession of Mrs. Bozeman till her death, and she received the dividends thereof. She became insane about the year 1895, and the New York Trust Company became her guardian or committee of her property, and later sold the one-half share for her benefit. The remaining 14 shares are still on hand, and have been issued in the names of John G. and W. S. McHenry. The Elyton Land Company, prior to March, 1888, owned \$200,000 of the capital stock of the Birmingham Trust Company, having acquired the same as an original subscriber to the stock; and in March, 1888, the Elyton Land Company, wishing to make a distribution of its assets among its stockholders, distributed to each of them one share of the capital stock in the Birmingham Trust Company for each share of stock held by the subscriber in the Elyton Land Company, and Mrs. Bozeman received as her portion of the distribution of the assets of the Elyton Land Company the $14\frac{1}{2}$ shares of the capital stock of the Birmingham Trust Company; and it is alleged that said distribution by the Elyton Land Company was a division of the corpus of the estate of said company among the shareholders. It is further alleged that by successive reorganizations substitution for the original stock in the Elyton Land Company has been made by stock in what is now called the Birmingham Realty Company, 137 shares having been issued to Mrs. Bozeman therein as representing her interest in the company reorganized. Said 137 shares have been likewise in her possession or that of her guardian for her till her death, and she received the dividends therefrom. Since her death the stock has been transferred into the names of John G. and W. S. McHenry.

The Elyton Land Company made a distribution of its assets in the year 1887 or 1888, by issuing to its stockholders 6 per cent. bonds, said company owning as a part of its assets a large amount of purchase-money notes representing the sale of real estate owned by said company, and said bonds were secured by bonds issued against the purchase-money notes referred to. When said bonds became due the company defaulted in the payment of the same about the year 1895,

and in order to meet said payment "the Elyton Land Company was reorganized into the Elyton Company, said Elyton Company receiving all the assets of the Elyton [Land] Company," and said Elyton Company issued 10 shares of its own stock for every one share of the Elyton Land Company to each stockholder in the last-named company, and substituted its own bonds at 5 per cent. in place of and to retire the bonds of the Elyton Land Company. The Elyton Company defaulted in the payment of its bonds that were issued in substitution of the Elyton Land Company, and said Elyton Company reorganized into the Birmingham Realty Company, a corporation, said Birmingham Realty Company taking over the assets of the Elyton Company and issuing to the stockholders of the Elyton Company its own stock and bonds in substitution of the stock and bonds held by the stockholders in the Elyton Company. Mrs. Bozeman received, in substitution for the stocks and bonds held in the Elyton Company, 137 shares of common stock of the par value of \$100, 78 shares of preferred stock of the par value of \$100, and \$7,000 of 5 per cent. bonds of the Birmingham Realty Company. This last reorganization occurred on February 8, 1900.

It is also contended that the 14 shares of stock in the Birmingham Trust Company and 137 shares of stock in the Birmingham Realty Company represent the corpus of the stock of the Elyton Land Company mentioned in said deed of 1888, set forth above, and are in equity impressed with the same limitations and uses, and are the property of petitioners in remainder as provided in said deed; that the estate of Mrs. Marion Bozeman is indebted for and liable for petitioners' interest in the half share of the former stock which was sold as aforesaid, said half share being of the present value of \$125; that on October 17, 1908, the New York Trust Company, the duly authorized and acting committee of the property of Marion McHenry Bozeman, sold the 78 shares of preferred stock in the Birmingham Realty Company hereinbefore referred to, and received therefor the sum of \$7,800, and likewise, on August 15, 1904, sold the bonds of said Birmingham Realty Company above mentioned for the sum of \$7,000; that said New York Trust Company reinvested the money derived from the stocks and bonds in first mortgages, loan certificates, and other valuable securities, holding and treating the same as the principal of the estate of said Mrs. Bozeman and turning over to the committee of the property for the support of said Mrs. Bozeman the income therefrom; that after her death these securities, or the money derived therefrom, were turned over to the duly ap-

pointed administrators of the estate of Mrs. Bozeman, to wit, W. S. and John G. McHenry; that the funds so received by them were in law and in fact not the estate of Mrs. Bozeman, but were controlled by and subject to the limitations of the deed referred to and set forth above; that W. S. and J. G. McHenry, in absolute disregard of the limitations imposed upon said securities, undertook to divide the same among themselves, and after the death of W. S. McHenry his widow, Mrs. W. S. McHenry, also disregarded petitioners' rights in said property, and J. G. McHenry and Mrs. W. S. McHenry have now possession and control of said property and are undertaking to hold the same in utter disregard of petitioners' remainder interest thereunder as created by the deed referred to.

Petitioners show that it is the duty of J. G. and Mrs. McHenry to account to them for said sums as remaindermen, and they are liable therefor both in their individual capacities and as administrator and administratrix, respectively, of the estates of Mrs. Marion McHenry Bozeman and W. S. McHenry; that the Elyton Land Company was the sole owner of the entire capital stock of the Birmingham Water Company, and the Highland Avenue & Belt Railroad, of Birmingham, Ala.; that on or about the year 1887 or 1888, and subsequently to 1886, said Elyton Land Company again made a distribution of some of its assets, by turning over to its stockholders all its capital stock in said companies; that Marion McHenry Bozeman received as her distributive share 36 and a fraction shares of the capital stock of the Birmingham Water Company and 76 and a fraction shares of the capital stock in the railroad company referred to. Said shares of stock were held by the New York Trust Company, as committee of the property of Mrs. Bozeman, until "the ——— day of October, 189—," at which time the same was sold, the water company's stock bringing something over \$3,000, and the railroad stock bringing between \$300 and \$400. Said stock was treated by said committee as corpus of the estate of Mrs. Bozeman, the income thereof being used for her support and maintenance; the proceeds from the sale thereof were invested by said committee of the property of said New York Trust Company in other securities, such as stock, bonds, or loan certificates, the same being held in the place of the original stock, and after the death of Mrs. Bozeman they were turned over to J. G. and W. S. McHenry as administrators of the estate of Mrs. Bozeman. Said substituted securities or their equivalent in cash, are now in the possession, custody, and control of the defendants, they having divided the same among themselves, and claiming title thereto in disregard of petitioners' rights

and in disregard of the limitations placed thereon in the deed set forth above. Petitioners attach to their petition a copy of the securities at the time of the death of Mrs. Bozeman turned over to the said administrators. It is also alleged that the Birmingham Realty Company, the successor of the Elyton Land Company and the Elyton Company, distributed, between November 3, 1908, and May 20, 1918, certain "liquidation dividends" amounting to a total of \$3,562, which the petitioners allege was a part of the corpus and which went into the hands of the committee of the property of Mrs. Bozeman, who treated said funds as a corpus of her estate and not as income, and turned it over, upon the death of Mrs. Bozeman, to the defendants. It is further alleged that a part of the assets received from the estate of Mrs. Bozeman by W. S. and John G. McHenry, a portion of which had been divided between them, had gone into the hands of Mrs. W. S. McHenry; that this property had not been kept separate by her, but had been mingled with other property that she had received as sole heir at law and as the sole representative of her deceased husband.

Mrs. McHenry demurred to this petition, both generally and specially upon numerous grounds. It is unnecessary to set forth in detail the grounds of the demurrer. The rulings made in the opinion substantially cover them. Mrs. McHenry also filed her plea and answer, admitting certain of the facts alleged in the petition, and denying others. The demurrers were overruled by the court, to which ruling the defendant excepted. Evidence was submitted upon the issues made by the pleadings, and the case was submitted to the court upon the law and facts without the intervention of a jury. After holding the case for consideration, the court rendered a judgment, which was in favor of the plaintiffs for most of the material issues in the case, and the defendant Mrs. W. S. McHenry excepted.

Maddox & Doyal, of Rome, and R. J. Bacon, of Baconton, for plaintiff in error.

King & Spalding and Spalding, MacDougald & Sibley, all of Atlanta, for defendants in error.

BECK, P. J. (after stating the facts as above). [1] 1. The first ground of the demurrer filed by Mrs. W. S. McHenry raises the question as to whether the superior court of Morgan county had jurisdiction of the defendant, the demurrant contending that she was improperly sued in that county. This ground of the demurrer was properly overruled. The plaintiffs are asserting a common right against both defendants; that is, the right of the remaindermen to have their interest declared in the described property and

to have the property protected against waste. Section 5417 of the Civil Code provides that—

"Generally all persons interested in the litigation should be parties to proceedings for equitable relief."

And section 5419 declares that—

"Where there is one common right to be established by or against several, and one is asserting the right against many, or many against one, equity will determine the whole matter in one action."

While the case of *Conley v. Buck*, 100 Ga. 187, 28 S. E. 97, is itself based upon a different state of facts from those involved here, the discussion in that case of the question of multifariousness and the authorities there cited illustrate and justify the ruling which we have made, and render a discussion and citation of authorities unnecessary. See, also, the case of *Blaisdell v. Bohr*, 68 Ga. 56. As substantial relief was prayed against one of the defendants residing in the county where the suit was brought, the court of that county had jurisdiction also of the codefendant.

[2] 2. The ground of the demurrer raising the question as to the character of the written document which is the basis of the suit, the demurrant contending that it was testamentary in character and not shown to have been probated as required by law, was also properly overruled. The instrument in question employs the language of a deed. It is recited that the grantor doth by the instrument "give, grant and convey" to the named grantees certain property; and it is also declared that—

"In making this conveyance it is agreed by the said Marion McHenry [the grantor] and her said two brothers [the grantees] that she hereby reserves to herself the full and absolute right to use, receive, and appropriate all dividends that may be declared during her life upon the 12½ shares of said stock [the property conveyed] in the same manner as she has heretofore done."

Elaborate argument is entirely unnecessary to show that the very material provision, the reservation of the right to receive and use the dividends during the life of the grantor, is entirely inconsistent with the idea that the instrument is testamentary in character. Other features of the instrument might also be pointed out which bear out the conclusion here reached, but we think that unnecessary.

[3] 3. The grantees in this deed are estopped from denying, as against the remaindermen, that the instrument was operative as a deed, on the ground that it conveyed a mere contingency and there is no provision as to the disposition of the property in case of the failure of the contingency contemplated. The deed itself was found among the papers, as the demurrant admits, of her husband, of whom she is the sole heir; and there are al-

legations to show that he at the time of his death was in possession of at least a part of the property conveyed by this deed; that there was acceptance by the life tenants of the interest in the property conveyed by the deed.

[4] 4. The general demurrer was properly overruled. The allegations of the petition show an interest in the remaindermen in at least a part of the property in controversy, which entitles them to the protection sought; and the allegations of the petition as amended are not open to the exception made in the special demurrers, that they are vague, uncertain, and insufficient. The character of the property, the way in which it was changed by substitution for other shares of stock than those which were originally held, and the reorganizations of companies which issued the shares of stock, the issuance of bonds, etc., and all the other material incidents in the history of the property sought to be impressed with the trust, are set forth with sufficient clearness and exactness to enable the parties defendant and the court to clearly understand the character of the property involved and the rights which the petitioners in the case insist that they have in the property. It may be that there are certain allegations, wherein certain claims are made in regard to the property, that are mere conclusions of the pleader and not statements of facts; but they are not of such materiality or weight as to require a reversal of the judgment because of the court's refusal to strike those conclusions, and in most cases where these conclusions are stated as a part of the pleadings they aid in making clearer the plaintiffs' contentions as to the rights which they pray the court to have ascertained and settled.

[5] 5. The property which was conveyed by the deed which we have heretofore considered, was, as we have seen, 12½ shares of the stock of the Elyton Land Company, standing at the time of the execution of the deed in the name of the grantor, Mrs. Bozeman, on the books of the company. Of this property, the shares of stock, W. S. and John G. McHenry (Mrs. Bozeman having died in 1917, without leaving a child) became the life tenants, and John G. became the sole life tenant upon the death of his brother, W. S. McHenry, leaving no child. The rights of the life tenant in the property are fixed and defined by our statute, which declares:

"The natural increase of the property belongs to the tenant for life. Any extraordinary accumulation of the corpus—such as issue of new stock upon the share of an incorporated or joint-stock company—attaches to the corpus and goes with it to the remainderman." Civil Code, § 3867.

Had the property conveyed by the deed remained in its original form, many of the

questions presented in this record could not have arisen; but it did not. The Elyton Land Company was reorganized; stock in other companies was substituted wholly or in part for the original shares of stock. Divisions and distributions of funds arising from the assets of the corporation were made. Some of these distributions were unquestionably dividends paid over to and enjoyed by the grantor in the deed under the rights preserved in that instrument. Other distributions were made about which there is a contest here as to whether they were really dividends or a distribution of the corpus of the estate of the corporation. The correct decision of these questions depends upon an application of the law to the facts in the case. The law constituting the rule under which the question as to whether certain portions of the property in controversy should be deemed corpus or income has been declared in this state by a decision of this court. In the case of *Jackson v. Maddox*, 136 Ga. 31, 70 S. E. 865, Ann. Cas. 1912B, 1216, Chief Justice Fish, speaking for the court, said:

"There are two lines of authority on the subject of whether shares so issued become part of the corpus, or whether they rank as dividends and belong to the life tenant. One of these lines of authority will be found illustrated by the decision of the Supreme Court of the United States, in *Gibbons v. Mahon*, 136 U. S. 549, 10 Sup. Ct. 1057, 34 L. Ed. 525, and of the Supreme Court of Massachusetts in *Minot v. Paine*, 99 Mass. 101, 96 Am. D. 705. The other line may be represented by *Earp's Appeal*, 28 Pa. 368; *Pritchard v. Nashville Trust Co.*, 96 Tenn. 472, 36 S. W. 1064, 33 L. R. A. 856, and *Hite v. Hite*, 93 Ky. 257, 20 S. W. 778, 19 L. R. A. 173, 40 Am. St. R. 189. When the law of this state was codified, in view of the older English cases and of such decisions as had then been made in America, one of these lines of authority had to be selected as containing the correct rule. The codifiers in substance selected the first of the two rules mentioned above. As formulated in the present Code (Civ. Code 1910, § 3687), the rule is thus stated: 'The natural increase of the property belongs to the tenant for life. Any extraordinary accumulation of the corpus, such as an issue of new stock upon the shares of an incorporated or joint-stock company, attaches and goes with it to the remainderman.'"

In brief, it is here declared that our state by the statute quoted above has adopted what is known as the Massachusetts rule upon the subject under consideration. What is known as the Massachusetts rule is thus stated in 14 *Corpus Juris*, 831, § 1260:

"The Massachusetts courts have adopted the rule that whether a dividend is to be regarded as income, and as such the property of the life tenant, or as capital belonging to the person entitled to the remainder interest in the stock, is to be determined by the substance and intent of the action of the corporation in declaring the dividend; in other words, if the action of the corporation manifests an inten-

tion, so far as it is concerned, no longer to treat its surplus profits as income, but, to the extent of the dividend, as a part of its permanent capital, the dividend, as between the life tenant and the remainderman, is to be considered as a distribution of capital, and where the effect and intent of the declaration is a permanent separation of its surplus profits, to the amount of the dividend, from the capital used in its business, it is to be considered, as between such term holders, as income. The view taken by the Massachusetts courts has been followed in a number of jurisdictions; and in Georgia the substance of the rule has been enacted by statute. It follows that where this rule obtains, regardless of the time the profits out of which they are made accumulate or were earned, all stock dividends are to be considered as capital belonging to the remainderman, and all cash dividends are to be regarded as income belonging to the holder of the life term. However, if the action of the corporation in declaring a dividend amounts in substance to a declaration of a stock dividend, its character as a distribution of capital is not affected by the fact that the dividend is in form a cash dividend. But the fact that an increase of the capital stock of a corporation is voted the same day as a cash dividend, to which increase the stockholder is entitled to subscribe, does not impress the transaction with the character of a stock dividend, if the stockholder is entitled to receive his dividend and to use it as he sees fit, and is at liberty to dispose of his rights to subscribe for the new stock. And a dividend made payable in stock or in cash at the option of the stockholder is a cash dividend."

And we think that the court in rendering the judgment complained of here was right in applying the rule to the facts in this case in determining the rights of the parties. Under that rule the substitution of other stock and the distribution of such substituted stock to the holders of stock in the Elyton Land Company in designated proportions brought the substituted stock within the rule here laid down and made it a part of the corpus of the estate, and it became impressed with the trust in favor of the remaindermen. Such in character were the shares of stock of the Birmingham Trust & Savings Company, which the Elyton Land Company held and owned and in March, 1888, divided among its stockholders; such, also, were the 187 shares of the common stock of the Birmingham Realty Company and the 78 shares of the preferred stock of that company, which through successive reorganizations were substituted for the original stock of the Elyton Land Company. It is also applicable to the distribution of the capital stock of the Highland Avenue & Belt Railroad Company and the mortgage bonds of the Birmingham Waterworks Company, which were distributed in the proportions designated in the resolution adopted May 5, 1887. In this resolution it is provided that the stock last referred to and the bonds should be distributed as dividends.

The recital that it was distributed as dividends will not be controlling upon the court. The court will look to the substance of it. It was evidently a division of a part of the corpus of the corporation, and falls within the operation of the rule which we have pointed out. The same is true of the dividend declared and called liquidation dividends. And there are other items that clearly fall within the operation of this rule, which we will not now undertake to segregate and point out. We have pointed out merely those which are incontrovertibly a part of the corpus, to illustrate the rule which we have laid down, or, rather, which we have restated, as it has already been clearly laid down. All of the items in the accounting and the question as to whether each falls under the head of corpus or capital, or whether it is to be considered as dividends and income, can be taken up and dealt with by the court below on its next hearing; as we feel compelled to reverse the judgment of the court below because of its error in finding and holding that the "part of the property described in the pleadings which constitutes corpus and what part constitutes income is really settled in the suit between the New York Trust Company, as plaintiff, and Wm. S. and John G. McHenry, individually and as administrators of the estate of Mrs. Bozeman." No decree of that court is found in this record; and, if it were there, it would not be binding in this case. The plaintiffs in this case were not parties to that suit. There are many items in the return made by the committee of the property of Mrs. Bozeman. Some of these are designated as principal and some as income. Whether all of these items so designated as principal are a part of the corpus of the estate should have been adjudged by the trial court under the evidence submitted, and the proceeding in the New York Supreme Court should not have been considered as finally determining this question. As to certain of the items the finding is incontrovertibly right, as we have indicated above. But as to certain other items, consisting of bonds and cash, the question should have been determined as one of fact by the court below, and this court cannot undertake to decide it. And, as we have said above, we will not segregate those items about which there is no controversy, so as to uphold the judgment in part and reverse it as to the remainder, but the entire account between the parties should be considered as a whole, and a judgment rendered thereon in accordance with the rules of law which we have stated and the facts.

[6] 6. As the judgment is reversed upon another ground, in the event the evidence upon the next trial fails to show that Mrs. W. S. McHenry was appointed administratrix of

W. S. McHenry, then she cannot be proceeded against as the administratrix of her deceased husband, and the suit can only proceed against her upon the other allegations of her being the widow and the sole heir of W. S. McHenry, together with the allegations of her having taken charge of the property.

Judgment reversed.

All the Justices concur.

(152 Ga. 119)

CITY OF ALBANY v. GEORGIA-ALABAMA POWER CO. (No. 2247.)

(Supreme Court of Georgia. Sept. 26, 1921.)

(Syllabus by the Court.)

1. Corporations \S 582—Conveyance of property, contracts, etc., held not to import consolidation or merger.

A deed executed by one corporation to another, which purports to convey for a valuable consideration, reciting that it does "grant, bargain, sell, and convey to the party of the second part, its successors and assigns," all of its personal property and realty, "as well as franchises, contracts, rights, leases, and all accounts receivable," does not import consolidation or merger of the two corporations, but shows a sale of all the property of the grantor to the grantee.

2. Electricity \S 4 — Corporation purchasing property held not bound to fulfill terms of contract of grantor corporation.

Under the facts of the case the court did not err in holding that the purchasing corporation was not bound to fulfill the terms of the original contract between the vendor corporation and the municipality with which it had a contract for furnishing electric power.

3. Electricity \S 4 — Corporation purchasing property of another not estopped from denying it was bound by contract with city.

Nor did the court err in holding that no estoppel was shown, as against the purchasing corporation, from denying that it was bound by the terms of the original contract between the vendor corporation and the municipality, and asserting on the contrary that if it was bound by any contract it was the one under which it had operated from the time of its purchase, under the deed referred to, of the property of the first corporation up to the time the present controversy arose.

4. Appeal and error \S 781(1)—No dismissal unless case completely moot.

This case should not be dismissed on the ground that the questions are moot.

Error from Superior Court, Dougherty County; W. M. Harrell, Judge.

Action by the City of Albany against the Georgia-Alabama Power Company. From

judgment for defendant, plaintiff brings error. Affirmed.

The city of Albany, plaintiff in the court below, by its petition against the Georgia-Alabama Power Company, sought to have the company enjoined from cutting off the electric current or power which it was alleged the company was then furnishing the city, under a contract, for the operation of the city's water and electric light and power plant, alleging that the company was demanding the immediate and unconditional payment in full of a bill for current, the amount of which was greatly in excess of what the city was authorized to pay, under the terms of the alleged contract; and that the company intended and was threatening to cut off the current or power being furnished the city if the entire bill was not paid; the city alleging that if the current or power was cut off the city's damage would be irreparable. The company filed its answer at the interlocutory hearing, and contended therein that its bill was correct, and offered in support of this defense an alleged contract between the city of Albany and the Albany Power & Manufacturing Company, which the defendant had succeeded, and which contract was subsequent to the original contract relied upon by the city, and was contended by the Albany Power & Manufacturing Company to have modified the original contract. The defendant produced this alleged subsequent contract and introduced the same in evidence. The city, by demurrer and objection to its admission in evidence, attacked the validity of this alleged subsequent contract, on various grounds. The court admitted the same in evidence. The original contract between the Albany Power & Manufacturing Company (hereinafter referred to as the Albany Power Company) and the city of Albany, and which is hereinafter referred to as the original contract, or the contract of 1904, embraces an agreement that upon the terms stated in the contract the Albany Power Company should furnish for a period of 17 years electrical power in a stipulated minimum amount to the municipality; and the contract also stipulates for the furnishing of additional power, and the rates at which this additional power was to be furnished. It is further agreed that the contract should be for a term of 17 years and become effective as soon as the power plant was installed and the company was in a position to furnish the power therein contracted for, not later than October 1, 1905; also, that the contract should be authorized at an election by the qualified voters of the city of Albany, as required by the Constitution of the state. Subsequently, in the year 1909, the Albany Power Company addressed the following communication to the city:

"R. P. Hall, Clerk, Hon. H. A. Tarver, Mayor, Albany, Ga.—Dear Sir: The Albany Power & Manufacturing Co. hereby agree to settle with the city of Albany for excess power on basis of 56 H. P. for 1908 and 60 H. P. for 1909, and that future settlements shall be made on basis of the average peak load above 300 H. P. The fire load coming on during the peak shall not be considered by the Power Co., but under such conditions the city agrees to throw off all power possible, so as to reduce it to the minimum. It is also understood and agreed that the city will come off of all motors which they are now operating in the city, and not to take on any more motors. Albany Power & Manufacturing Co., by Smith D. Pickett, President."

The city of Albany took action upon this communication, as shown by the following extracts from the minutes:

"Albany, Ga., Dec. 20th, 1909. Regular meeting adjourned from regular meeting on 14th day of December, 1909. Present—Mayor Tarver, Aldermen Kalmon, Jones, Ehrlich, and Sterne. Absent—Aldermen Vason and Rawlins. Mayor Tarver stated that the Albany Power & Manufacturing Company had agreed to settle with the city of Albany for excess power on basis of 56 H. P. for 1908 and 60 H. P. for 1909, and that future settlements shall be made on basis of the average peak load above 300 H. P. The fire load coming on during the peak shall not be considered by the power company, but under such conditions the city shall throw off all power possible so as to reduce it to the minimum, and the city to agree to cut off all motors which they are now operating in the city and not to take on any more. On motion the agreement was accepted by council, and the mayor was requested to have it drawn up in writing. No other business, council adjourned. Y. C. Rust, Clerk."

After hearing the case the court passed an interlocutory order denying the injunction, on the ground that it had not been shown that the contract relied upon by the city was binding on the defendant, as the original contract was between the city and a former company, to wit, the defendant's predecessor in title, and no legal merger of this former company and the defendant company had been shown. To this order or judgment the city excepted.

Pope & Bennet, and James Tift Mann, all of Albany, for plaintiff in error.

Milner & Farkas, of Albany, and Robt. C. & Philip H. Alston, of Atlanta, for defendant in error.

BECK, P. J. (after stating the facts as above). [1] 1. The court below properly held that there was no consolidation or merger of the two corporations, the Albany Power & Manufacturing Company and Georgia-Alabama Power Company. The instrument in writing introduced in the case, whereby the

first-named party undertook to convey all of its property, that is, all of its realty and personalty, contracts, franchise, etc., was a deed of conveyance. It is evidence of a sale, and completed the sale and transfer of the property of the Albany Power Company to the Georgia-Alabama Power Company. There were no extraneous facts in evidence that required the trial judge hearing this case to find that the instrument was other than what it purports to be, a deed of conveyance; and we do not enter upon a discussion of the question as to whether or not such a conveyance as this might be shown to be a merger and consolidation of the two corporations by allunde evidence tending to show that the grantee of the deed actually absorbed the grantor, or that the two were fused into a complete union. In so far as the evidence in this case shows, the Albany Power Company still maintains its corporate entity. In the case of *State v. Atlantic & Gulf R. Co.*, 60 Ga. 268, it is said by this court that there may be a merger or consolidation of corporations in the following ways:

"First, by merger, or the extinction of one corporation, and the absorption of its stock, assets, etc., by the other. * * * Second, by coalescence, or the vital union of the two corporations, neither being extinguished, but their existence becoming joint and ceasing to be several. [Chief Justice Bleckley, delivering the opinion, said that there may be examples of this last mode, but he was unable at the time to cite any.] Third, by vital succession, or the extinction of both original corporations and the creation of a new one."

We do not think that under the rule here stated the present case falls under any one of the three ways in which a merger or consolidation of two corporations can be accomplished; and especially do we so conclude from the decision in the case of *Hawkins v. Central of Georgia Ry. Co.*, 119 Ga. 159, 46 S. E. 82. In that case it was said:

"Where there has been no sale, but a merger, and no provision made for the payment of the debts of the absorbed company, the consolidated corporation is liable for the debts of the former, at least to the extent of the value of the property received. But where there has been a lawful and absolute sale of a railroad, the grantee is not responsible for the existing debts of the grantor."

The character of the transaction in the case of *Hawkins v. R. R. Co.*, supra, held to be a sale and not a merger, is shown by the allegations of the petition and the portions of the deed set forth in the petition and as an exhibit thereto. The petition in that case alleged that on May 16, 1901, the Chattanooga Company sold to the Central Company, and made a deed (a copy of which was attached as an exhibit) conveying to it all of the railroad, real estate, personal property, rights,

privileges, and franchises of, or belonging to, or thereafter to be acquired by, the Chattanooga Company; the consideration, according to the recitals in the deed, being \$1,300,000 in 50-year 4 per cent. gold bonds of the Central Company, "the assumption by the Central Company of the current liabilities of the Chattanooga Company," and the payment of \$5 in cash. It appears from the deed that the sale was made subject to mortgages for \$2,743,000 on the property of the Chattanooga Company. It was alleged:

That "petitioner's claim for damages, under said deed and the agreement of consolidation in pursuance of which it was made, is covered in said deed, and * * * the Central Railway Company is directly liable to him for damages;" that "after said deed was made and delivered the Central Company took possession of said Chattanooga Company's entire line of railway," and of all its assets, both real and personal, "and took over also all the franchises of said Chattanooga Company, and are now in possession of the same, operating said line of railway;" that "said Chattanooga Company has gone out of existence; it has no line of railroad, no visible property of any kind, and has ceased to do business, having yielded up to the Central Company all its property, franchises, and rights, and it has no organization, no officers or agents, in the state of Georgia or elsewhere, so far as petitioner can find out, or so far as he is advised and believes."

The defendant filed a demurrer, and this was sustained. In the opinion which affirmed the judgment of the court below it was said:

"It was held (102 Ga. 443) that 'where a consolidation actually takes place between two companies under a written contract providing for the absorption of the one by the other, but making no provision for liabilities against the company which goes out of existence, these liabilities by operation of law become binding upon the new company to the extent of the assets of the absorbed company, or to the extent of the latter's ability to perform the contracts out of which such liability arose.' See, also, *Morrison v. American Snuff Co.*, 79 Miss. 598, and note in 89 Am. St. Rep. 598. But this is not such a case. Here there was no merger, but an absolute sale, and the purchase price was paid. There is no suggestion of any fraud or attempt to hinder, delay, or defeat the creditors of the Chattanooga Company; no allegation that the price paid was less than the value of the property bought."

Numerous other cases closely analogous to the present case could be cited, showing that the sale by the Albany Power Company of all its property was not a merger of that company with the defendant in this case; but we deem it unnecessary. See, in this connection, 5 *Thompson on Corp.* (2d Ed.) §§ 6038, 6040, 6044, 6090, 6093, and cases cited

under these sections; 10 Cyc. 308; 7 R. C. L. 183; also, the case of Vicksburg, etc., Tel. Co. v. Citizens' Tel. Co., 79 Miss. 341, 30 South. 725, 80 Am. St. Rep. 656.

[2] 2. There being no merger or consolidation of the companies, the trial court was right in holding that the defendant in the case was not bound by the contract originally entered into between the city of Albany and the Albany Power & Manufacturing Company, especially under the facts of the case. We will not stop to discuss whether or not, if there had not been a contract between the city of Albany and the Albany Power Company as to the terms upon which electrical power was to be furnished subsequently to the original contract entered into between these two parties in the year 1904, the Georgia-Alabama Power Company could be liable to carry out the terms of the original contract because of the fact that under the deed of conveyance it purchased the "contracts" of the Albany Power Company; for there was a modification of that original contract, or an attempted modification by the subsequent contract entered into between the mayor and council and the Albany Power Company. Even if the last contract between the city and the power company was not adopted with all the formalities and its execution attended with all the necessary formalities and solemnities, in substance it was in form substantially a contract between the parties and somewhat in the nature of an interpretation and modification of the original contract, and was treated and recognized by both parties as a contract for several years and up to the date of the sale effected by the execution of the deed hereinbefore referred to. And if the Georgia-Alabama Power Company took over the contracts of the Albany Power Company under such circumstances as to make it liable under the terms of those contracts, it seems clear that it would be bound by the terms of the contract as the two parties to the deed understood them to be. Even where there is a difference of intention between the parties to a contract, the meaning placed on the contract by one party and known to be thus understood by the other party at the time shall be held as the true meaning. Civil Code, § 4267. So far as concerns the present case, the judge below could well have found, if indeed he was not compelled to find, that the contract for the furnishing of electric power to the city, which the Albany Power Company sold and the Georgia-Alabama Power Company bought, was the contract as modified or interpreted by the contract of 1909.

[3] 3. Nor did the court below err in holding that the Georgia-Alabama Power Company is not estopped from denying that it was

bound to continue to fulfill the contract, on the ground that it had furnished power under the contract for a number of years, or that it had thereby adopted and ratified the contract and was therefore bound by its terms. The judge was fully authorized to find, under the evidence, that the only contract the defendant had ratified and adopted or performed was the contract of 1909; and that could not be an adoption or performance according to the terms of the original contract.

[4] 4. The motion to dismiss on the ground that the questions involved are moot is overruled, as the showing that the questions are moot fails to show that they are completely so.

Judgment affirmed. All the Justices concur.

(152 Ga. 141)

MANION v. VARN et al. (No. 2175.)

(Supreme Court of Georgia. Sept. 27, 1921.)

(Syllabus by the Court.)

1. Injunction \Leftrightarrow 28—Proceeding for registration of land not temporarily enjoined under allegation that debt for which deed was given was discharged.

A proceeding under the Land Registration Act (Georgia Laws 1917, p. 108) should not have been temporarily enjoined at the instance of the grantor in the conveyance under which the applicant asserted title to the land, for the alleged reason that such instrument, though in form a warranty deed, was given to secure a debt which had been discharged, because the applicant for the registration, without authority, had appropriated to his own use timber growing on the land of value exceeding the amount of the debt, and for which, as was alleged, the applicant could not be brought to an accounting in such proceeding.

2. Injunction \Leftrightarrow 28—Issue as to discharge of debt for which deed was given raised by cross-action in suit for registration.

Such issue could be raised in the suit for registration, by the filing of a cross-action thereto by the grantor in the conveyance, and the title registered in accordance with the decision on that issue.

Error from Superior Court, Lowndes County; W. E. Thomas, Judge.

Action between Margaret Manion and G. W. Varn and others. From the judgment, the former brings error. Affirmed.

J. P. Knight, of Nashville, and H. W. Nelson, of Adel, for plaintiff in error.

Dan R. Bruce, of Valdosta, for defendants in error.

FISH, C. J. Judgment affirmed. All the Justices concur.

(152 Ga. 167)

BRIGHAM et al. v. MAYOR AND COUNCIL OF CITY OF DUBLIN. (No. 2285.)

(Supreme Court of Georgia. Sept. 30, 1921.)

(Syllabus by the Court.)

1. Hospitals \S 3—Charter authorized ordinance prescribing that hospital buildings be constructed of noninflammable material.

Under the charter granted by the general assembly to the city of Dublin authority was granted to the mayor and aldermen to make and establish such rules, laws, ordinances, regulations, and orders as may to them seem right and proper, respecting all and every such matter and thing whatsoever "that may be by them considered necessary or proper or incident to the good government of said city, and to the peace, security, health, happiness, welfare, protection, or convenience of the inhabitants of said city, and for preserving the peace, good order, and dignity of said government." They were also granted therein all other powers necessary or incident to municipal government, not in conflict with any other special power or authority given said city. Acts 1910, p. 622, \S 5. *Held*, that the powers above expressed were sufficient to authorize the mayor and aldermen to pass an ordinance prescribing that buildings to be used for hospital purposes should be constructed of brick or other non-inflammable material. This ruling is not in conflict with the principle repeatedly laid down by this court that the powers of a municipal corporation in this state are limited to those expressly granted by the General Assembly or conferred by necessary implication. *Peginis v. Atlanta*, 132 Ga. 302, 63 S. E. 857. 35 L. R. A. (N. S.) 716; *Blackman Health Resort v. Atlanta*, 151 Ga. —, 107 S. E. 525.

2. Hospitals \S 3—Ordinance concerning construction held not unreasonable.

An ordinance of the city of Dublin declared: "That from and after the passage of this ordinance it shall be unlawful for any person, firm, or corporation to erect or cause to be erected within the city limits of Dublin, Ga., any building to be used for hospital or other building of like character, of material other than brick, the same to be erected in all other respects as prescribed by the building laws of said City of Dublin." *Held*, that this ordinance was not void on the ground that it was unreasonable. 2 Dillon on Municipal Corporations (5th Ed.) \S 698. No question was raised as to the constitutionality of the ordinance.

3. Municipal corporations \S 601—City properly refused to permit wood additions to existing building.

Applying the foregoing principles to the pleadings and the evidence in the case, the mayor and council of the city of Dublin were authorized to decline to grant the permit to the petitioners to make additions to an existing building, the same to be constructed of wood; and the judge did not err in refusing the mandamus absolute.

Gilbert, J., dissenting.

Error from Superior Court, Laurens County; J. L. Kent, Judge.

Application by W. R. Brigham and others for a writ of mandamus against the Mayor and Council of the City of Dublin. From judgment denying the writ, plaintiffs bring error. Affirmed.

Burch & Daley, of Dublin, for plaintiffs in error.

T. W. Evans, J. S. Adams, and R. Earl Camp, all of Dublin, for defendant in error.

ATKINSON, J. Judgment affirmed. All the Justices concur, except GILBERT, J., dissenting, and HILL, J., absent.

(152 Ga. 54)

TURNER v. DUNCAN et al. (No. 2158.)

(Supreme Court of Georgia. Sept. 14, 1921.)

(Syllabus by the Court.)

1. Appeal and error \S 302(3)—Ground of motion for new trial complaining of refusal to sustain objection to question held incomplete without disclosing answer.

A ground of a motion for new trial is incomplete which complains of a refusal to sustain an objection to a stated question propounded to a witness, but does not disclose the substance of the answer made by the witness.

2. Appeal and error \S 302(3)—Ground of objection must be stated in motion for new trial to present question for review.

A ground of a motion for new trial complaining of the overruling of a motion to rule out certain testimony delivered by a witness, which fails to state the ground of the objection that was urged before the judge for excluding the evidence, is too indefinite to present any question for decision.

3. Justices of the peace \S 135(5)—Fl. fa. issued by justice held properly admitted in evidence in trial of statutory claim.

On the trial of a case based on a statutory claim interposed to a levy on land by a constable under a fl. fa. issued by a justice of the peace, the plaintiff offered in evidence the fl. fa., which contained a caption in which was stated the names of the plaintiff and of the defendant, following which was the direction: "To any lawful constable of said county, greeting." Then followed the command to levy on a sufficiency of the property of "the defendant above named," etc. *Held*, that it was not error to admit the fl. fa. in evidence over the objection that, while the name of the defendant was stated in the caption, it was not again stated in the body of the fl. fa.

4. Justices of the peace \S 135(5)—Fl. fa. held properly admitted in evidence though clerk did not make entry of constable in execution docket.

In the Civil Code 1910, \S 4767, it is declared: "No constable shall levy on any land unless there is no personal property to be found sufficient to satisfy the debt, which fact

must appear by an entry on the execution to be levied by a constable of the county where such execution was issued, or where the property to be levied upon may be found: Provided, that the defendant shall have the right in all cases to point out any portion of his property in his possession he may think proper; and should he point out land to be levied upon, the above entry of 'no personal property' may be omitted." See, also, Civil Code 1910, § 6034. The provisions of the Civil Code 1910, § 3321, require the clerk of the superior court of each county to keep a general execution docket on which executions issued from the several courts of this state and of the United States are required to be entered in order that they may be binding as against third persons. By subdivision 4 of paragraph 6 of section 4891, it is made the duty of the clerk of the superior court to keep an execution docket which shall show "the names of the parties and their attorneys, date, the time returnable, to whom and when delivered, when returned, and memoranda of all entries on the original." Held, construing together the several provisions above mentioned, the requirement in section 4891 that the clerk shall enter upon the execution docket all entries on the *fi. fa.* did not render inadmissible in evidence, on the trial of a claim case as described in the first note, a *fi. fa.* issued from a justice's court, which is levied by a constable upon land pointed out to him for the purpose of levy by the defendant in *fi. fa.*, who was found in possession of the land, although the constable, prior to levying on the land, made an entry on the *fi. fa.* to the effect that he had made diligent search for personal property of the defendant and could find no such property upon which to levy the *fi. fa.*, and such entry was not entered by the clerk of the superior court upon the execution docket.

5. Appeal and error §1050(1)—Evidence §273(2)—Declarations of defendant in *fi. fa.* in claim case admissible; evidence held not prejudicial.

In a claim case the declarations of the defendant in *fi. fa.* tending to show the character of his possession are not inadmissible upon the ground that the declarant is not a party to the case.

(a) Testimony to the effect that the defendant in *fi. fa.*, while residing on the land with his wife and family, declared, at a trial of his son under charge of a crime, that he was worth \$2,000, was of doubtful admissibility, but of such slight materiality that its admission would not require the grant of a new trial.

6. Justices of the peace §135(5)—Evidence by claimant of land levied on held not supported by evidence.

The evidence was sufficient to show title of the land in defendant in *fi. fa.*; and there was no error in overruling the motion to dismiss the levy, on the ground that the plaintiff failed to make out a *prima facie* case.

7. Justices of the peace §135(2)—Defect in justice court summons cured by judgment.

A ground of the motion for new trial (in so far as it presents any question for consideration) is without merit which alleges that

the court erred in rejecting a copy of the original summons from the justice's court on which one of the *fi. fas.* was based, such copy being offered in evidence by the claimant for the purpose of showing that the amount of the plaintiff's demand was not specified in the original summons by any express allegation or by attaching a copy of the note sued upon; it being contended that because of such failure to specify the amount of the debt the judgment and *fi. fa.* based thereon were void. Even if the copy was admissible, it would not have been sufficient to show that the judgment was void. The defect in the summons complained of was an amendable defect and was cured by the judgment.

8. Appeal and error §231(9)—Objection to charge held insufficient to raise any question for decision.

The judge charged the jury: "That a husband would have the right to make his wife a deed to any part of his property, * * * provided he does not thereby defraud his creditors, * * * provided he is not indebted, don't owe any debts at the time, no judgments or liens against him; * * * can't do it when he is in debt." Error was assigned on this charge, because: (a) "It is given without qualification." (b) The court should have charged that if defendant in *fi. fa.* "did not own the land and had not paid anything on it, and that his wife had paid all of the purchase money on the land," the equitable title would have been in claimant and the jury could not find a verdict against her. The charge was not strictly accurate, but the criticism that the charge was erroneous because "it was given without qualification" is not sufficiently definite to raise any question for decision. In a subsequent portion of the charge the judge instructed the jury substantially as it is insisted by the second criticism that he should have charged.

9. Justices of the peace §135(5)—Charge held applicable to issues involved in claim suit to property levied on.

In the thirteenth ground of the motion for new trial complaint is made of the charge: "He would have the right to make his wife the deed, if it was an honest transaction, * * * even though she didn't pay any money, if by doing so he didn't deprive himself of the ability to pay his debts; * * * and although he may become indebted afterwards that wouldn't be a transaction as would defeat the deed. * * * The honesty of this transaction you are to look to. * * * See whether she paid the money or he paid it. * * * If she paid it, * * * you would be authorized to find the property not subject. If you believe from the evidence that he * * * paid for this land, and that this transaction was fraudulent to defraud the plaintiff, * * * you should find the property subject." This charge was applicable to the issues involved in the case and was authorized by the evidence. There was no contention that it did not state correct principles of law.

10. Appeal and error §843(2)—Grounds of motion for new trial not considered because merely elaborative of general grounds.

Other grounds of the motion for new trial complained that the verdict was contrary to

certain portions of the charge delivered by the court. Such grounds are merely elaborative of the general grounds that the verdict was contrary to law, etc., and do not require separate consideration. The evidence was sufficient to support the verdict finding the property subject, and there was no error in refusing a new trial on any of the grounds taken.

Error from Superior Court, Douglas County; F. A. Irwin, Judge.

Actions by N. B. and J. T. Duncan against C. W. Turner, wherein judgments were rendered for plaintiffs and executions levied upon land, and S. A. Turner interposed a statutory claim. From an adverse judgment, the claimant brings error. Affirmed.

On November 6, 1914, a judgment was rendered in a justice's court, for \$64.46 principal, with interest, attorney's fees, and costs of court, in favor of N. B. and J. T. Duncan against C. W. Turner, in a suit upon a promissory note. On December 4, 1914, another judgment in favor of the same plaintiffs in a similar suit against the same defendant was rendered in the same court for \$90 principal, with interest, attorney's fees, and costs of court. Executions were duly issued and entered on the general execution docket on November 19, and December 17, 1914, respectively. The constable of the district in which the judgments were rendered made entry on each execution, to the effect that upon diligent search no personal property of the defendant could be found on which to levy. Subsequently the constable levied both executions on the same tract of land. When the sheriff of the county was about to expose the land to sale, Sarah Ann Turner, the wife of defendant in execution, interposed a statutory claim. The claim was returned by the sheriff to the superior court, where an issue was made, and the trial resulted in a verdict finding the property subject. The claimant made a motion for new trial, which was overruled, and she excepted. On the trial the plaintiff introduced both executions with entries thereon, as above indicated; and tax digests of the county for the years 1910 to 1917, inclusive, showing returns of the property in the name of defendant Charles W. Turner; and also certain parol evidence.

One of plaintiff's attorneys testified to the following effect: At the time of the levy the defendant was in possession of the land, residing thereon with his family. He purchased the land in 1905 or 1906, and had been in continuous actual possession, by residing thereon and cultivating the land for agricultural purposes, from 1908 until the time of the trial. During that period and both before and after "this litigation" commenced, he offered to sell the property for \$1,200. At the time of offering to sell he did not make any statement as to who owned the property, though in one instance he said

"he would settle this matter if Mr. Duncan would buy the land. [I] told him he might work up a trade with my son. [He] said if Mr. Duncan would buy the land he would pay it all. But he wanted to sell it all * * * and get away from here." He told witness he gave \$700 for the land. Witness could not identify a note dated March 10, 1912, exhibited to him while on cross-examination by claimant's attorney, as a note on which one of the judgments was based; witness explaining that he was not employed before the judgments were rendered and had never seen the notes. Another witness for the plaintiff was the constable, who gave testimony to the following effect: Defendant was in possession of the land, residing on it with his family at the time of the levy, and pointed it out to witness as his property for the purpose of levy, and went with him to the attorney for the plaintiff to make his return. Defendant had been in possession of the land for several years prior to the levy, during which time he and the several members of his family, including the claimant, engaged in the usual agricultural work on the land. Witness did not know, when he levied on the land, that claimant held any deed to it or claimed title or possession thereof. The justice of the peace testified for the plaintiff that at the time the judgments were rendered both the claimant and defendant were present. Witness has been acquainted with C. W. Turner since 1904 or 1905, during which time he has lived about a mile away, and defendant has lived on the land with his family; and witness does not know of defendant's claiming any other land. Witness has seen both Mr. and Mrs. Turner working in the field on the land. O. C. Tyson, who was the former owner of the land, testified: Some time about 1905, witness sold the land to defendant for \$700, receiving seven promissory notes for \$100 each, payable successively one each year after the date of sale, and giving bond for title to the purchaser. The defendant went into possession at the time of the sale, and has been living there ever since. Witness sold the notes to S. O. Fielder.

The claimant introduced evidence as follows: (a) A copy of the summons on which the judgment was predicated. (b) A deed from O. C. Tyson to S. O. Fielder, dated October 14, 1905, on consideration of \$425. (c) A deed from S. O. Fielder to C. W. Turner, dated October 19, 1912. (d) A warranty deed from C. W. Turner to claimant, dated October 19, 1912, recorded October 9, 1916, and expressing a consideration of \$500. Claimant as a witness in her own behalf testified:

Defendant bargained for the land, and witness furnished \$700 to pay for it, giving the money to her husband to pay the notes as they would fall due each year: "I sent cotton by

him to sell, except what I borrowed from my sister [Mrs. Mary O'Connell], cotton that me and the children made. There was paid from the cotton that was turned over to him \$350; that was paid out of the cotton. The cotton was mine and the children's. * * * My husband just said he would not pay for it; and me and him had a right smart little row, and he said he was going to leave me. I said: 'Go, if you go for that. I have moved around with you as much as I am going to on rented land.' He says, 'If you do, you will pay for it yourself.' I told him we could; we done most of the work anyhow. He got his hat and started. I followed him a piece, and I says: 'If you go you can just go; don't come back any more; can stay with me or go if you please.' He set down a while and studied about it, and come on back to the house. I paid \$350 out of the cotton for the land. That was not all paid at one time. We took up the notes as they come due, a hundred dollars a year. I got money from no one else but my sister. I got from her \$350. I paid it on the land. That paid the \$700 that I am speaking of."

To the question, "What did your husband tell you and the children about paying for the land?" the witness answered:

"He said we could do as we pleased after he come back, pay for it or let it alone; he wouldn't pay any out on it; he hadn't paid none and wouldn't have anything to do with it. I told him if he would stay there and help me we would swap work, what time he worked there. He worked for Banks & Co. a right smart; did some work. Me and the children worked the crop; did not work any in the cotton patch, only what he swapped in there. We hoed for him in the corn to get him to plow for us. He cultivated a corn patch on the place. He made a little corn crop every year. I swapped with him. The corn crop belonged to him. He claimed it. I had nothing to do with the corn matter, only swapped work. We hoed for him, and he would plow some in the cotton. One of the boys plowed. He would plow some. When he got through, wouldn't have anything to do with it; just like a stranger, just like anybody else. He said he didn't care, just wanted to plow some. * * * The deed was made to me because I paid for it, or furnished the money that paid for it. He says, 'If you will go on and pay for it, I will make the deed to it to you, and it will be yours.' Wanted him to do that so he couldn't never trade it. He was sorter bad about trading, making sorter bad trades. Told him wanted the deed made to me so he couldn't trade it. He agreed for me and the children to make the cotton on it and have the property myself."

On cross-examination witness testified:

"I saw deed from Fielder to Turner. Mr. Turner [never] turned me over any deed besides this one. I never had any other. The name of this lady, my sister, is Mrs. O'Connell. She furnished me this money * * * along at different times when I needed it. I don't know that I can tell you about the times. I don't remember. When cotton was cheap

and I failed a payment, she furnished the money. I don't know what year it was; before the deed was made, of course. * * * I would get about \$50 a year. * * * I think I got 40 one time. I remember I got money several times. I got some every year, because cotton was cheap then."

Mrs. Mary O'Connell testified:

"I let her have, before this place in question was finally paid for, \$350; let her have it at one time. I think I let her have \$40 at one time, but I would have to look over the memorandum to tell how much. When she needed money, if she was short in her payments, I let her have money, helped her out whatever it took to take up a note each year. I helped her take up a note each year. I know I let her have \$350 to pay on the farm. That is the land in dispute."

C. W. Turner, for the claimant, testified:

"I am the defendant in this execution here. My wife furnished the money to pay for the land. A portion of it was made on the place. Her and her children made it. Of course, I plowed through it. My crop was the corn. * * * I paid no money down on the land at first. I was to pay for it \$700. I executed notes to Tyson. I give my notes to Tyson. I give my notes—these notes to become due each year. They were paid. I paid the money over to him and taken up the notes. My wife delivered me the money. * * * When a note would come due, she would give me the money, and went and paid it to Tyson or Mr. Fielder; paid it all to Fielder. Q. Here is a deed to the land that Fielder made you October 19, 1912; did he ever deliver you this deed? A. Yes, sir; the deed that I made to my wife, dated 19th day of October, 1912, the same day. Mr. Hall, J. P., witnessed both of these deeds. Q. State who wrote the deed from Fielder to you. Do you remember who wrote it? A. Mr. Hall witnessed the deed. He fixed up both these deeds the same day at Villa Rica. As soon as he turned me over the deed, I told him then it wasn't made as I intended for it to be; told him I wanted it to my wife. Then he wrote this deed. I told him to make another one, I just forgot it. That was from me to my wife. He signed the deed and delivered it to me. I taken it home and delivered it to her, my wife. I haven't had no interest in that land since then, not only just to live in it. I live there with my wife and children."

On cross-examination the witness testified, among other things, that he took the cotton away and sold and looked after it generally; that sometimes his wife would go with him; and that he sold a part in his own name and a part in his wife's name. Testimony by the daughter of the claimant tended to corroborate her testimony and that of her husband and sister, already quoted. The claimant further testified that she had furnished the money to pay the taxes on the land ever since she commenced paying the purchase money.

James & Bedgood, of Atlanta, for plaintiff in error.

D. S. Strickland and J. H. McLarty, both of Douglasville, and W. H. Swofford, of Winston, for defendants in error.

ATKINSON, J. Judgment affirmed. All the Justices concur.

(152 Ga. 100)

PICKENS v. JACKSON. (No. 2351.)

(Supreme Court of Georgia. Sept. 24, 1921.)

(Syllabus by the Court.)

1. Trusts \S 63 $\frac{3}{4}$, 368 — Implied or resulting trust on land purchased by agent.

The allegations of the petition show that the action is a suit by a principal against his agent, to enforce an implied or resulting trust, for an accounting, and for injunction, and are sufficient to allege a cause of action.

2. Limitation of actions \S 66(10) — Does not begin to run against principal until repudiation or settlement of accounts.

In a suit for an accounting as mentioned in the preceding note, the statute of limitations does not begin to run until the agent has rendered an account, accompanied by an offer to settle, or there has been by the principal a demand for settlement and a refusal by the agent to pay, or there has been an express repudiation of the agency, or until there has been such a change in the relations of the parties as would warrant the inference that the confidential agency had in fact ceased. *Teasley v. Bradley*, 110 Ga. 497, 35 S. E. 782, 78 Am. St. Rep. 118; *Garner v. Lankford*, 147 Ga. 235, 93 S. E. 411; *Ramsey v. Street*, 150 Ga. 539, 104 S. E. 222.

Applying the rule above announced to the allegations of the present petition, it was not open to demurrrer alleging that plaintiff's cause of action, or any portion thereof, was barred by the statute of limitations, or that the same had become stale.

3. Judgment \S 518 — Trusts \S 366(3) — Grantees of trustee not necessary parties in action for accounting; petition not collateral attack on judgment.

The petition does not seek to cancel any of the deeds, nor to set aside either of the judgments of the court of ordinary, but prays for a decree of a court of equity giving to the petitioner the benefit of all of the deeds and judgments, and requiring an accounting of the defendant. The petition therefore was not subject to demurrer on the ground that the grantees in the deeds were not made parties, and that the petition as amended "collaterally attacks judgments and sales apparently regular in all other respects."

4. Trusts \S 366(3), 371(1,4) — Petition not subject to demurrer that it prayed for rescission without restitution.

The petitioner does not seek rescission of the sales of land in part or as a whole, and

therefore the petition was not subject to demurrer on the ground that "the petition seeks to ratify in part and reject in part, while rescission without restitution cannot be accomplished; that said petition fails to attack the validity of the administrator's deed to T. M. Mann, and fails to allege that the defendant has any part of the purchase price of \$10,300 therein recited, and fails to tender back to the said purchaser the price of \$10,300; that said Mann is not a party to said suit, and so long as the administrator's deed to him stands said transaction cannot be inquired into."

5. Abatement and revival \S 52 — Trusts \S 365(3) — Not barred by laches; right to accounting survived.

For the reasons set forth in the second headnote, the cause of action was not barred by laches during the life of the testatrix, and the suit is based upon a chose in action which survived to her legal representative.

6. Trusts \S 371(1) — Petition held to sufficiently allege collusion of third person with defendant.

Properly construed, the petition alleged that the defendant, Jackson, procured the services of T. M. Mann to be a "by-bidder" at the sale of the land by the administratrix, ostensibly, and as represented by Jackson, that Mann was bidding in the interest of the estate, but he was in fact acting in collusion with Jackson, in the interest of the latter, whose plan was to absorb the estate himself. Therefore the petition is not demurrable on the ground that it alleges "that T. M. Mann, in the event the property was not bringing its full value, * * * could bid in the same as if purchasing for himself, but his bid would be for the estate," while in paragraph 5 of the plaintiff's amendment she alleges that "T. M. Mann was the agent and servant of J. B. Jackson, and that this bid was intended for J. B. Jackson."

7. Pleading \S 248(16) — Allegation of amendment held not to set forth new cause of action.

The allegation in the amendment to the petition that the testatrix was "old, illiterate, without business experience, and easily imposed upon," was not subject to demurrer on the ground that "the petition sets forth a new cause of action in alleging that Mrs. McCravy was mentally incompetent to manage her property; that the allegations as to said incompetency are, besides, too general, vague, and indefinite."

8. Venue \S 5(1) — Suit concerning land held not one respecting title to land.

A petition that seeks a final accounting between the legal representative of a principal and the agent of the latter, and which contains a prayer that such agent be required, by decree of court, "to turn over to the petitioner the balance of the land unsold by such agent," does not render the suit one respecting title to land, and the decree prayed may be had in a court of equity in a county other

than that in which the land lies. *Williams v. Lancaster*, 113 Ga. 1020 (7), 39 S. E. 471.

9. Pleading \S 250 — Additional consistent prayers do not render petition demurrable.

An amendment to the petition, which does not add a new and distinct cause of action, or new and distinct parties, is not demurrable on the ground that it "adds additional prayers praying for new and different relief," if such prayers are consistent with the nature of the case made by the petition. This ground of the demurrer should have been overruled.

10. Grounds of demurrer without merit.

In so far as any of the grounds of special demurrer not specifically dealt with above were not met by appropriate amendment, they were without merit under application of principles above announced. It followed that the court erred in sustaining the demurrers and in dismissing the petition.

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action by Martha C. Pickens, as administratrix of the estate of Jane McCravey, deceased, against J. B. Jackson. Judgment for defendant, and plaintiff brings error. Reversed.

A. P. McCravey died intestate, owning a farm containing 179½ acres, called Turner's peach orchard farm, in Cobb county. The farm was incumbered by a deed to Marietta Trust & Banking Company, securing a debt on which there was a balance due of \$7,000. Jane McCravey, widow and sole heir at law of the deceased, was appointed administratrix upon the estate February 2, 1912. Shortly thereafter the administratrix procured from the ordinary of Cobb county an order to sell the farm for the purpose of paying off the debt and realizing for herself a balance over and above the incumbrance. The lands were duly advertised and sold on the first Tuesday in September, 1913. Subsequently Jane McCravey died December 10, 1919, leaving a will in which J. B. Jackson was nominated as executor. Jackson refused to probate the will, and on application of Martha C. Pickens the will was probated in solemn form February 1, 1918, and Martha C. Pickens became administratrix with the will annexed. Prior to and until the death of A. P. McCravey J. B. Jackson was general agent and attorney at law for McCravey; and had in charge and control for him the lands above mentioned, and the renting and selling of said lands.

Jane McCravey, being old, illiterate, without business experience, and easily imposed upon, became administratrix at the suggestion and by the assistance of Jackson, who

also procured for her the order to sell the land, and represented the administratrix in conducting the sale. To that end Jackson procured the services of T. M. Mann, and on the day of the sale went with him to bid on the property. Mrs. McCravey remained away from the sale. Mann was to be a "by-bidder," so that, in the event the property did not bring its full value, Mann could bid in the same as if purchasing for himself (but his bid would be for the estate); and it was represented by Jackson that Mann was bidding in the interest of the estate, but in fact he was acting in collusion with Jackson, in the interest of the latter, whose plan was to absorb the estate himself. Under such circumstances Mann bid \$10,300, the property being worth twice that sum, and it was knocked off to him. In pursuance of such sale, Jane McCravey, administratrix, signed a deed to Mann, without any consideration being paid therefor by either Jackson or Mann, the deed being thus made at the instance and suggestion of Jackson. Neither Jackson nor Mann ever paid any of their own money for the land. The incumbrances thereon were paid off from the proceeds of sale of portions of the land, as will be hereafter stated.

In order to discharge \$3,500 of the debt due Marietta Trust & Banking Company, that company consented to release a certain part of the land covered by its deed, to enable Mann to obtain a loan for such amount from the John Hancock Mutual Life Insurance Company; and accordingly, at the instigation of Jackson, Mann, on December 4, 1913, executed a deed to such part of the land to the insurance company as security for a loan of the above amount, which was applied to the reduction of the debt to Marietta Trust & Banking Company. On July 29, 1914, after the execution of said deed, Jackson required Mann to execute to him a deed to the balance of the land, which deed was withheld from record until July 24, 1917, in order to enable Jackson to conceal his interest, and at the same time pay off the indebtedness. To that end, on April 20, 1915, Mann executed another deed to Jackson for a part of the property described in the deed next above mentioned, naming a consideration of \$1,750, which was recorded on May 10, 1915, and Jackson on the same day executed a deed conveying the same land to T. J. Eubanks for the consideration of \$5,250, Eubanks, as a part of the consideration, assuming payment of the loan of \$3,500 in favor of the John Hancock Mutual Life Insurance Company. On July 28, 1916, Jackson executed a deed to B. T. Frey, conveying a portion of the land for a consideration of \$3,000, which money was applied on the remaining

\$3,500 due Marietta Trust & Banking Company.

In addition to the above, Mann and Jackson sold certain personality to Mrs. Christian for \$1,250. On December 8, 1913, Jackson and Mann executed a security deed on some of the property to Marietta Trust & Banking Company for \$2,900; and Jackson borrowed \$1,000 on the land from J. H. Patton. After the deed from Mann to Jackson was placed on record, Jackson borrowed from Garity \$1,500 on a part of the land which was still unsold.

On May 6, 1920, Martha C. Pickens, as administratrix of the estate of Jane McCravey, instituted an action against Jackson, and in the petition as amended she alleged in substance all that is stated above. She further charges therein that, while Jackson has tried to manipulate said lands in such way as to destroy his identity through Mann, his agent, his acts in fraud of his principal create a trust in favor of said estate (the estate of Jane McCravey, deceased); that said estate is entitled to the benefit of all the trades made by Jackson, and is the owner of the overplus over and above what it took to pay off said debt of the Marietta Trust & Banking Company, and the remaining land unsold, namely, 61 acres of said McCravey farm, which is fully described; that Jackson is a naked trustee, holding for the benefit of the estate and all those interested in the estate; that in relation to the estate his agency and his fraudulent acts estop him from claiming the remaining lands and the overplus of money received from the sale of the lands after paying off \$7,000 to the Marietta Trust & Banking Company; that no settlement was ever made between Mrs. Jane McCravey and her agent, Jackson, during the life of Mrs. McCravey, nor did she know the condition of her own affairs, but she trusted all to Jackson. The prayers were that the defendant be permanently enjoined from selling or further incumbering the land; that the plaintiff have verdict and judgment for a stated amount against the defendant; and that a decree be entered requiring the defendant to turn over to her the balance of the land; that defendant be required to account; that a trust be decreed in favor of the plaintiff; and for general relief. The defendant demurred generally and specially. Each and every ground of the demurrers was sustained, and the petition dismissed. The plaintiff excepted.

H. B. Moss and B. T. Frey, both of Marietta, for plaintiff in error.

Robt. C. & Philip H. Alston, of Atlanta, for defendant in error.

ATKINSON, J. Judgment reversed. All the Justices concur.

(152 Ga. 197)

COKER v. UTTER. (No. 2329.)

(Supreme Court of Georgia. Sept. 30, 1921.)

(Syllabus by the Court.)

1. Bankruptcy \S 364—Proving claim does not estop assertion of lien against property of which court of bankruptcy has no jurisdiction.

A lien creditor by proving his claim does not waive, nor is he estopped from asserting, his lien in a court of competent jurisdiction against the property which the court of bankruptcy has not the jurisdiction to administer for the benefit of creditors. *McBride v. Gibbs*, 148 Ga. 380, 96 S. E. 1004.

2. Bankruptcy \S 198, 433(7) — Bankruptcy does not avoid all liens; discharge does not discharge lien of judgment upon note waiving homestead exemption.

The effect of section 67f of the national Bankruptcy Act of 1898 (U. S. Comp. St. \S 9651) is not to void the levies and liens therein referred to against all the world, but only as against the trustee in bankruptcy and those claiming under him, in order that the property may pass to and be distributed among the creditors of the bankrupt. It is applicable only as against such trustee, and was designed to prevent preferences between creditors. A discharge in bankruptcy does not discharge the lien of a judgment obtained within four months prior to the adjudication of bankruptcy, upon a note waiving the homestead exemption allowed by the laws of this state upon lands set aside by the bankrupt court as exempt. *McKenney v. Cheney*, 118 Ga. 387, 45 S. E. 433.

3. Appeal and error \S 1041(3)—Pleading \S 258(4)—Amendments to answer permitted after submission to judge; rejection of amendment held not harmful.

While it was competent for the plaintiff in error to file an amendment to his answer after the case was submitted to the judge, so as to give efficacy to any fact that might have been proved or admitted at the hearing, the rejection of the amendment in the present case was not hurtful to the plaintiff in error, inasmuch as the allegations of the amendment, so far as they were supported by evidence, did not materially change the controlling issues as they stood when the case was submitted to the judge.

4. *Stare decisis*—Opinion not overruled.

The request to review and overrule the case of *McKenney v. Cheney*, supra, is denied. While the ruling made in that case may not be in harmony with all the dicta in the case of *C. B. & Q. Ry. Co. v. Hall*, 229 U. S. 511, 33 Sup. Ct. 885, 57 L. Ed. 1306, it is not necessarily in conflict with the decision in that case upon the issues actually involved, as in the present case the judgment sought to be enforced is based upon a promissory note containing a waiver of homestead, and it was otherwise in the case last cited.

5. Error—Rendering judgment.

Applying what is said in the foregoing headnotes, the court below did not err in rendering the judgment complained of.

Atkinson, J., dissenting.

Error from Superior Court, Oglethorpe County; W. L. Hodges, Judge.

Action by A. B. Utter, as trustee, against John E. Coker. From an adverse judgment, the defendant brings error. Affirmed.

A. B. Utter, as trustee, obtained a judgment, on which execution was issued, against John E. Coker, on March 5, 1919, for something over \$2,000, on two notes waiving homestead and exemption rights. On May 8, 1919, the defendant in execution was adjudicated a bankrupt, and on September 21, 1919, he obtained his discharge in bankruptcy. Later certain assets were recovered and brought into the estate. Out of the proceeds of their sale the sum of \$1,445 in cash was set apart by the trustee to the bankrupt as a homestead. Before the 20 days expired, and while the money was in the hands of the trustee, an application was filed in the superior court of Oglethorpe county by R. G. Hackney, the father-in-law of J. E. Coker, bankrupt, and by A. H. Coker, administrator (a cousin of the bankrupt), on two notes given by the bankrupt, waiving the homestead, which were dated and executed after the homestead was set apart by the trustee and about 10 months after J. E. Coker had been adjudicated a bankrupt. This application asked that a receiver be appointed to take charge of the homestead fund. The bankrupt joined in this application, and asked that a receiver be appointed to take charge of the fund. J. H. Lumpkin was appointed under this petition, and is now receiver, holding the fund under order of the court. Before the 20 days expired, and while the money was in the hands of the trustee, an application was filed in the superior court of Oglethorpe county by A. B. Utter, as trustee, setting up the judgment that had been obtained in his favor some 60 days prior to the adjudication in bankruptcy, and asking that a receiver be appointed to take charge of said fund and apply the same to said execution, and that John E. Coker (the plaintiff in error), or anybody for him, be restrained from accepting this money from the trustee in bankruptcy. In this latter suit a stay of discharge was not asked, for the same had been granted. An order was taken consolidating the two cases. When the case was heard by the judge, under an agreement the petition of A. B. Utter as trustee

was taken up and passed on. In answer to this suit of Utter, trustee, Coker, the bankrupt, filed his defense, alleging that the plaintiff trustee had no right of action, for two reasons: First, because he had filed proof of claim on his execution in the bankrupt court; second, because under the Bankruptcy Act the judgment or lien obtained within 4 months prior to the adjudication in bankruptcy was null and void, and the bankrupt (defendant) had been discharged as against the debt.

After the case was submitted to the judge, J. E. Coker filed an amendment to his answer, which amendment was disallowed. After considering the case as submitted, the court rendered a judgment adjudging that "the \$1,445 now in the hands of J. H. Lumpkin, as receiver of J. E. Coker, is subject to the execution in favor of A. B. Utter, trustee of G. O. White, bankrupt, against J. E. Coker, issued from the city court of Lexington, March 5, 1919," and in said judgment it was also ordered that after paying certain costs specified the remainder be paid to the attorneys of record for the plaintiff in said execution. To the judgment of the court disallowing the amendment, and to the final judgment, the defendant excepted.

Stephen C. Upson, of Athens, for plaintiff in error.

T. W. Lipscomb, of Rome, and Erwin, Erwin & Nix, of Athens, for defendant in error.

BECK, P. J. Judgment affirmed. All the Justices concur, except Hill, J., absent, and—

ATKINSON, J. (dissenting). In the case of C., B. & Q. Ry. Co. v. Hall, 229 U. S. 511, 33 Sup. Ct. 885, 57 L. Ed. 1306, it was held:

"The decisions of the state and lower federal courts in regard to annulment of liens on exempt property have been conflicting, and this court now holds that section 67f annuls all such liens obtained within four months of the filing of the petition, both as against the property which the trustee takes for benefit of creditors and that which may be set aside to the bankrupt as exempt. In re Forbes, 186 Fed. Rep. 76, approved."

That ruling made by the Supreme Court of the United States is applicable to the facts of this case, and controls it adversely to the defendant in error, who did not obtain a valid judgment on his claim, which was provable in bankruptcy before the bankrupt obtained his discharge, which he might have done by a timely application for a stay of the discharge.

(152 Ga. 174)

IRVING et al. v. IRVING. (No. 2371.)

(Supreme Court of Georgia. Oct. 1, 1921.)

*(Syllabus by the Court.)***1. Wills §191—Not revoked by birth of "child" of bigamous marriage.**

Where one died leaving a last will and testament containing various bequests, and subsequently to the execution of the will a posthumous child was born to the testator, the child being the issue of a bigamous marriage, the testator having a living wife at the time of entering into the bigamous marriage, the birth of the child did not revoke the will.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Child—Children.]

2. Bastards §1—Statute held not to make child of bigamous marriage legitimate.

Such child was not made legitimate under the provisions of Civ. Code 1910, § 2935, relating to void marriages and legitimacy of offspring prior to the annulment of the marriage.

*(Additional Syllabus by Editorial Staff.)***3. Marriage §54—Bigamous marriages absolutely void.**

Bigamous marriages are absolutely void for all purposes.

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

In the matter of the estate of Lacy Irving, deceased. Application by Willie Bell Irving and another for probate of a will, to which Lena Irving filed a caveat. From a judgment sustaining the caveat, the propounders bring error. Reversed.

Lacy Irving died on December 6, 1919, leaving a last will and testament which contains various bequests to Willie Bell Irving, referred to in the will as his wife, and to certain named children of his. This will was offered for probate by Willie Bell Irving and J. W. E. Linder; and to the application for probate a caveat was filed by Lena Irving. One of the grounds of caveat—the one out of which springs the question to be determined here—is that subsequently to the death of Lacy Irving there was born to Willie Bell Irving a posthumous child of the said Lacy Irving, this child being known as Lacy Irving, Jr.; and it is contended that the birth of the child subsequently to the execution of the will, in which no provision is made in contemplation of such an event, revoked the will. The case was appealed to the superior court, and was submitted to the judge without the intervention of a jury, on the following agreed statement of facts:

"It is agreed that Lena Irving is the lawful widow of Lacy Irving, deceased, she and the said Lacy Irving having married in Key West, Fla., on October 26, 1898; that as the issue of this marriage between Lena Irving and Lacy

Irving there are three surviving children, Lewis Irving, age 20, Leroy Irving, age 19, and Lillian Irving, age 17; that about two years before his death the said Lacy Irving, while still lawfully married to Lena Irving, contracted in Fulton county, Ga., a second marriage with Willie Bell Irving; that on December 6, 1919, Lacy Irving died; that a few weeks after his death there was born to the said Willie Bell Irving a posthumous child of the said Lacy Irving, said posthumous child now being known as Lacy Irving, Jr.; that on August 7, 1919, Lacy Irving executed the instrument referred to in the petition and purporting to be a last will and testament. It is further agreed that the marriage between Lacy Irving and Willie Bell Irving was never annulled and declared void by a court of competent jurisdiction. It is agreed that said will is regularly and properly executed, and is entitled to probate unless same is revoked by the subsequent birth of the child referred to in paragraph 1 hereof."

After evidence submitted and argument of counsel, the court rendered judgment sustaining the caveat on the ground that the will had been revoked by the subsequent birth of a child to the testator. The propounders excepted.

Anderson, Rountree & Crenshaw, of Atlanta, for plaintiffs in error.

Wm. A. Fuller, of Atlanta, for defendant in error.

BECK, P. J. (after stating the facts as above). [1, 2] The ground of the caveat out of which springs the issue which this court has to determine does not show good ground for the refusal to admit the will to probate. Section 3923 of the Civil Code declares that—

"In all cases the marriage of the testator, or the birth of a child to him, subsequently to the making of a will in which no provision is made in contemplation of such an event, shall be a revocation of the will."

The word "child" as here used in this section, where it is declared that the birth of a child subsequently to the making of a will in which no provision is made in contemplation of such an event revokes the will, means a legitimate child. Such is its ordinary meaning in laws and statutes prescribing the rules of inheritance and property rights; and usually where the term "child" is allowed to include illegitimate children it is done under the provisions of statutes recognizing the rule just stated, and which make an exception to that rule. No doubt the court below recognized this doctrine, but the court evidently was of the opinion that section 2935 of the Civil Code, relating to void marriages and legitimacy of children, made the posthumous child, Lacy Irving, Jr., a legitimate child. This section reads as follows:

"Marriages of persons unable to contract, or unwilling to contract, or fraudulently induced to

contract, are void. The issue of such marriages, before they are annulled and declared void by a competent court, are legitimate. In the latter two cases, however, a subsequent consent and ratification of the marriage, freely and voluntarily made, accompanied by cohabitation as husband and wife, shall render valid the marriage."

This section does not have reference to bigamous marriages, but includes three classes of marriages: (1) Marriages between parties unable to contract; (2) marriages between parties unwilling to contract, that is, marriages procured by force or duress; (3) marriages where one of the parties is fraudulently induced to contract. Clearly the bigamous marriage does not fall within the last two classes; nor do we think it falls within the first class, that is, marriages between persons unable to contract. While the expression "marriages of persons unable to contract" might be sufficiently broad if we consider only the expression "unable to contract" to include marriages of persons one of whom had a living spouse, when we take the entire expression "marriages of persons unable to contract," we do not think that bigamous marriages were included, for the reason that a mere marriage ceremony between a man and a woman, where one of them has a living wife or husband, is not a marriage at all; it is a mere empty ceremony, and effects nothing and creates no status between the parties. Such a marriage is an absolute nullity, and may be treated so by the parties to such a ceremony and by all the world.

"The marriage of a man and woman, where one of them has a husband or wife by a prior marriage, who is then living and undivorced, is void, and not merely voidable. Being a nullity, no decree is necessary to avoid the same. *Reeves v. Reeves*, 54 Ill. 332; *Drummond v. Irish*, 52 Iowa, 41; *Blossom v. Barrett*, 37 N. Y. 434; 97 Am. D. 747; *Janes v. Janes*, 5 Blackf. 141; *Tefft v. Tefft*, 35 Ind. 44; *Glass v. Glass*, 114 Mass. 563; *Martin v. Martin*, 22 Ala. 86. A void marriage is good for no legal purpose, and its invalidity may be shown in any court, between any parties, either in the lifetime of the parties thereto, or after their death." *Cartwright v. McGown*, 121 Ill. 388, 12 N. E. 787, 2 Am. St. Rep. 105, 107.

[3] An almost unbroken line of precedents for this ruling, taken from the decisions of other states of this country, might be cited to support the proposition here stated. See annotations on the subject of bigamous marriages, whether void or voidable, in 9 L. R. A. 19160, 711. But this court has more than once held that bigamous marriages are absolutely void. In the case of *Murchison v. Green*, 128 Ga. 339, 57 S. E. 709, 11 L. R. A. (N. S.) 702, where the presumption of the validity of the marriage arising from the performance of the ceremony came in conflict

with the presumption of a continued life of a former spouse of one of the parties, neither presumption being aided by proof of extraneous facts, the presumption of the validity of the second marriage, it was ruled, will prevail over the presumption of the continuance of the life of the former spouse; and Presiding Justice Cobb, delivering the opinion of the court, gave as one of the reasons for holding that the presumption of the validity of the marriage should prevail that—

"The status of the woman is involved, as well as the legitimacy of children, and every reasonable presumption must be indulged which will relieve the woman of the charge of being a concubine and her children being declared bastards."

The converse of the proposition stated by the learned justice is that, if the first presumption had prevailed—that is, the continuation of the life of the former spouse—then the wife who became such by a bigamous marriage was a mere concubine, and her children who resulted from such bigamous marriage were illegitimate. And such we have concluded to be the law, and consequently that the birth of a child to a testator as the issue of a bigamous marriage, subsequently to the making of a will, does not work the revocation of the will, although no provision was made in the will in contemplation of the birth of such child. And it follows that the court below erred in sustaining the caveat on the ground that the birth of the posthumous child worked a revocation of the will of Lacy Irving.

Judgment reversed.

All the Justices concur, except HILL, J., absent.

(152 Ga. 160)

VAUGHN et al. v. VAUGHN. (No. 2331.)

(Supreme Court of Georgia. Sept. 30, 1921.)

(Syllabus by the Court.)

1. Homestead § 122—Grantees estopped to set aside deeds executed under order of court, on ground of collateral understanding not disclosed to judge.

"Parties who have taken a homestead of realty under the Constitution of 1868 shall have the right to sell said homestead and reinvest the same, by order of the judge of the superior courts of this state." Constitution of Georgia, art. 9, § 9, par. 1 (Civ. Code 1910, § 6590); *Yeates v. Donaldson*, 147 Ga. 335, 94 S. E. 465; Civ. Code 1910, § 3397. Where the head of a family and his wife, being the sole remaining beneficiaries of a homestead set apart in land under the Constitution of 1868, apply to the superior court under the above-quoted provision of the Constitution, and under Civ. Code 1910, § 3397 (relating to sales of homestead property), for authority to sell the homestead property at private sale, for

the purpose of reinvestment in other specified real estate, on the ground that the property to be obtained can be purchased for the price that the homestead estate will bring, and that the property to be obtained will be of equal value and produce more for rent than the homestead property, and on such application an order of sale for reinvestment is granted by the court, and the sale and reinvestment are duly made by the exchange of appropriate deeds between the parties in accordance with the order, and the sale is duly reported to the judge and the proceeding is ordered filed, and the provisions of the statute relating to such sales are otherwise carried out, the applicants for sale will be estopped thereafter from moving to set aside the deeds so executed between the parties, on the ground that there was a collateral understanding between them, not disclosed to the judge, that the exchange of the property would be made merely for convenience, to enable the grantee of the homestead property to sell it a higher price, and, if he failed to make a sale, that the deeds should be canceled.

2. Verdict—Direction.

Under the pleadings and the evidence, in a suit by the administrator of the head of the family and the widow against the purchaser of the homestead property, to cancel the deeds and restore the parties to their original status, the court did err in directing the verdict for the defendant.

Error from Superior Court, Carroll County; J. R. Terrell, Judge.

Action by O. O. Vaughn, administrator, and others, against J. T. Vaughn. From judgment for defendant, plaintiffs bring error. Affirmed.

T. G. Lewis, of Atlanta, and S. Holderness, of Carrollton, for plaintiffs in error.

Lloyd Thomas, of Tallapoosa, and Smith & Smith, of Carrollton, for defendant in error.

ATKINSON, J. Judgment affirmed. All the Justices concur, except HILL, J., absent.

(152 Ga. 149)

BECKCOM v. SMALL. (No. 2338.)

(Supreme Court of Georgia. Sept. 27, 1921.)

(Syllabus by the Court.)

1. Mortgages — 378—Security deed held to accomplish assignment of property, subject only to defeasible title under former deed.

A grantor in a duly recorded security deed executed under the provisions of Civ. Code 1910, §§ 3306, 3310, 6037, to secure a debt for the principal sum of \$25,000, besides interest and attorney's fees, executed a second security deed conveying the same property to a different person to secure a debt for the principal sum of \$7,935.65, with interest and attorney's

fees. The grantor remained in possession after execution of both deeds. Following immediately after the description of the land in the second deed were the words and figures: "There is a prior claim for \$25,000 in favor" of the grantee in the first deed. The second deed contained also a provision for accelerating maturity of the principal debt for failure to pay annual interest installments as they should mature, or taxes, and the like, and declared that the grantee or her assigns are "authorized to sell at public outcry, before the courthouse door, * * * to the highest bidder for cash, all of said property to pay said principal, with the interest thereon to the date of sale and the expenses of the proceeding, including fees of attorneys, if incurred, of 10 per cent. on the amount of the principal and interest due, after advertising the time, place, and terms of sale * * * once a week for four weeks prior to said day of sale, * * * and the said party of the second part * * * may make to the purchaser or purchasers of said property good and sufficient titles in fee simple to the same, thereby divesting out of the said party of the first part all right and equity that she may have in and to said property, and vesting the same in the purchaser or purchasers aforesaid." The grantee as holder of the second deed, without having paid off or acquired the first deed, undertook to exercise the power of sale expressed in the second deed, on the ground that default had been made in payment of the debt. The advertisement announced for sale "the equity of redemption" in the land, and described the debt and the power of sale as specified in the second deed. The advertisement concluded with the words and figures: "Said land is subject to a prior lien in favor of the [grantee named in the first deed] for the sum of \$25,000 and said property will be sold subject to said first lien." While the property was being so advertised the grantor instituted an action to enjoin the sale, on the grounds: (a) That the grantee had not paid off or otherwise acquired the first security deed. (b) The advertisement gives notice that the "equity of redemption" will be sold, whereas the power of sale conferred upon the grantee in the second deed does not authorize sale of the equity of redemption. (c) The advertisement is ambiguous and confusing, in that it fails to state accurately the status of the title, the statement being that the property "is subject to a prior lien," and will be sold subject to "said first lien" of the first deed, when in truth the grantee in the first deed holds "legal title to said property." At an interlocutory hearing the case was submitted upon the pleadings, from which the foregoing facts appear. The judge refused an interlocutory injunction, and the plaintiff excepted. Held:

As between the grantor and the grantee named in the second deed, the power of sale contained in such deed was valid, and authorized sale of the property under the conditions specified in the power, and the execution of the deed to the purchaser in pursuance of the sale. Such sale and conveyance would not divest or affect the title of the grantee named in the first deed or his successors in title, but, purporting to convey the property in fee sim-

ple, would accomplish an assignment of the property subject only to the defeasible title held under the first deed; and thus the conveyance would include all equity of redemption or equitable interest, by whatever name called, of the grantor in the second security deed. *Williams v. Foy Mfg. Co.*, 111 Ga. 856, 86 S. E. 927.

2. Mortgages ¶354—**Advertisement held sufficient.**

The advertisement was in substantial compliance with the power conferred, and was not invalid on account of either of the grounds of attack made upon it.

3. Injunction against sale properly denied.

The judge did not err in refusing an interlocutory injunction.

Error from Superior Court, Bibb County;
H. A. Mathews, Judge.

Action by E. G. Beckcom against Mrs. R. E. Small. From an adverse judgment, the plaintiff brings error. **Affirmed.**

Harris, Harris & Witman and Hall, Grice & Bloch, all of Macon, for plaintiff in error.
Jordan & Moore, of Macon, for defendant in error.

ATKINSON, J. Judgment affirmed. All the Justices concur.

(152 Ga. 1)

ETHRIDGE v. PITTS et al. (No. 2254.)

(Supreme Court of Georgia. Sept. 17, 1921.)

(Syllabus by the Court.)

1. Guardian and ward ¶81—**Superior court has jurisdiction to authorize guardian to sell legal or equitable interest in land.**

In this state the superior court since first established has been the court of equity, and as such has had jurisdiction, on petition, to which minors were parties (plaintiffs or defendants), to render during term decretal orders authorizing guardians to sell the lands of their wards, whether held by legal or equitable title.

2. Guardian and ward ¶81—**Superior court has jurisdiction to authorize guardian to sell legal or equitable interest in land.**

The court of equity was not deprived of such jurisdiction by the statutory adoption of the Code of 1863, which declared (section 1779) that "All sales of any portion of the property of the ward shall be made under the direction of the ordinary, and under the same rules and restrictions as are prescribed for sales by administrators of estates." Nor did the incorporation of the same provision in Code of 1868, § 1819, have such effect.

3. Guardian and ward ¶79—**Life estates** ¶27(3)—**Remainders** ¶16—**Superior court had jurisdiction to order sale of land, including interest of remaindermen and life tenant.**

In a will probated in 1865, a testator devised a plantation consisting of some 1,600 acres of land to his daughter during her life, "and immediately after the death [of his daughter] to go to and be vested in her child, children, or representatives of children, if any, surviving her." At that time she had two children, a daughter seven and a son five years of age. In 1867 another daughter was born to her. She never had other children. In 1867 a guardian was duly appointed by the ordinary for the persons and property of the three minors. In 1869, during a regular term of the superior court of the county of the residence of all the parties, where the land was situated, a judgment was rendered, upon the joint petition of the mother of the minors (the life tenant) and their appointed guardian, authorizing them, for the reasons alleged and shown, to sell at private sale to a named individual, and for its full value in cash, the entire interest or estate in some 200 acres of the land, situated at least a mile from the rest of the plantation, the proceeds of sale to be used in making necessary repairs on and in improving the balance of the plantation. *Held*, that the court had jurisdiction to render the judgment granting the power to sell, the facts submitted to the court authorized such order, and the sale thereunder passed to the purchaser the legal estate of the remaindermen in the land, as well as the life estate.

4. Sale by life tenant and guardian passed interests of remaindermen.

In view of the facts as agreed upon, and the rulings of law stated in the preceding notes, the trial judge, to whom the case was submitted without a jury, erred in adjudging that the remaindermen, under the devise referred to in the fourth headnote, were entitled to recover from the defendant, who is the devisee of the purchaser at the sale made by the life tenant and the guardian in 1869 under the decretal order of the equity court.

(Additional Syllabus by Editorial Staff.)

5. Statutes ¶243—**Abridging jurisdiction of equity strictly construed.**

Statutes abridging the jurisdiction of courts of equity must be strictly construed.

6. Guardian and ward ¶79—**Remainders** ¶16—**Ordinary would not have jurisdiction to grant order to convey contingent remainder of unborn children.**

An ordinary would not have jurisdiction on joint petition of life tenant and guardian of minor remaindermen in life to grant an order of sale which would convey a contingent remainder of unborn children.

7. Remainders ¶16—**Equity may order sale of contingent remainder of unborn children.**

A court of equity may grant a decretal order in a proper case to sell the contingent remainder of unborn children.

Error from Superior Court, Jones County; J. B. Park, Judge.

Action by P. T. Pitts and others against Della Ethridge. From an adverse judgment, the defendant brings error. Reversed.

In his will executed in 1859, and probated in solemn form in June, 1865, Thomas W. Choate devised some 1,600 acres of farm or agricultural lands, situated in Jones county, to his daughter, Mrs. Mary C. Pitts, during her life, and at her death "to go to and be vested in her child, children, or representatives of children, if any, surviving her." When the will was probated Mrs. Pitts had two minor children, Rebecca Elizabeth Pitts, about seven, and Peyton Thomas Pitts, about five years of age. Another child, Mattie Taylor Pitts, was born in June, 1867. Mrs. Pitts never had other children. Her husband having died, his father, Peyton Thomas Pitts, Sr., was thereafter appointed by the ordinary of Jones county, in 1867, guardian of the persons and property of the three minor children of Mrs. Pitts, and qualified as such. During the regular October term, 1869, of the superior court of Jones county proceedings were had at the instance of Mrs. Pitts, the life tenant, and Peyton T. Pitts Sr., as the next friend and guardian of the persons and property of her minor children, to obtain leave to sell a portion of the land covered by the devise above mentioned. These proceedings consisted of the joint petition of Mrs. Pitts, the life tenant, and of Peyton T. Pitts, Sr., as next friend and guardian of her three minor children, addressed "to the Hon. Philip B. Robinson, Judge of the superior court of the Ocmulgee circuit in said state," and praying, for the reasons set forth in the petition, for an order for the sale of lot of land No. 176, in the Sixth district of originally Baldwin, now Jones county, which constituted a portion of the 1,600 acres of land devised to Mrs. Pitts for life, with remainder in fee to her surviving children. The substance of so much of the petition as needs to be here stated is to the following effect: When Mr. Choate executed his will, and at the time of his death, he owned a large quantity of land, which was cultivated by his slaves. The land devised to his daughter for life, with remainder in fee to her children, consisted of about 1,600 acres. The tenements on this land and practically all of the personality of the testator were destroyed by Sherman's army in 1864. The slaves were emancipated; Mrs. Pitts and her three minor children have no property other than the land devised to them by the testator. They are unable to cultivate all of it. In its condition they cannot rent it to others. The tenements and fences must be rebuilt, and petitioners need money with which to have this done and to carry on farming operations. They have no means with which to

keep the taxes paid on all the land, and to keep it all would be burdensome to them. The lot No. 176 does not adjoin the balance of the 1,600 acres, but is a mile from any of it, and about two miles from the main body of the plantation. It is average pine land, without sufficient timber to keep it under fence for more than two years. Petitioners have negotiated with one Newton Ethridge to sell him lot No. 176 at a fair price, and greatly to the advantage of all having an interest therein; and "petitioners represent that all parties in interest are embraced in this petition, and that they have no other property than that devised by said will and as herein set forth." The prayer is for an order for the sale and conveyance of lot 176 by petitioners to Newton Ethridge on the terms agreed upon with him and as set forth, and that the proceeds of the sale may be used by petitioners in building necessary tenements, fences, repairing the farm, and carrying on its operations generally, the residue, if any, to be invested in state bonds, or put out at interest in the sound discretion of the petitioners. The petition was not filed; no process was prayed for or attached. Service was acknowledged by both of the petitioners on October 20, 1869, which was during the term of the court; and on the next day, still in term, the following judgment was rendered:

"Jones Superior Court, October term 1869. Upon hearing and considering the foregoing application it is ordered and adjudged that the said Mary C. Pitts and Peyton T. Pitts, Sr., guardian of the minor children of said Mary C. Pitts, be authorized to sell said lot of land No. 176, in the Sixth district of originally Baldwin, now Jones county, containing 202½ acres more or less, to Newton Ethridge, at and for the sum of \$1,600, it being shown that said sale is to the best interest of the said Mary C. Pitts and her children. It is further ordered that the said Mary C. Pitts and said Peyton T. Pitts, Sr., be authorized and directed to execute unto the said Newton Ethridge good and sufficient titles to said land upon payment in full of said sum of money. It is further ordered that the said Mary C. Pitts and the said guardian be authorized to use said money in the improvement and repairing the other lands of said Mary C. Pitts derived under the will of her deceased father, Thomas W. Choate; and the clerk of the superior court of Jones county is ordered to spread upon the minutes of said court this application, order, notice, and other papers attached. October 21, 1869. Philip B. Robinson, Judge Superior Court, Ocmulgee Circuit."

On December 28, 1869, Mary C. Pitts and Peyton T. Pitts, Sr., as guardian of her minor children, executed a deed to Newton Ethridge for the lot 176, in consideration of the sum of \$1,800 paid in cash, the deed reciting the material parts of the decree. Newton Ethridge went into possession of the lot, being the premises sued for in the present

case, immediately after the execution and delivery of the deed to him, and remained in possession until his death in March, 1901. He died testate, devising the land to his wife, Della Ethridge. The purchase price, \$1,800, paid by Newton Ethridge, was the full value of the life estate and remainder interest in fee to lot 176 at the time it was conveyed to Ethridge. Mrs. Mary C. Pitts, the life tenant, died in November, 1913, leaving surviving her son, Peyton Thomas Pitts, and her daughter Mattie Taylor Pitts. Her daughter Rebecca Elizabeth Pitts died in 1905, leaving several children. Mattie Taylor Pitts died in December, 1913, leaving children.

In September, 1914, Peyton Thomas Pitts, one of the remaindermen, and the children of Rebecca Elizabeth Pitts, as remaindermen, brought in Jones superior court this action in ejectment against Mrs. Della Ethridge, for the recovery of the lot of land No. 176. The children of Mrs. Mattie Taylor Pitts did not join them in the suit. The judge by consent tried the case without a jury, and on an agreed statement of facts the material portions of which are hereinbefore set out. The judgment was rendered in behalf of the plaintiffs and against the defendant for an undivided two-thirds interest in lot 176. It appears from this judgment that his honor was of the opinion that the order for the sale of the land, granted in 1869, was void, because—

“under the law and facts set out in the petition, which is a part of said agreed statement of facts in this case, that the judge of the superior court of said circuit had no authority to order the sale of the interest of the minors in the property in controversy, and said order which is attached to said petition, under the law as it existed at that time, in 1869, was void, and did not authorize the sale of the interest of the minors in said property. At the time of the date of said order, in order to sell the interest of wards in property, the ordinaries only had the legal authority to empower such sale.”

The defendant excepted, assigning error on this judgment.

F. Holmes Johnson and Willard W. Burgess, both of Gray, for plaintiff in error.

Jno. R. L. Smith and Grady C. Harris, both of Macon, for defendants in error.

FISH, C. J. (after stating the facts as above). 1. Section 1779 of the Civil Code, which went into effect on January 1, 1863, declared:

“All sales of any portion of the property of the ward, shall be made under the direction of the ordinary, and under the same rules and restrictions as are prescribed for sales by administrators of estates.”

The same language was contained in the Codes of 1868, 1873, and 1882. The act of

1889 (Civil Code 1895, § 2545; Civ. Code 1910, § 3064) provides that—

“By order, in term or vacation, of the judge of the superior court of the county of the guardian's appointment, guardians may sell the whole or any part of the estate of their wards, for reinvestment, upon such terms and at such time and place as said judge may order.”

The following section provides for the publication of notice of the application for sale, and that the application shall describe the property sought to be sold, the reasons for making the application, the property in which the guardian wishes to reinvest the proceeds of sale, etc. The next section is as follows:

“All other sales of any portion of the property of the ward shall be made under the direction of the ordinary, and under the same rules and restrictions as are prescribed for sales by administrators of estates.”

Except for the word “other” in the first line, this is the same language as that contained in the Codes of 1863, 1873, and 1882, as above noted. Administrators may sell lands of their intestates when necessary for the payment of debts or for distribution under an order of the ordinary, granted upon petition setting forth the reason for the application, and on publication of the prescribed notice; and all such sales, except of annual crops sent off to market, and of vacant lands, must be at public outcry and to the highest bidder. In view of these statutes, did the judge of the superior court, in 1869, have jurisdiction, while presiding over a session of the court, on a petition then presented by a life tenant and the guardian of minors owning a legal remainder interest in land, to grant, during term, a decretal order for the sale of such remainder by the guardian?

[1,2] The superior court has been the court of equity in this state at least since the judiciary act of 1799 (Digest of Laws 1802, p. 292) and the language used in reference to it by the Constitutions, as in that of 1868, has been that “the superior courts shall have exclusive jurisdiction in * * * equity cases.” In *Beall v. Fox*, 4 Ga. 404, it was said:

“The act of 1784 adopted the laws of England, adapted to our circumstances. The act of 1799 conferred equity powers on the superior courts, necessary to give to those laws a complete and practical application, for the benefit of the citizens of this state, in as full and ample manner, as the same existed in Great Britain, for the benefit of the subjects of that kingdom. We have not only adopted the laws of England suited to our circumstances, but we have created the necessary judicial machinery, to give to those laws a practical and beneficial effect, and such we understand to be the office and duty of a court of equity, and such we understand to have been the object of the Leg-

islature, in 1799, in conferring equity powers on the superior courts."

In *Jones v. Dougherty*, 10 Ga. 281, it was said:

"We have not only adopted the whole system of English jurisprudence, common law, and chancery, suited to our condition and circumstances, but * * * we have framed the necessary judicial machinery to give to that system a practical and beneficial effect, and that such is the office and duty of a court of equity, and such was the object of the Legislature of 1799, in conferring equity powers upon the superior courts."

And in *Mordecai v. Stewart*, 37 Ga. 375, it was said:

"The equity jurisdiction was created by the act of 1799. Cobb's N. D. 467; section 53 of the Judiciary Act. It was a special grant, and gave an exclusive jurisdiction. It authorized the superior courts to "exercise the powers of a court of equity" by such proceedings as were "usual in such cases." * * * Generally, equity jurisprudence embraces the same matters of jurisdiction and modes of remedy in Georgia as was allowed and practiced in England." Civil Code of 1863, § 3083; Id. 1868, § 3045.

And the language of this section is embodied in all subsequent civil codes.

[5] As was said by Justice Story, the origin of the jurisdiction in chancery over the persons and property of infants is quite obscure, and has been a matter of much juridical discussion. "But whatever may be the true origin of the jurisdiction of the court of chancery over the persons and property of infants, it is now conceded on all sides to be firmly established and beyond the reach of controversy. Indeed, it is a settled maxim that the king is the universal guardian to infants, and had, in the court of chancery, to take care of their fortunes." 3 Story's Eq. Jur. (14th Ed.) §§ 1743, 1752. In 14 R. C. L. 269, § 43, it is said:

"But is it also within the inherent and comprehensive power of a court of general equity jurisdiction, according to the great current of American decisions, to sell the land of infants lying within its jurisdiction when such sale is necessary. * * * The clearest case for the exercise of such a power is when the sale is necessary to procure funds for the infant's proper maintenance and education; and the weight of authority seems to be that it does not extend to sales merely because it appears to be for the general interest of the infant, though there is not lacking very respectable authority for the power to sell real estate when shown to be for the manifest interest of the minor. The jurisdiction does not spring from, nor is it dependent upon, the character of the estate, whether absolute or contingent, whether in possession, or the possession postponed until the happening of a future event. It rests upon the power and duty of the court to protect infants, to take care of and preserve their estates while under disability debarring them from the administration of property. The courts would be more reluctant to decree the

sale of an estate in remainder, or of a contingent estate, lest it might operate a sacrifice of the interests of the infant; but the jurisdiction exists even as to such estates, though it may be more seldom and more sparingly exercised, and it has been held that such a sale could be made, though contingent interests were vested in persons whose residences and names were unknown, or even in possible children yet unborn."

See, also, 21 C. J. 121, § 99.

Many cases are cited in support of the text quoted, and a few to the contrary of some portions thereof. Other text-writers, and many adjudicated cases might be cited to the same effect.

"In general it may be said that in all the states having the complete equity system, the original jurisdiction of chancery must be considered as remaining in full force and effect, notwithstanding the jurisdiction given to the probate courts, unless the constitutional or statutory provisions creating these courts, by express, negative, prohibitory language, take away the former chancery jurisdiction, or unless by these statutes the probate jurisdiction is given in such affirmative and exclusive language as to raise necessary implication that it was the intention to displace the former corresponding chancery powers." 21 C. J. 120, § 98, note 63.

Statutes abridging the jurisdiction of courts of equity must be strictly construed.

This court has decided a number of times that a judge of the superior court, at chambers, was without authority, prior to the act of 1889 (Civil Code of 1910, § 3064), upon a petition then presented, to order a sale of the legal estate of minors in realty, although it may be represented as beneficial to them. *Webb v. Hicks*, 117 Ga. 335, 43 S. E. 738, and cases cited; *Morehead v. Allen*, 131 Ga. 807, 63 S. E. 507, and cases cited; *Powell v. Heyman*, 143 Ga. 728, 85 S. E. 891. These decisions were evidently based mainly upon the grounds that chancery jurisdiction in this state was conferred upon the superior courts, not upon the judges thereof, and that the judges acting in vacation were not courts of equity (*Milledge v. Bryan*, 49 Ga. 397), because "the judges of the superior courts of this state can do no act nor grant any decree in vacation unless it be authorized by statute" (*Rogers v. Pace*, 75 Ga. 436), and because "the power of a judge of the superior court to authorize, in vacation, a sale of the legal estate of a minor can be derived only from a statute" (*Mitchell v. Turner*, 117 Ga. 958, 960), 44 S. E. 17.

In *Milledge v. Bryan*, supra, it was said: "The general rule was by an application to the court of ordinary." In *Knapp v. Harris*, 60 Ga. 398, 408, it was said:

"Equity may, in some cases, interfere with the administration of the estates of deceased persons, or direct the management and disposition of property belonging to minors; but, gen-

erally, executors, administrators and guardians are to resort to the court of ordinary for orders of sale, and such judgments as are necessary to supplement their general powers."

From these quotations it appears that the jurisdiction of a court of equity—the superior court—to order the sale of a minor's property was not entirely taken away by the section of the Code authorizing ordinaries to exercise such power. In *McCamy v. Higdon*, 50 Ga. 629, it was held:

"A deed purporting upon its face to have been made by the guardian of a minor, under the authority of a decree of the superior court, is inadmissible in evidence without the production of said decree."

There is a clear implication that if the decree had accompanied the deed the instrument would be admissible; and, further, that a decree of the superior court, authorizing a guardian to sell his ward's estate was valid.

The decisions holding that the judge of the superior court had no power to grant an order to a guardian to sell the legal estate of his ward all stressed the point that the judge had no power to grant such order in vacation, and on a petition presented in vacation, thereby raising the strong implication that if the petition had been presented to the judge when he was presiding over a session of the court, and he had granted an order for such sale during term, it would have been valid. As was said in *Richards v. East Tenn. etc., Ry. Co.*, 106 Ga. 614, 634, 33 S. E. 193, 201 (45 L. R. A. 712):

"As far as this court has ever gone is to declare that the chancellor has no power to grant at chambers an order for the sale of the legal estate of minors."

It has never since gone further.

There are several decisions of this court to the effect that by a decretal order of the superior court, granted during a session thereof, upon a petition to which the minors are parties, plaintiff or defendant, a guardian may be authorized to sell the lands of his minor ward, whether held by legal or by equitable title. In *Rakestraw v. Rakestraw*, 70 Ga. 806, the will of the testator was probated in April, 1878. The widow was named as executrix, and qualified. Certain realty was devised to the widow for life, with remainder to testator's children. She filed a bill in her own right, and as next friend of the six minor children of the testator, making his three adult children defendants, and alleging that the rents, issues, and profits of the land so devised were not sufficient for the support of herself and the minor children. The prayer was that she be allowed to sell such land or a portion thereof for the support of herself and the minor children. It was held (in 1883) that it was—

"competent for the life tenant to waive the life estate in the property devised; and this would vest the whole estate in the children; and it would be in the power of a court of equity to decree a sale of the whole or a part of the property for the support, education, and maintenance of the children and the support of the widow. The court could hear evidence as to the probable value of the life estate, and decree to the widow such sum as would be equal thereto, and could, by proper order, protect the remainder for the use of the children, or decree that the same be turned over to the guardians of the minors and to those children who have become of age."

Also:

"An amendment should be made specifically, setting forth the property constituting the estate held by the widow, and stating her willingness to surrender her life estate," and "it seems to be the policy of the law to provide for the support of the widow and minor children, and the court should in all proper ways forward and carry out this policy."

That was a clear-cut holding that a court of equity could grant an order for the sale of the legal estate of minors.

In *Sharp v. Findley*, 71 Ga. 654, the executor of a will filed a petition, to which legatees were parties, and minor legatees were represented by a guardian ad litem praying for an order, at chambers, for the sale of the realty of such infants. Chief Justice Jackson in delivering the opinion (at page 665) said:

"The very minute this petition came before this chancellor and disclosed the fact that the land of infants was involved, his wards were before him, and the case was concerning 'an estate of the wards of chancery.' The case was made where these wards were suffering or likely to suffer; where their property must be changed, so as to realize for them the necessities of life, and it was necessary that his protective powers be exercised to make such decree as would relieve that necessity, and at the same time protect the estate by looking to the reinvestment and preservation of the fund. Again, the 'proceedings' to 'be had therein' are to be such 'as the necessity of each case may demand.' Of that necessity he is the judge and the only judge. If the infant be not safe in his breast, where shall he look for help? If chancery protect not its wards, what guardian, what law, can protect them? I had rather confide an infant to the custody and care of an honest judge than to any jury ever sworn to find facts and apply law."

In *Mitchell v. Turner*, *supra*, it was said (referring to the above quotation from *Sharp v. Findley*):

"The language of the Chief Justice is manifestly sound as applied to applications filed in term, as were those in the *McGowan* and *Richards* Cases, *supra*, and it was with reference to such applications that those cases approved the language used in *Sharp v. Findley*. The language, when applied to proceedings instituted in vacation, is opposed to the rulings made

In many cases, both before and after the Sharp Case, and it has never been followed in a case where the proceedings were had and the order of sale granted at chambers."

Richards v. East Tenn., etc., Ry. Co., supra, was an especially well-considered case, as will readily appear from a perusal of the majority opinion delivered by Justice Lewis, and the dissenting opinion by Chief Justice Simmons. As several rulings made by the majority in that case bear directly on and control questions involved in the case at bar, we quote the following headnotes from the majority opinion:

"1. The jurisdiction of equity over the estates of wards of chancery is broad, comprehensive, and plenary.

"2. When one holds title to realty in trust for the benefit of a mother and her minor children during the life of the mother, but is not clothed with the title to the legal fee in remainder which vests in the children, he may apply to a court of equity for a sale of the entire property, including the legal as well as the equitable estate, the purpose of the application being for the benefit of the children as well as the mother. The moment such an ex parte petition comes before the chancellor and discloses the fact that the legal as well as the equitable estate of infants is involved, they become his wards, and the case is one concerning, 'an estate of the wards of chancery'; and accordingly the chancellor has jurisdiction to grant in term an order to sell the entire property, the minors being properly made parties and represented before him.

"3. The petition of the trustee for the sale of the premises in dispute having been made and passed upon prior to the act of 1876, requiring personal service on minors, the appointment of a guardian ad litem for them, and his appearance and answer to the petition, were sufficient to give the court jurisdiction of their rights.

"4. Where such a trustee petitions for the sale of the entire property embraced in the conveyance to him, for the purpose of supplying the immediate necessities of all the beneficiaries, including the children, and of making permanent investments for their benefit, an order granted to sell the property in accordance with the petition in effect directs an absolute sale of the entire estate, both legal and equitable. * * *

"5. Since the first Code went into effect on the 1st of January, 1863, it has never been necessary, in order to give the chancellor jurisdiction to direct a sale of the legal and equitable estate of minors in the same property, that a regular proceeding in equity be instituted; but such a sale may be ordered by the judge without a jury, upon an ex parte petition, and at the term of the court when the petition is filed or presented.

"(a) In the absence of any legislative provision to the contrary, it would seem that equity has inherent jurisdiction to order a sale of the legal estate of minors for reinvestment, whenever to the minors' interest. Be this as it may, the present case is distinguishable from one where the sole purpose is to sell such an estate for reinvestment. This is so because the petition for sale now under consideration in-

volved equitable rights over which the superior courts of this state clearly had jurisdiction.

"6. Where such a petition had entered thereon 'January adjourned term, 1871,' and the order of sale had entered on it at the place of the judge's signature, 'January adjourned term, May 12, 1871,' and it appeared that the judge was actually on that day holding a regular session of such adjourned term, this was sufficient to authorize the presumption that the order in question was granted in open court, during its regular session in the transaction of term business, and was therefore a proceeding in term and not at chambers. The facts that the petition was not filed, that the case was not entered on the regular docket of causes for trial, that no process was attached to the petition, and that the order of the sale directed a record of the proceedings on the minutes, as is usually the case when such orders are granted at chambers, were not sufficient to overcome this presumption; especially in view of the principle that the court should adopt that construction which treats the order as completely legal, and not as partially illegal and to that extent void.

"7. Even if the proceedings to sell the property were defective on account of the omissions to file the petition, attach process, and docket the case, these were mere irregularities which did not render void the judgment of a court that had jurisdiction over the persons and subject-matter of the suit; especially where the interests of innocent purchasers are involved, with whose rights equity is always loath to interfere."

In that case there was a trust estate for the joint use of a mother and her minor children during her life, with a legal remainder in fee to the children at the death of the mother. The main point in the case, however, was as to the power of a judge of the superior court to grant in term, upon a petition then presented to him, a decretal order for the sale of the legal estate in remainder of wards; and the majority of the court held, in effect, that the judge had jurisdiction so to do. This construction was placed upon the ruling in the *Richards Case*, in *Reed v. Alabama, etc., Iron Co.*, 107 Fed. 586 (Circuit Court N. D. Georgia), wherein District Judge Newman delivered an able opinion, the headnotes to which, so far as here relevant, being as follows:

"Under the law of Georgia, as settled by the decisions of its Supreme Court, a court of equity has inherent jurisdiction to order a sale of the legal estate of minors in real estate for reinvestment, where it is to the minors' interest, at least, when grounds exist, aside from the interest of the minors, which make it proper to invoke the jurisdiction of equity in the premises. * * *

"2. Where an estate in remainder in comparatively unproductive property is vested in the children of the life tenants who shall be living at the time of their death, and there are a number of such children in being, who are minors and in need of funds for their maintenance and education, a court of equity has the inherent power, having before it the life tenants and the remaindermen in esse, with their

guardian ad litem, and on a proper showing, to render a decree for the sale of the property and the reinvestment of the proceeds so as to produce an income for the children; and such decree will bind children afterwards born, provided it has made proper provision for the investment and protection of their interests in the proceeds."

In line with the ruling covered in head-note 2, just quoted, is a decision of this court in *Cooney v. Walton*, 151 Ga. —, 106 S. E. 167. There a testator died in March, 1918. The will devised certain realty to his wife for life, remainder in fee to his issue living at her death, and, if none, then to named persons. Included in the realty so devised was a city lot on which there were buildings in need of repair, and therefore could not be advantageously rented. The life tenant brought suit against the only issue of the testator, an adult son, who was childless, and the contingent remaindermen named in the will, the purpose of the suit being to obtain a decree for the sale of the property, including every possible interest therein of contingent remaindermen in being or any possible future issue of the testator's son, for reinvestment under the same limitations provided in the will. It was held that the court had jurisdiction of the parties and the subject-matter, and that the decree rendered, authorizing the sale as prayed for, was binding upon all parties to the suit, and upon any unborn issue of the son of the testator who might be in life at the death of the life tenant. The rulings in this case were followed in *Donaldson v. Donaldson*, 151 Ga. —, 106 S. E. 272.

In *Palmer Brick Co. v. Woodward*, 135 Ga. 450, 60 S. E. 527, this court construed the *Richards Case*, supra, as holding in effect that a judge of the superior court, on a petition presented during term by a guardian for the sale of his ward's legal estate, had jurisdiction to grant, during a session of the court, a decretal order for the sale. In that case *Howell*, in 1876, conveyed certain land to Woodward in trust for the sole and separate use of his wife "during her life, and then to her children, if she should leave any, by her present or any future husband." In 1896 an application addressed to the judge of Fulton superior court (the land lying in Fulton county), "exercising jurisdiction in chancery therein"—was made by Woodward, calling himself trustee, for an order to lease the property conveyed in the deed, for 20 years, to the Palmer Brick Company for it to use the clay in the land for making brick, and for other purposes. The life tenant acknowledged service on the petition, and stated therein that she united with the petitioner in the application, and requested the court to grant the same. The minor remaindermen were served, and a guardian ad litem was appointed for them, who recommended the granting of the order, as it would be for

the best interest of the beneficiaries. The order as prayed for was granted in term. It was, among other things, held:

"The petition having been considered and passed upon in term time, the minors [represented by guardian ad litem] became wards of chancery, and the order granting the application to lease the property was binding upon the defendant in error [a remainderman]. This is true although the deed may have created no valid trust, and the remainder estate conveyed to the minors was a legal estate. * * * The minors having duly been served and being represented by a guardian ad litem, who filed an answer in their behalf, and the proceedings being in term time and the minors having become wards of chancery, the absence of process did not vitiate the proceedings. * * * The contract of lease made was authorized by the terms of the order. * * * The court erred in granting an injunction restraining the plaintiff in error 'from mining, digging, or removing any soil, dirt, or clay from the premises described in the petition.'"

It is clear that the deed involved in that case did not create a valid trust for Mrs. Woodward, as it was executed in 1876, when she was sui juris under the act of 1866, and no trust could therefore be created for her. No attempt was made to create a trust for the remaindermen. The life estate of Mrs. Woodward was a legal estate, as was the estate of the remaindermen. That decision is directly applicable to the case at bar. It was not founded upon the act of 1889, and could not have been based upon that act (Civil Code 1910, § 3064), because it was not a sale for reinvestment, but a lease the proceeds of which were to be consumed in their use. The decision does not refer to that act. The fact that the order of the judge of the superior court, granted during term, authorized a lease for 20 years of the land (in which the remaindermen had a legal estate), to be used for the manufacture of brick, could not, of course, differentiate, on principle, such order from one authorizing a sale of the legal interest of the remaindermen in the land. While the remaindermen in that case, who had no general guardian, were represented by a guardian ad litem when the order for the lease was granted in term, there was no necessity for a guardian at litem in the case at bar, wherein the order for the sale of the land was granted in term, for the reason that the minors were represented by the guardian duly appointed for their persons and property by the ordinary. In the cases we have cited in support of the doctrine that a judge of the superior court, on a petition presented while he is presiding over a session of the court, by a guardian for the sale of the legal estate of his ward, has jurisdiction in term to grant an order for such sale, we say that in such cases the orders for the sale so granted by the judge of the superior court were passed since the Civ-

11 Code of 1863, wherein first appeared the section that:

"All sales of any portion of the property of a ward shall be made under the direction of the ordinary, and under the same rules and restrictions as are prescribed for sales by administrators of estates"

—and, with the exception of the Woodward Case, prior to the passage of the act of 1889, authorizing judges of the superior court to grant, either in vacation or in term time, orders for the sale of a ward's property for reinvestment. It clearly appears, therefore, that this court in none of the cases cited was of the opinion that the section of the Code, as to ordinaries granting orders to guardians for the sale of the estate of their wards, deprived the superior courts, as courts of equity, of the jurisdiction to grant, during term, on petition then presented, decretal orders for the sale of the estates of wards, whether legal or equitable. Judge Powell in his excellent work *Actions for Land*, § 254, and at page 320, says:

"Minors are wards of chancery. The jurisdiction of equity over the estates, both legal and equitable, of wards in chancery is broad, comprehensive, and plenary. The superior courts are the courts of equity in this state. Hence, by a decree of the superior court, granted during a session of the court, upon an equitable petition to which the minors are parties (plaintiff or defendant), a guardian may be authorized to sell the lands of his minor ward, whether held by legal or by equitable title."

[3,4] There were controlling reasons why the court of equity, and not the ordinary, had jurisdiction to grant the order for the sale of the land involved in this case. The land, as we have seen, was devised to the widow for life, with remainder to her surviving child or children. She and her children, all of whom were minors of tender years, had practically no other property than their interest in the devised lands, which constituted a plantation of some 1,600 acres, the tenements on which had been destroyed by federal troops during the then recent war; and the fences thereon needed rebuilding, in order that the lands could be rented and the widow and children supported. The duly appointed guardian for the minors and their mother, the life tenant, found a man, Newton Ethridge, who was able and willing to purchase the lot 176, which was not contiguous to the balance of the plantation of some 1,200 acres, but situated a mile therefrom, and to pay the full value of the entire interest therein—the life estate of the widow and the remainder estate of her surviving child or children. There was an actual necessity, in view of the circumstances, that the lands be put in condition to be rented, that money for the maintenance of the widow and children could be secured. She and the guardian evidently believed it would be best for all interested

in the lands that the entire interest in lot 176 be sold to Ethridge at private sale, for the prearranged price, the full value of the entire interest. The ordinary did not have jurisdiction to grant an order for such a sale. The only power he had under the statute was to grant an order to the guardian to sell the legal estate in remainder of his wards in the land at public sale to the highest bidder, and any prearranged agreement to sell to a particular person at a given sum would, if carried out, have rendered such sale voidable. Moreover, is it not clear that, at a public sale, to the highest bidder, of the legal estate alone of the remaindermen, it would, on account of the uncertainty of the life estate, bring an uncertain and inadequate price? Such a sale would necessarily be speculative. As it happened, the widow, who owned a life estate in lot 176, sold under order of the superior court, lived for about 44 years after the sale. Of course she might have lived only a very short time. All of such uncertainty as to price was avoided by the widow and guardian uniting in an application to the court of equity for leave to sell the entire interest in the land to a named person for its full value.

Again, the jurisdiction to order the sale of the minors' estate was improper for the ordinary, and proper for chancery, because the minors did not have a clear and fixed title, but a title affected by the chances of survivorship, and because there was a contingent remainder to unborn children. The devise was to the widow for life, and at her death to such child or children or representatives of any as might survive her. Under the devise any child or children of the life tenant living at her death, or the descendant or descendants of such, would be entitled to share in the lands devised. One child was born in 1867, after the probate of the will, and survived the life tenant; there might have been others.

[5,7] The ordinary did not have jurisdiction, upon the joint petition of the life tenant and the guardian of the minor remaindermen then in life, to grant an order of sale of lot 176 which would convey the contingent remainder to unborn children; but this court and others have decided that a court of equity could grant a decretal order in a proper case to sell the contingent remainder of unborn children. *Cooney v. Walton*, *Donaldson v. Donaldson*, and *Reed v. Alabama*, etc., *Iron Co.*, *supra*, and cases cited.

We have reached the conclusion from the foregoing that the trial judge erred, in view of the agreed statement of facts and the law applicable thereto, in holding that the order of sale involved in the case was not valid, and that the several plaintiffs in the court below were entitled to recover.

Judgment reversed.

All the Justices concur.

(152 Ga. 162)

(198 S.E.)

SOUTHERN EXCH. BANK v. POPE.
(No. 2156.)

(Supreme Court of Georgia. Sept. 30, 1921.)

(Syllabus by the Court.)

1. Pleading \S 248(8)—Petition held not to set forth new cause of action.

The amendment to the petition did not set forth a new cause of action, and it was properly allowed.

2. Banks and banking \S 226—Petition against bank converting special deposit in another bank held sufficient.

The petition set forth a cause of action; the special demurrer to it was not meritorious; overruling the demurrers was not error.

3. Merits—Instructions—evidence.

The case upon its substantial merits is controlled by the legal principles announced in the second division of the opinion; the request to charge was, so far as consistent with the law of the case, covered by the general charge; the verdict was authorized by the evidence; and in none of the grounds of the motion for a new trial does cause for a reversal of the judgment below appear.

(Additional Syllabus by Editorial Staff.)

4. Banks and banking \S 153—Bank an agent for deposit for specific purpose.

Where money or property is delivered to a bank for some designated purpose, in using the deposit the bank acts as agent of the depositor, and, if it fails to apply it or misapplies it, it may be recovered as a trust deposit, and the agency is revocable by the depositor at any time before the purpose of the deposit has been accomplished, and a mere parol direction is sufficient to create such a deposit.

5. Banks and banking \S 153—One aiding bank in diversion of specific deposit liable.

When a bank becomes the agent of a depositor by accepting from him a deposit for a designated purpose, the least turning aside by the bank of the funds is legally a wrongful act and subjects any person who knowingly aids in such diversion to full responsibility.

6. Banks and banking \S 116(1)—Notice to president notice to bank.

Notice to the president of a bank of facts affecting its interest is imputed to the bank.

7. Principal and agent \S 172—Agent cannot repudiate act in part.

A principal cannot ratify an act of his agent in part and repudiate it in part, and, if he receives money or other benefit under a contract of his agent, he must restore it upon demand or account for it.

8. Banks and banking \S 226—Petition held to definitely inform bank aiding in diversion of special deposit as to facts giving notice.

In action against bank which aided in diversion of a specific deposit in another bank, held, that the petition was not subject to demurrer on the ground that it did not definitely

and fully inform defendant of facts that imparted to it such knowledge of the facts and circumstances that put it on notice of the special deposit and trust.

Error from Superior Court, Wheeler County; E. D. Graham, Judge.

Action by Daniel Pope against the Southern Exchange Bank and others. From judgment for plaintiff, the named defendant brings error. Affirmed.

Daniel Pope sued the Bank of Alamo of Wheeler County, the Southern Exchange Bank of Dublin, Laurens County, and C. R. Williams of the latter county. The substance of the petition here material is to the following effect: Pope, as treasurer of Wheeler county, had a deposit account with the Bank of Alamo, subject to his checks drawn in such official capacity, and subject also to warrants drawn on him as treasurer by the board of commissioners of roads and revenues of that county in favor of those to whom the county was indebted. On April 23, 1915, the board drew an order or warrant on Pope as treasurer of Wheeler county, in favor of F. P. Helfner, for \$4,755.31. This warrant was held for collection by the Bank of Wheeler County, and was presented by that bank to Pope for payment, who directed that the warrant be presented for payment to the Bank of Alamo. This was done; whereupon, the Bank of Alamo informed Pope that he as treasurer did not have a sufficient fund on deposit in that bank to pay the warrant, and that the deficiency was approximately \$2,500. Pope thereupon, as treasurer of Wheeler county, drew a check on the Farmers' Bank of Glenwood, payable to the Bank of Alamo, for the sum of \$2,000, at the same time giving to the Bank of Alamo his check, as treasurer, on the Wheeler County Bank for the sum of \$500. These checks were delivered by Pope to the Bank of Alamo in accordance with an express agreement between him and that bank that the two checks were given and were to be used only for the specific purpose of paying the county warrant drawn on him as treasurer in favor of Helfner by the board of commissioners. The Bank of Alamo sent the \$500 check to the Wheeler County Bank, and it was paid. The Bank of Alamo delivered its check on the Southern Exchange Bank, its correspondent, to the Bank of Wheeler County for an amount sufficient to pay the balance due on the county warrant in favor of Helfner, and deposited with the Southern Exchange Bank the check for \$2,000, drawn by Pope as treasurer on the Farmers' Bank of Glenwood and in favor of the Bank of Alamo; this check "to be credited [by the Southern Exchange Bank] to the account of the Bank of Alamo, for the pur-

pose of paying the draft of the Bank of Alamo on said Southern Exchange Bank, given to pay said order," or warrant. The Southern Exchange Bank refused to pay the check drawn on it by the Bank of Alamo and in favor of the Bank of Wheeler County; whereupon, Pope stopped payment by the Farmers' Bank of Glenwood of the check for \$2,000 drawn by him on it and in favor of the Bank of Alamo.

Thereupon the cashier and president of the Bank of Alamo assured Pope that the check of that bank on the Southern Exchange Bank and in favor of the Wheeler County Bank would be paid if he would permit payment of his check for the \$2,000 on the Farmers' Bank of Glenwood. Pope thereupon agreed to allow payment of his check, and it was paid to the Southern Exchange Bank; but that bank refused the check drawn on it by the Bank of Alamo for the purpose of paying the Wheeler County Bank the amount of the county warrant to Helfner, and Pope as treasurer was forced to pay Helfner "from other funds in the treasury of said county of Wheeler." The Southern Exchange Bank, with knowledge that Pope's check on the Farmers' Bank of Glenwood was given by him to the Bank of Alamo for the special purpose of being appropriated, together with other funds he had on deposit in the Bank of Alamo, to the payment of the county warrant drawn on him as treasurer, appropriated such \$2,000 in paying existing indebtedness due the Southern Exchange Bank by the Bank of Alamo, and refused to pay any part thereof to Pope, or to the Bank of Alamo. The Bank of Alamo was insolvent when the county warrant was presented to it for payment, and has since continued in that condition; and its cashier falsely represented to Pope that the bank would and could pay the county warrant with the money of his on deposit, together with the amount of his checks for \$2,500. Williams, the president of the Southern Exchange Bank, knew of the insolvency of the Bank of Alamo during the transactions set forth in the petition, and the Southern Exchange Bank had received from the Bank of Alamo large quantities of its paper for the purpose of giving the Southern Exchange Bank preference for whatever amount might be due it in case the Bank of Alamo should have to discontinue its business. Among others, there were prayers in the petition that the Bank of Alamo be enjoined from disposing of any of its assets and preferring any of its creditors, that a receiver be appointed to take charge of its assets, and that plaintiff have judgment against all of the defendants.

Over objection of the defendants, an amendment to the petition was allowed, which in substance set up that after Pope had stopped payment of his check for \$2,000 drawn on the Farmers' Bank of Glenwood

and in favor of the Bank of Alamo, and while the check was in the possession of the Southern Exchange Bank, that bank, through its president, Williams, offered and proposed that, if Pope would allow his check paid, the Southern Exchange Bank would pay the check drawn by the Bank of Alamo on the Southern Exchange Bank and in favor of the Wheeler County Bank, for the purpose of paying the county warrant; that Pope thereupon agreed to allow the Farmers' Bank of Glenwood to pay his check; but that the Southern Exchange Bank thereafter refused to pay the check drawn by the Bank of Alamo on it in favor of the Bank of Wheeler County, and in settlement of the county warrant, and refused to pay Pope any part of the \$2,000. The Southern Exchange Bank demurred to the petition generally and specially. It is also answered, denying all the material allegations except such as it could neither admit nor deny for want of sufficient information. The Bank of Alamo made no defense, and a verdict was directed against it. A verdict was rendered against the Southern Exchange Bank for the sum of \$2,000 and interest thereon. It moved for a new trial, which was overruled, and it excepted, assigning error upon that ruling, and also upon exceptions pendente lite to the allowance of the amendment to the petition and the overruling of its demurrers thereto. Williams seems in some way to have dropped out of the case, and there were no rulings or findings as to him.

Larsen & Crockett, of Dublin, for plaintiff in error.

W. S. Mann, of McRae, for defendant in error.

FISH, C. J. (after stating the facts as above). [1] 1. The amendment to the petition was properly allowed over objection by the defendant "that it was irrelevant and immaterial and changed the cause of action and set up a new cause of action."

[2-4] 2. Nor was it error to overrule the demurrers to the petition.

"A deposit may be for a specific purpose; as where money or property is delivered to the bank for some particular designated purpose, as a note for collection, money to pay a particular note or draft, etc. While such a deposit is sometimes termed a 'special deposit' and partakes of the nature of a special deposit to the extent that title remains in the depositor and does not pass to the bank, yet it seems more accurate to look on this as a distinct class of deposit. In using deposits made for the purpose of having them applied to a particular purpose, the bank acts as the agent of the depositor, and, if it should fail to apply it at all, or should misapply it, it could be recovered as a trust deposit; and the agency created by the deposit is revocable by the depositor at any time before the purpose of the deposit has been accomplished." 7 O. J. 632, § 307,

where many cases are cited in support of the text in notes 7, 8, 9, 10, 11.

Among the cases cited are *McGregor v. Battle*, 128 Ga. 577, 58 S. E. 28, 13 L. R. A. (N. S.) 185, and *Howard College v. Pace*, 15 Ga. 486. It was held in the latter case:

"Where money is paid by A., into the hands of B., to remain at the disposal of C., the right to that money continues in A. until B. gives and C. takes credit for it, or B. actually pays it to C.; up to this period B. is the agent of A. only, and A. may countermand the authority to make the payment; in the same manner as a person who sends another to pay money may stop him before he arrives at the place where it is to be paid, and require him to deliver it back."

Also, *Mayer v. Chattahoochee National Bank*, 51 Ga. 325(2), was cited. It was there held:

"When A. deposits money in a bank, with directions that it is to be paid out to a check which he has given, or will give, to C., the money is still the money of A. until the bank either pays it, or promises C. to pay it, or unless it be deposited at the instance of procurement of C., or under an arrangement with him."

In *Dolph v. Cross*, 153 Iowa, 289, 133 N. W. 669, it was held that a depositor, making a deposit for the specific and stated purpose of meeting checks which he had just issued, binds the bank by the special conditions imposed, and does not make the bank merely the debtor of the depositor, as is the case with general deposits. And it has been held that a parol direction is sufficient to create a "specific deposit" or a deposit for some specific, designated purpose.

[5] Of course, it is the duty of the bank, when it becomes the agent of a depositor by accepting from him a "specific deposit," or one for a particular designated purpose, to use the deposit for that purpose and no other; and it has been held that the least turning aside by an agent of funds of his principal, held by the agent for a particular, designated purpose, is legally a wrongful act, and subjects any person who knowingly aids in such diversion to full responsibility. 21 R. C. L. 833, § 15.

[6] Notice to the president of a bank of facts affecting its interest is imputed to the bank. *Fouche v. Merchants' National Bank*, 110 Ga. 827(3), 36 S. E. 256, and cases cited; *Faircloth v. Taylor*, 147 Ga. 787(4), 95 S. E. 689; *Balfour v. Fresno Canal, etc., Co.*, 123 Cal. 395, 55 Pac. 1062; *Magee on Banks and Banking* (3d Ed.) 120; 1 *Michie on Banks and Banking*, 825, § 116(1); *Id.*, 834, § 116(3).

[7] A principal cannot ratify an act of his agent in part, and repudiate it in part. He must either ratify or repudiate it in its entirety; if he receives money or other benefit

under a contract of his agent, he must restore it upon demand, or account for it.

[8] Applying the foregoing legal principles to the allegations of the petition as set forth in the statement of facts preceding this opinion, it set forth a cause of action against the Southern Exchange Bank as well as the Bank of Alamo. The special demurrer to the petition was without merit. The ground of it was that the petition did "not definitely and fully inform this defendant of the facts that would impart to it such knowledge of the facts and circumstances upon which the plaintiff relies that would put this defendant on notice of the special deposit and trust as aforesaid."

3. The rulings announced in the third headnote do not need elaboration.

Judgment affirmed.

All the Justices concur, except HILL, J., absent.

(27 Ga. App. 839)

GILLIAM v. WESTERN UNION TELEGRAPH CO. (No. 12018.)

(Court of Appeals of Georgia, Division No. 2. Sept. 27, 1921.)

(Syllabus by the Court.)

1. Banks and banking. \S 188½.—Agent represents sender of money in signing application.

It is no part of the duty of a telegraph company's agent in charge of an office, which receives messages and transmits money by telegraph, to write out an application for the transmittal of money by an applicant; and when one desiring to transmit money by telegraph makes a verbal application over the telephone to the agent of the telegraph company, requesting him to transmit the money on the applicant's credit, and is informed by the agent that the rules of the company require the agent to have the money in hand before undertaking to transmit it, and where, for the convenience of the applicant, it is arranged between the agent and the applicant that the applicant shall deposit the money for the agent at some point where the agent will call and receive it, and where the agent, after having made such agreement with the applicant, takes the steps necessary for the transmission of the money to a distant point, and makes out an application to the telegraph company, signing thereto the applicant's name, the agent is, in signing such application, under such circumstances, the agent for the applicant; and where such application contains a waiver on the part of the applicant of identification of the payee of the money at the office at the point where the payee is to receive it, and authorizes and directs the telegraph company to pay the sum named in the order at the applicant's risk, and to such person as the company's agent believes to be the payee named in the application, the applicant is bound thereby. See, in this connection, *Western Union Tel. Co. v. Prevatt* (1907) 149 Ala. 617, 43 South. 106(2); *Western Union Tel. Co. v. Holcomb* (Tex. Civ. App. 1912), 152 S. W.

190(1); *Carroll v. Sou. Express Co.* (1892) 87 S. C. 452, 16 S. E. 128.

2. Banks and banking Ⓒ188½—Held not negligent in delivering money to wrong person.

Where the agent of the telegraph company at the office at the point of payment in good faith delivers the money to one whom he believes to be the payee, after satisfying himself from the direction on a letter in the possession of such person and from such person's correct knowledge of the amount of money expected and the name and address of the applicant, the telegraph company is not negligent in delivering the money to such person, and therefore is not liable to the applicant for delivering it to the wrong party, and to one who is not entitled thereto.

3. Verdict directed.

In a suit by the sender against the telegraph company to recover against the latter for having delivered the money transmitted to the wrong party, and to one not entitled thereto, where the evidence showed the above facts, a verdict was properly directed for the defendant.

Error from Superior Court, Fannin County; D. W. Blair, Judge.

Action by E. L. Gilliam against the Western Union Telegraph Company. Judgment directed for defendant, and plaintiff brings error. Affirmed.

Wm. Butt, of Blue Ridge, for plaintiff in error.

Brewster, Howell & Heyman and Mark Bolding, all of Atlanta, for defendant in error.

STEPHENS, J. Judgment affirmed.

JENKINS, P. J., and HILL, J., concur.

(27 Ga. App. 373)

BIBB REALTY CO. v. S. F. FULGHUM & CO. (No. 11835.)

(Court of Appeals of Georgia, Division No. 2. Sept. 27, 1921. Rehearing Denied Oct. 1, 1921.)

(Syllabus by the Court.)

1. Contracts Ⓒ170(2)—Meaning placed on contract known by other party to be so understood.

Where a building contractor contracted with the owner to perform certain services in the construction of a building, the compensation being a fixed amount, to be paid in part in certain stipulated monthly installments, and where, during the performance of the contract and before its completion, the entire interest in the lot and the interest in the contract were sold by the owner and acquired by a third party, who, under negotiations with the same supervising architect, who had devised the original plans and had been employed by the original owner to supervise the construction of

the building, changed the original plans of the building, and enlarged thereon and planned for a building larger and costing more than as originally planned, and where the contractor, with knowledge of these facts and without any specific agreement with the new owner, continued in the capacity of contractor under the new conditions, and received from the new owner monthly installments in amounts equal to those provided in the original contract, the inference is authorized that the contractor was continuing to work for the new owner for the same compensation fixed by the original contract, and that the contractor knew that the new owner so understood and believed. In a suit by the contractor against the new owner to recover on quantum meruit for the services thus rendered to the defendant, a greater sum than he would have been entitled to under the original contract, where the above facts appeared from the evidence, section 4267, Civ. Code 1910, was applicable, and that section, or its substance, should have been given in charge to the jury without qualification. The section reads as follows: "The intention of the parties may differ among themselves. In such case, the meaning placed on the contract by one party, and known to be thus understood by the other party, at the time, shall be held as the true meaning."

2. Work and labor Ⓒ30(2)—Implied agreement of contractor to perform services for purchaser of lot held for the jury.

Under the conditions above narrated, where there is no express agreement between the contractor and the new owner obligating the contractor to perform services to the new owner under the terms of the original contract as to compensation, it may be inferred, from all the facts and circumstances of the entire transaction and the knowledge of the same by the contractor, that the contractor impliedly agreed to perform his services under the original contract and for the compensation therein provided, and this theory of the evidence should have been fully submitted to the jury under appropriate instruction.

3. Instructions—Judge did not misstate defendant's contentions.

Properly construing the plea and answer of the defendant, the trial judge did not misstate the defendant's contentions.

4. Evidence Ⓒ370(4)—Witnesses Ⓒ388(7)—Writings held properly excluded from evidence.

Certain writings offered in evidence by the defendant, the exclusion of which is excepted to in the first, second, third and fourth grounds of the amendment to the motion for a new trial, were properly excluded, since it does not appear that they were written by the plaintiff or by his authority or by his authorized agent. Nor were they admissible for the purpose of impeachment, as being previous contradictory statements of the writers, since no foundation was laid for their admission for this purpose.

5. Grounds of motion without merit.

Except as above indicated, there appears no error as complained of in any of the grounds of the motion for a new trial.

6. Motion for new trial.

The defendant's motion for a new trial should have been sustained.

Error from Superior Court, Bibb County; H. A. Matthews, Judge.

Action by S. F. Fulghum & Co. against the Bibb Realty Company. From a judgment for plaintiff, defendant brings error. Reversed.

Jones, Park & Johnston and Hall, Grice & Bloch, all of Macon, for plaintiff in error.

Ryals & Anderson, of Macon, for defendant in error.

STEPHENS, J. Judgment reversed.

JENKINS, P. J., and HILL, J., concur.

(27 Ga. App. 376)

ZABAN v. COLEMAN et al. (No. 11812.)

(Court of Appeals of Georgia, Division No. 2, Sept. 27, 1921.)

(Syllabus by the Court.)

1. Partnership §200—Suit against firm suit against individuals and recovery permitted against one of the several defendants.

A suit against named parties, where it is alleged in the petition that the defendants did business under a certain style and name importing a partnership, is not necessarily a suit against the partnership alone, but is also a suit against the named individuals jointly and severally, and where the evidence sustains a verdict against one of the defendants only, the verdict will not be set aside at the instance of that defendant upon the ground that the evidence fails to support the plaintiff's petition.

2. Landlord and tenant §169(10)—Instruction pertinent to defect in premises prior to plaintiff's tenancy held proper.

This being a suit by a tenant to recover against the landlord for personal injuries alleged to have been received by the plaintiff, due to a defective condition in the rented premises, and the amendment to the plaintiff's petition and the evidence adduced upon the trial having presented an issue as to whether or not the defective condition of the premises arose prior to the commencement of the plaintiff's tenancy, a charge pertinent to such issue was proper, and was not subject to the exception that it introduced a foreign issue calculated to prejudice the defendant's case.

3. Landlord and tenant §164(6)—Liable for injuries occasioned by defect in premises.

While a landlord cannot be held liable for damages caused from defects in the rented premises occurring after he has parted with the possession, unless he has been notified thereof and has had a reasonable time in which to make repairs, he may nevertheless be liable for damages resulting from defects of which he had no notice, but the existence of

which he could in the exercise of ordinary care have discovered when repairing the defects of which he did have notice.

4. Trial §242—Instruction referring to the defendant, where there were several, held not misleading.

A verdict having been directed for all of the defendants except one, and the case having proceeded to trial against this one defendant alone, a reference to "the defendant" in the charge of the court could not have misled the jury, and caused confusion in their minds as to which one of the defendants the court had reference to.

5. Deeds §119—Whether certain land falls within description may be question of fact for jury.

While the construction of a deed is a question for the court, yet whether certain real estate falls within the description recited in the deed may be a question of fact for the jury.

6. Tenants—Evidence warranting inference that defendant was landlord and was negligent.

The evidence warrants the inference that the defendant was the plaintiff's landlord, and that through his negligence the plaintiff was injured by reason of a defective condition in the rented premises.

7. Personal injuries—No abuse of discretion in denying new trial for excessive verdict.

Under all the evidence in this case this court is unable to hold that the trial judge abused his discretion in failing to sustain the defendant's motion for a new trial upon the ground that the verdict is excessive.

8. Appeal and error §242(1)—No review of statements by counsel, in absence of ruling.

Exceptions to statements made by counsel in argument to the jury, where the attention of the court was not called thereto and no ruling invoked thereon, present no ground of error for this court to consider. The fact that counsel for the complaining party refrained from invoking a ruling because of his fear that his act in so doing would operate to prejudice the jury against his client cannot affect the soundness of the present ruling.

9. Appeal and error §1075—Ground expressly abandoned not considered.

The seventh ground of the amendment to the motion for a new trial, having been expressly abandoned by the plaintiff in error, will not be considered.

10. Appeal and error §303—Ground of motion for new trial, not approved, not considered.

The eighth ground of the amendment to the motion for a new trial, not being approved by the trial judge, cannot be considered.

11. Instructions—Court correctly charged jury.

In view of the above rulings, the court correctly charged the jury, and did not otherwise commit any error.

Error from Superior Court, Fulton County; W. D. Ellis, Judge.

band placed the automobile with the plaintiff for repairs, by the direction of his wife, or by the approval of his wife," then she would be liable for the debt "that she had directed her husband to incur, or that she had approved or ratified," is not subject to the exception that the use of the word "approval" was calculated to mislead the jury to the prejudice of the defendant, in that "no explanation was given or limitation made as to just what would and what would not amount to an approval." Nor was this excerpt from the charge subject to the exception that it was not applicable to the issues made in the case.

2. Motion for new trial overruled.

A verdict for the plaintiff being authorized by the evidence, and no error of law appearing, the court did not err in overruling the defendant's motion for a new trial.

Error from Superior Court, Bibb County; Malcolm D. Jones, Judge.

Action by W. R. Riley against Mrs. W. H. Britt. Judgment for plaintiff, and defendant brings error. Affirmed.

Walter De Fore and Jas. O. Estes, both of Macon, for plaintiff in error.

W. E. Martin, of Macon, for defendant in error.

STEPHENS, J. Judgment affirmed.

JENKINS, P. J., and HILL, J., concur.

(27 Ga. App. 386)

JONES v. NEWSOME. (No. 12057.)

(Court of Appeals of Georgia, Division No. 2. Sept. 27, 1921. Rehearing Denied Sept. 30, 1921.)

(Syllabus by the Court.)

1. Logs and logging ⚡26(3)—Proprietor of sawmill held not to acquire lien.

The proprietor of a sawmill who contracts to saw timber and to furnish for that purpose a mill and a fireman at a stipulated price per day, such price to cover the rent of the mill, as well as his own labor and the labor of the fireman, does not acquire, and cannot foreclose, a lien for the price thus contracted for, under sections 3357, 3334, and 3335, Civ. Code 1910, providing for laborers' liens. *Evans v. Beddingfield*, 106 Ga. 755, 32 S. E. 664.

2. Logs and logging ⚡28—Proprietor of sawmill, to acquire lien upon lumber, must file and record it.

In order for the proprietor of a sawmill to acquire a lien upon the lumber sawed by his mill under a contract with the owner of the lumber, after the lumber sawed has been surrendered to the owner thereof, it is necessary for him to file and record his lien within 10 days from the time of the completion of the work. Civ. Code 1910, §§ 3354, 3356.

3. Logs and logging ⚡33(9)—Affidavit of foreclosure of lien held properly dismissed.

It appearing from the affidavit of foreclosure in the instant case, as amended, that the plaintiff was a sawmill proprietor, and counsel for the plaintiff having admitted that the provisions of Civ. Code 1910, §§ 3354, 3356, had not been complied with, and it also appearing from the original affidavit of foreclosure, as amended, that the sum sought to be recovered was the contract price, which included the labor of the proprietor, as well as the labor of an employee of the contractor and the rent of the sawmill, and thus not within the provisions of the statute providing for the foreclosure of laborers' liens, the court did not err, upon motion of the defendant, in dismissing the plaintiff's affidavit of foreclosure as amended, since the amendment in substance adopted the allegations in the counter affidavit denying the existence of a lien.

Error from City Court of Swainsboro; George Kirkland, Jr., Judge.

Action by N. A. Jones against Aaron Newsome. Judgment for defendant, and plaintiff brings error. Affirmed.

Alfred Herrington, Jr., of Swainsboro, for plaintiff in error.

G. A. Faircloth, of Birmingham, Ala., and J. C. Newsome, of Sandersville, for defendant in error.

STEPHENS, J. Judgment affirmed.

JENKINS, P. J., and HILL, J., concur.

(27 Ga. App. 331)

ANDERSON et al. v. HOLDEN et al. (No. 11645.)

(Court of Appeals of Georgia, Division No. 2. Aug. 8, 1921. Rehearing Denied Sept. 28, 1921.)

(Syllabus by the Court.)

1. Banks and banking ⚡58(3)—Suit held brought by receiver.

Under an order of the superior court a petition was filed in the name of the receiver of the bank by and for the benefit of certain named persons, with the privilege of all others similarly situated to join therein. Demurrers, both general and special, were filed to the petition. On the hearing of the demurrers the court held that the petition was in the name of and by the receiver. This question was certified to the Supreme Court and that court held that under a proper construction of the pleadings the suit was by the receiver.

2. Banks and banking ⚡58(3)—Bank need not be defendant in its receiver's action.

In addition to this ruling by the lower court the judge ruled as follows: (2) That it was not necessary that the bank be named as party defendant; (3) that the amendments to the petition were allowable and did not add a new

party or new cause of action; (4) the general demurrers were overruled; (5) the special demurrers were overruled. *Held*, that these rulings and judgments of the trial judge were not erroneous for any of the reasons assigned.

Error from Superior Court, Fannin County; D. W. Blair, Judge.

Action by J. F. Holden, receiver, and others, against J. W. Anderson and others. Judgment for plaintiffs, and defendants bring error. Affirmed. Conforming to Supreme Court's answer to certified questions (107 S. E. 860).

T. H. Crawford and O. R. Dupree, both of Blue Ridge, Pat Haralson, of Blairsville, and Morris & Hawkins and Anderson & Roberts, all of Marietta, for plaintiffs in error.

Geo. F. Gober, of Atlanta, and H. B. Moss, of Marietta, for defendants in error.

PER CURIAM. Judgment affirmed.

JENKINS, P. J., and STEPHENS, and HILL, JJ., concur.

Rehearing denied.

(131 Va. 707)

THACKER v. COMMONWEALTH.

(Supreme Court of Appeals of Virginia.
Sept. 28, 1921.)

1. Criminal law \S 304(20)—Common knowledge that corn whisky is intoxicating.

It is a matter of common knowledge that corn whisky is intoxicating.

2. Intoxicating liquors \S 138—Fixed destination not necessary to constitute unlawful "transportation."

An ultimate destination at a fixed point is not necessary to constitute "transportation" within the prohibition statute.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Transport—Transportation.]

3. Intoxicating liquors \S 138—Transportation held unlawful.

Transportation of corn whisky in an automobile to be drunk along the road by defendant and the friends who were riding with him held unlawful.

4. Intoxicating liquors \S 224—No burden on commonwealth to show quantity unlawfully transported.

In a prosecution for unlawfully transporting corn whisky, where it appeared that defendant took a half-gallon fruit jar of the whisky along on an automobile trip to be drunk along the road, there was no burden on the commonwealth to show that the jar contained more than a quart.

5. Criminal law \S 172(8)—Where verdict is correct error in instructions immaterial.

Where the jury could not have found any other verdict than that of guilty error in the instructions is immaterial.

Error to Circuit Court, Alleghany County.

One Thacker was convicted of unlawful transportation of ardent spirits, and he brings error. Affirmed.

Geo. A. Revercomb and W. Chapman Revercomb, both of Covington, Va., for plaintiff in error.

John R. Saunders, Atty. Gen., J. D. Hank, Jr., Asst. Atty. Gen., and Leon M. Bazile, Second Asst. Atty. Gen., for the Commonwealth.

BURKS, J. The plaintiff in error was convicted of unlawful transportation of ardent spirits, and sentenced to pay a fine of \$50 and to confinement in jail 30 days. There is no conflict in the testimony, which was to the following effect: The plaintiff in error (hereinafter called the defendant) invited two friends to accompany him in his automobile to the country. They accepted the invitation and drove into the country to the house of one Harmon Smith, where the defendant obtained a half-gallon glass fruit jar with something in it, whether more or less than a quart the witness did not know, and put it on the running board of the car. The contents of the jar tasted and smelt like corn whisky, and was corn whisky, but did not make the witness drunk. While the defendant was cranking his car for the return trip, one of his friends, who was the witness testifying, picked up the jar and took a drink out of it, and set it in the rear of the car, and "they all drank out of this jar on the way back."

[1-5] Several errors are assigned, but it would be a waste of time to discuss them. It is matter of common knowledge that corn whisky is intoxicating, and section 1 of the prohibition act declares that "whisky" shall be embraced in the term "ardent spirits." The court is also of opinion that an "ultimate destination" at a fixed point is not necessary to constitute "transportation" within the meaning of the prohibition statute; that the transportation was not in the personal baggage of the defendant; that the transportation "to be drunk along the road" was unlawful; that there was no burden on the commonwealth to show that the jar contained more than a quart; and that the jury could not have found any other verdict than that of guilty, and hence the ruling of the trial court on the instructions was immaterial.

The judgment of the trial court will be affirmed.

Affirmed.

(181 Va. 261)

OSBORNE v. RICHMOND et al.

(Supreme Court of Appeals of Virginia. Sept. 22, 1921.)

1. Descent and distribution §117—Evidence held sufficient to show payment of consideration recited in deed.

On an issue, in a partition suit, as to whether land conveyed by a deed reciting a consideration "in hand paid, the receipt whereof is hereby acknowledged" was intended as an advancement constituting plaintiff's full share in the estate, evidence held sufficient to show that such consideration was actually paid; the recital being accepted as true unless overturned by clear proof.

2. Descent and distribution §117—Evidence held insufficient to show inadequate consideration for lands conveyed to plaintiff.

On an issue in a partition suit as to whether land conveyed to plaintiff by deed reciting payment and receipt of a named pecuniary consideration constituted his full share of the estate, parol evidence, though admissible to show there was also the consideration of an advancement, held insufficient to show the amount paid was inadequate.

3. Descent and distribution §117—Evidence held to show conveyance not intended as advancement.

In a partition suit, evidence held to show decedent intended deed conveying land to plaintiff as one for valuable consideration, and not as advancement or gift constituting plaintiff's full share of the estate.

4. Descent and distribution §115—Gift to child presumed advancement to be brought into hotchpot.

Whether a gift to a child adapted to advance it in life is an advancement to be brought into hotchpot depends on the parent's intention, and a free gift so adapted is prima facie presumed to be so designed.

5. Descent and distribution §112—Value of advancement brought into hotchpot fixed as of date of gift, and consideration paid deducted from value of land as of date of deed.

The value of an advancement brought into hotchpot must be fixed as of the date of the gift, not that of the partition, and a consideration actually paid must be deducted from the value of the land as of the date of the deed.

Appeal from Circuit Court, Scott County.

Suit by G. W. Osborne against Ellen Richmond and others. Decree for defendants, and complainant appeals. Reversed and remanded.

S. H. Bond, of Gate City, R. P. Bruce, of Wise, and Will H. Nickels, of Gate City, for appellant.

W. S. Cox, of Gate City, for appellees.

KELLY, P. This is a partition suit, and the sole question for decision is whether a

certain deed from David Osborne to his son, G. W. Osborne, should be treated as an advancement and brought into hotchpot.

David Osborne at one time owned three separate tracts of land—the "home tract," of 211 acres, the "Buckner's Ridge tract," of 236 acres, and the "mountain tract," of 220 acres.

On August 8, 1901, he conveyed 120 acres of the Buckner's Ridge tract to his son, G. W. Osborne, for life, with remainder in fee to his children, reserving, however, a life estate in the grantor, and excepting and reserving "all minerals on, in, and under the aforesaid tract of land which have been contracted or sold to other parties." The deed recited a consideration of "four hundred and ninety-five dollars in hand paid, the receipt whereof is hereby acknowledged."

On October 2, 1903, David Osborne, in consideration of \$1,500, the receipt of which was acknowledged in the deed, conveyed to another son, L. N. Osborne, all of the home tract with the exception of the "iron ore" theretofore sold to Patrick Hagan, and reserving to the grantor and his wife a life interest in 100 acres of the tract thus conveyed. This deed contained the following stipulation:

"The said grantee, L. N. Osborne, accepts the above tract of land described in this deed as his part, or interest, in the real estate owned by said David Osborne."

In 1915 David Osborne, being still the owner of the mountain tract and 116 acres of the Buckner's Ridge tract, died intestate; and shortly thereafter this suit was brought by G. W. Osborne against the other heirs of David Osborne, seeking a partition of these lands. The bill alleged that the above-recited deed of October 2, 1903, to L. N. Osborne constituted an advancement to him of his entire interest in the estate, and that he was not entitled to participate in the partition. The truth of this allegation conclusively appears on the face of the deed, is conceded by L. N. Osborne, and he claims no share in the lands herein involved. Mrs. Ellen Richmond, a daughter, T. J. Osborne, a son, and some of the other heirs of David Osborne, answered the bill, and denied the right of the complainant, G. W. Osborne, to share in the partition, because, as they claimed, the deed made to him by his father on August 8, 1901, constituted his full share in the estate.

Proof was taken on both sides, and the court upon final hearing entered a decree adjudging that the land conveyed to G. W. Osborne by deed of August 8, 1901, "was an advancement, and should, if complainant participated in the partition, be brought into hotchpot." Thereupon G. W. Osborne obtained this appeal.

[1] Many witnesses were examined on both sides, and the evidence is in some particulars in great conflict. There is one material fact, however, which seems to us established by the clear weight of testimony, and that is that the consideration of \$495 named in the deed was actually paid. Whether this consideration was adequate, and, if not, whether the excess in value of the land should be treated as a gift and advancement, are different questions; but the fact that the \$495 was paid is hardly open to fair debate under the evidence before us. The recital itself, though open to contradiction by satisfactory proof, is *prima facie* true, and must be so accepted unless overturned by clear proof. The solemn acknowledgment of this payment in writing is evidence of the highest and most satisfactory character, and of great probative value. 23 Am. & Eng. Ency. L. (2d Ed.) p. 983. This rule certainly applies to recitals in a deed in so far as the grantor and his heirs are concerned. 2 Devlin on Deeds (3d Ed.) §§ 817-821. G. W. Osborne testified directly to the payment, and explained in a plausible and reasonably satisfactory way how it was made. The notary public who wrote the deed and took the acknowledgment testified that David Osborne dictated all of the terms of the deed, including the recital as to the consideration. At least eight witnesses, apparently free from bias or interest, testified that David Osborne in his lifetime acknowledged that G. W. Osborne had bought and paid for the land. No witness testified in terms that the consideration was not paid, and the only evidence which can be construed as being substantially to that effect is the statement of the witness L. N. Osborne, who said that G. W. Osborne stated soon after the deed was made that he "had the deed made as though it was a sale in order to make it hold good." This witness has no property interest in this suit, and his testimony is entitled to careful consideration. We do not think, however, that his evidence as just quoted is sufficient to offset the recital in the deed and the volume of evidence in its support. The money consideration recited in the deed from David Osborne to G. W. Osborne must, in our opinion, be regarded as having actually passed.

[2] The next question to be considered is whether the purchase price recited therein was the full consideration for the deed, and, if not, whether the gift as to the residue must be regarded as an advancement. This is a more difficult question than the one just disposed of, and is a practical and important one here, because, while an advancement is always a gift, the advancement may be embodied in a deed of bargain and sale for which a money consideration is paid. "Where a deed of bargain and sale recites a pecuniary consideration, it may be shown by parol that there was also the consideration

of an advancement to the daughter of the bargainor." 2 Devlin on Deeds (3d Ed.) 829. It is insisted that the evidence shows that the land was worth much more than G. W. Osborne paid for it. This insistence, however, is not very well supported by the evidence in its entirety. The witnesses differ, but upon the whole, and considering the fact that a life estate in the land was reserved to David Osborne and his wife, that the minerals on the land had been sold and were excepted, and that it was shown that the best of the timber had been sold and taken from the land, we are unable to say that \$495 may not at the time have been a reasonably adequate price for the conveyance.

[3] Coming to the question of the intention of the grantor, it may perhaps be fairly said that the parol evidence is about equally balanced as to whether David Osborne by his own subsequent statements indicated that he intended the land conveyed by the deed of August 8, 1901, to be in lieu of G. W. Osborne's share in his estate; but it certainly does not preponderate in favor of the affirmative of this question. We are very much impressed by the testimony of Dr. N. W. Stallard, a practicing physician, who had known David Osborne for 40 years, had been intimately acquainted with him for 20 years, and had repeatedly heard him say that L. N. Osborne had already received his full share, that he expected the other children to share equally in the remainder of the estate, and that G. W. Osborne had bought and paid for the land theretofore conveyed to him. This testimony strikes us as being entitled to especial weight, not only because of the character of the witness and his opportunity to know the facts, but because it is in harmony with the provision in the deed to L. N. Osborne to the effect that the land he got was to be treated as his full share, and with the absence of any such provision in the deed to G. W. Osborne. The fact that the father of these two boys put such a provision in one of the deeds and omitted it in the other is quite significant. In view of this circumstance and the parol testimony in harmony with it, and in the absence of any preponderating proof that the price paid was not reasonably adequate, or that David Osborne intended the transaction as other than an ordinary deed and conveyance for a valuable consideration, we have reached the conclusion that it was error to treat the same as an advancement.

[4] The general propositions of law controlling the subject of advancements are well settled in this state, and have been reviewed by this court in several recent cases. Whether a gift to a child, supposing the gift to be adapted to advance the child in life, is or not to be deemed an advancement such as must be brought into hotchpot, depends upon the intention of the parent; and a free gift so

adapted is prima facie to be presumed to have been so designed. *Payne v. Payne*, 128 Va. 33, 104 S. E. 713, 715; *Poff v. Poff*, 128 Va. 62, 104 S. E. 719, 724. In this case, however, the gift is not proved, and the case of the appellee breaks down at this point.

[5] The conclusion we have reached does not affect the result of the partition as materially as might upon a casual view appear. The Buckner's Ridge land, a part of which was conveyed to G. W. Osborne, and the remainder of which now belongs to the estate to be partitioned, appears at this time to be quite valuable, but it was not so valuable at the time of the alleged advancement, and, if it were treated as an advancement, the value when brought into hotchpot would be fixed as of the date of the gift, and not as of the date of partition. *Graves' Notes on Real Prop.* § 171. Moreover, the \$495 which was paid for the land by G. W. Osborne would have to be deducted from its value as of the date of the deed, so that in the final result the value for which G. W. Osborne would have to account in the partition would perhaps not amount to a great deal as compared with the value of the whole estate at this time. But, however this may be, the decree complained of, for the reasons stated, will be reversed, and the cause remanded to the circuit court for further proceedings to be had therein not in conflict with the views expressed in this opinion.

Reversed.

BURKS, J., absent.

(120 Va. 624)

ATWOOD v. HUFF.

(Supreme Court of Appeals of Virginia.
Sept. 22, 1921.)

1. Corporations §152 — Corporation acting on stockholders' resolution declaring dividend estopped to deny its validity.

Where stockholders and directors by common consent concur in the management of a corporation, it will be assumed that the directors accepted a resolution of the stockholders declaring a dividend, and the corporation, having acted on the resolution, is estopped to deny its validity.

2. Corporations §155(4) — Dividend belongs to owner of stock when declared whether due or not.

A dividend belongs to the owner of the stock at the time it is declared whether it is payable at a future time or not.

3. Corporations §121(5) — Buyer of stock has burden of showing that dividends previously declared are included in sale.

The burden is on buyer of stock to show that a dividend previously declared, but not yet paid, is included in the sale; the presumption being that it is not included if the agreement is silent in that respect.

4. Corporations §152—Stockholders' ratified resolution held effective declaration of dividend.

A resolution of the stockholders of a corporation declaring a dividend from assessments from new stock issued, ratified by the corporation, held an effective declaration of a dividend, constituting a contract between the stockholders and the company whereby definite rights were fixed, though such dividend was not immediately payable.

Error to Law and Chancery Court of City of Roanoke.

Suit by B. P. Huff against the Virginia Atwood Orchard Company, Inc., wherein K. C. Atwood intervenes. Judgment against the Company in favor of plaintiff, and intervener brings error. Affirmed.

Staples, Cocke & Hazlegrove, of Roanoke, for plaintiff in error.

Woods, Chitwood, Coxe & Rogers, and Hall, Wingfield & Apperson, all of Roanoke, for defendant in error.

PRENTIS, J. On November 9, 1911, the stockholders of the Stuart Orchard Company, at a meeting lawfully called by the board of directors for the purpose of amending its charter by increasing its outstanding capital stock from \$50,000 to \$75,000, passed a resolution, the pertinent part of which as it affects this litigation, reads thus:

"Resolved that we increase the capital stock of the Stuart Orchard Company to \$75,000.00, and that the present stockholders shall have a cash dividend declared to them of 10 per cent payable out of the last assessment from the extra \$25,000.00 issue. * * *

The reason for this resolution is thus explained in the brief of counsel for the plaintiff in error:

"At this time it was found necessary to have additional capital in order to carry on the business with greater success, and hence the appropriate steps were taken to obtain an amendment to the charter in order to enable the Stuart Orchard Company to issue and sell \$25,000 of new stock. However, the assets of the corporation were in excess of its capital stock, and hence the shares of stock with a par value of \$100 were now worth more. Therefore it would be unfair to the old stockholders to allow the new stock to participate equally in the gross assets of the corporation at a purchase price of \$100 per share."

In order to obviate this unfairness, it was determined to guarantee to the then stockholders by way of a preference over those who should subscribe to the new stock an amount equal to the difference between its actual and its par value; this difference being found to be \$10 per share, or 10 per cent. To effect this purpose, therefore, the resolution declared a preferred dividend of this amount to be paid out of the last assessment on the new stock whenever paid.

This resolution accomplished the same result as if the new stock had been sold for a premium, instead of at par, \$100 per share.

The purpose of the resolution may be otherwise expressed thus in the language of the attorneys for the defendant in error:

"At the time of the passage of the resolution, the Stuart Orchard Company had a surplus. To have sold the new stock at par and to have allowed the purchasers of the extra \$25,000 issue to share in this surplus would be giving them the benefit of the years of accumulation that the old stockholders had brought about. The obvious purpose, therefore, was that the surplus should be distributed among the persons who were the stockholders on November 9, 1911, and thereby put their stock on an equal basis with the new stock. Both the old and the new stock would then be on a parity."

Pursuant to that resolution, the board of directors of the Stuart Orchard Company secured an amendment to its charter, the additional \$25,000 of stock was subscribed for, and the stock issued. The last assessment, 10 per cent., was paid in July, 1917.

The Stuart Orchard Company and another corporation, the Atwood Orchard & Nursery Company, had previously, in the year 1916, merged with each other, under the name of the Virginia Atwood Orchard Company, Inc., and the new or merged company assumed all of the obligations of the Stuart Orchard Company, and collected the last 10 per cent. assessment due upon the \$25,000 capital stock increase of the Stuart Orchard Company referred to. On November 9, 1911, when the resolution was adopted, Huff, the defendant in error, owned 105 shares of stock in the Stuart Orchard Company, and he subscribed for 54 shares of the new stock. Thereafter, on May 13, 1913, Huff and certain other stockholders gave a written option, whereby they agreed to sell their stock in the Stuart Orchard Company. This option did not refer to the resolution of November 9, 1911, or to the 10 per cent. cash dividend thereby declared. This option was assigned to John C. Shockley, trustee, who on September 1, 1913, exercised it, and there is a fair inference that he was then acting for Atwood and another. At the time that option was exercised, Huff and Taylor, another one of the old stockholders, stated to Shockley that they claimed this 10 per cent. dividend, and demanded that the amount thereof be added to the \$150 per share for which their entire holdings were about to be sold. Shockley, however, neither admitted nor denied that they were entitled to the dividend, but responded that the dividend was not then due. Huff, upon advice of counsel, in Shockley's presence, did not insist upon the dividend being then paid because it was not then payable. Atwood claims that when he bought the stock from Shockley he understood that the dividend was sold to him with the stock, but he admits that this informa-

tion was not derived from either Huff or any of his associates.

The proceedings of both companies show that all of the interested parties were fully aware of the existence of the original resolution, and frequent references thereto appear in the records of the Stuart Orchard Company and in reports made by its secretary and treasurer. One of several similar reports, that of December 31, 1915, containing a statement of outstanding liabilities as well as the working capital of the company, has this memorandum attached:

"This takes no account of the interest on past-due assessments, and no account of the 10 per cent. dividend to be paid old stockholders out of the last assessment of the last stock issued. This dividend will amount to \$5,000."

And the minutes show that this report was ordered to be spread upon the records of the company upon motion of Shockley by Atwood. After the final installment of 10 per cent. upon the additional stock had been collected, Huff instituted this motion against the Virginia Atwood Orchard Company, Inc., for the recovery of the 10 per cent. upon 105 shares of stock of the Stuart Orchard Company, of which he was the owner in November, 1911, when the resolution was adopted—that is, for \$1,050.

The defendant company filed its affidavit disclaiming any interest in the amount constituting the subject-matter of the motion, but alleging that Atwood had a claim thereto; and thereupon Atwood was allowed to intervene, and this controversy is between Huff and Atwood as to which is entitled to the amount.

The parties waived a jury, and submitted all questions of law and fact to the judge of the trial court upon a written stipulation of the evidence. The court entered judgment against the company in favor of Huff, and Atwood assigns error.

The chief argument for Atwood appears to be based upon the claim that the stockholders in 1911 had no legal authority to declare a dividend, because the board of directors alone has such authority to declare corporate dividends.

[1, 2] In this case we do not think it necessary to undertake to follow the learned counsel in their discussion of the powers and the limitations thereof of stockholders and directors in this respect. It is observed however, that where stockholders and directors, by common consent, concur in the management of a corporation, as is clearly shown to have been the case here, the rights of creditors being in no way involved, it will be assumed that the directors accepted the resolution of the stockholders declaring a dividend, and the corporation, having acted on the resolution, is estopped to deny its validity. *Thiry v. Banner Window Glass Co.*, 81 W. Va. 39, 93 S. E. 958, L. R. A. 1918B, note 1051. In our view it is entirely immaterial whether

the 10 per cent. which the company by the resolution obligated itself to pay to the then stockholders is technically a dividend or not. It created an obligation having all of the effect of a dividend. It is referred to in the resolution as a dividend, whenever referred to in the minutes of the stockholders' meeting it is so called, and by both litigants in their pleadings it is thus designated. When acted upon, it constituted an obligation of the Stuart Orchard Company to its then stockholders, created for the purpose of equalizing the value of the old and the new stock. The Virginia Atwood Orchard Company, Inc., has recognized it as its obligation only because upon the merger it assumed the liabilities of the Stuart Orchard Company. If it was not then a debt previously contracted by the Stuart Orchard Company, it could not be an obligation of the merged company. This dividend or debt was a part of the consideration to be paid out of the subscriptions of the new stockholders to the old stockholders upon the amendment of the charter whereby the new subscribers were permitted to become stockholders. By acting upon that resolution in securing the amendment to its charter, under which the corporation has since transacted business for many years, it ratified and approved the incurring of that obligation. It is perfectly well settled that a dividend (and, as we have indicated, this obligation must be construed to have all of the attributes of a dividend) belongs to the owner of the stock at the time it is declared, and this whether it is payable at a future time or not.

This is said in 14 C. J. p. 820, § 1242:

"So as between vendor and vendee, although the rule may be changed by contract between the parties, in the absence of an agreement to the contrary, dividends declared prior to the transfer of ownership belong to the transferor, and the rule is the same although the dividend is not payable until after the transfer, while dividends declared subsequent to the change of ownership belong to the transferee, and it is immaterial that such dividends were earned in whole or in part prior to such transfer."

Pertinent cases are *Bowers v. Post* (D. C.) 209 Fed. 660, affirmed 220 Fed. 1006, 135 C. C. A. 665; *Wheeler v. Northwestern Sleigh Co.* (C. C.) 39 Fed. 347; *Cogswell v. Second Nat. Bank*, 78 Conn. 75, 60 Atl. 1059, affirmed 204 U. S. 1, 27 Sup. Ct. 241, 51 L. Ed. 343; *Bright v. Lord*, 51 Ind. 272, 19 Am. Rep. 732; *Hill v. Newichawanick Co.*, 8 Hun. (N. Y.) 459, affirmed 71 N. Y. 593; *Hopper v. Sage*, 112 N. Y. 530, 20 N. E. 350, 8 Am. St. Rep. 771; *Clark v. Campbell*, 23 Utah, 569, 65 Pac. 496, 54 L. R. A. 508, 90 Am. St. Rep. 716; 7 R. C. L. § 287, p. 292.

This proposition is not questioned. It is insisted, however, for the plaintiff in error, that this was not a dividend declared in 1911, and that it did not have the attributes of a dividend until after the contract between

the Stuart Orchard Company and the Virginia Atwood Orchard Company, which provided that the latter should pay a dividend to the stockholders of the former company, and so, regardless of any corporate action by the former company, this debt only then became an executed obligation of the new corporation to then holders of the stock of the dissolving corporation. Thenceforth it is admitted it had every attribute of a dividend, but that it was not until after Atwood had become the holder of the stock that this contract arose, and not until then did any of the essential attributes of a dividend attach.

[3] We cannot agree that this is true. If the action of the stockholders of the Stuart Orchard Company and its repeated confirmation thereof from time to time did not create this obligation, it has never yet been created, and does not exist because it has never been formally declared as a dividend by the board of directors of either company. Atwood did not become the owner of this fund merely because he purchased the 105 shares of stock of Huff, after the obligation had been created. It was, of course, within the power of Huff, when he sold the stock, to include this debt or dividend of the company, and to make it payable to his vendee, but the burden is upon the vendee upon such a transfer of stock to show that such debts previously incurred, or dividends previously declared, but not yet paid, are included in the sale. The agreement being silent on this subject, the presumption is that they are not so included, and hence do not pass to the vendee.

There is some conflict in the evidence as to what the parties understood, but this conflict was submitted to the judge of the trial court, and under Code 1919, § 6363:

"When a case at law is decided by a court or judge without the intervention of a jury, and a party excepts to the decision on the ground that it is contrary to the evidence, and the evidence (not the facts) is certified, the judgment of the trial court shall not be set aside unless it appears from the evidence that such judgment is plainly wrong or without evidence to support it."

[4] This judgment is neither plainly wrong nor without supporting evidence. There is evidence that, when the settlement for the transfer of the stock was made, Huff called attention to and claimed this dividend, but, as it was not then due and had not been paid, he had no legal right to insist that his vendee should pay it, and upon the advice of counsel he transferred the stock. This, as we have indicated, does not of itself assign the dividend. So that we are of opinion that the resolution of November 11, 1909, ratified in so many ways as it has been since, was the effective declaration of a dividend, constituting a contract between the then holders of the stock of the Stuart Orchard Company and the company, whereby definite

rights were fixed, though the realization thereof was deferred, which contract was thereafter assumed by the Virginia Atwood Orchard Company, and that Atwood has failed to show that this dividend obligation or debt thus clearly due originally to Huff has ever been by him either sold or assigned.

It is unnecessary for us further to follow the elaborate arguments of counsel in all of their details, because the reasons herein indicated are sufficient to support the judgment of the trial court.

Affirmed.

SIMS and BURKS, JJ., absent.

(130 Va. 721)

CYPHERS v. DINGUS.

(Supreme Court of Appeals of Virginia. Sept. 22, 1921.)

1. Deeds \S 211(3)—Burden of proof on party charging fraud.

One charging fraud as a ground for cancellation of deeds must prove it by strong, clear, and convincing evidence.

2. Deeds \S 207—Circumstances considered in determining whether instrument was obtained by fraud.

The mere fact that oral testimony relating directly to the execution of the deed is equally balanced in point of number of witnesses testifying for and against its fair execution does not necessarily mean that the attack upon the instrument must fail, since a question of fraud may depend as much upon circumstances as upon the statements of the parties.

3. Deeds \S 211(3)—Finding of fraud warranted by evidence.

A finding of fraud in an action to cancel deeds conveying land held warranted by the evidence.

4. Appeal and error \S 931(1) — Presumption of correctness of decree on appeal.

On appeal in an equitable action to cancel deeds conveying land, the Supreme Court sits as a court of review, and the decree comes to it with a presumption of correctness, and it will not be reversed if the court is not fully satisfied that it is wrong.

Appeal from Circuit Court, Wise County.

Suit by J. B. Dingus against W. A. Cyphers. Decree for plaintiff, and defendant appeals. **Affirmed.**

Fulton & Vicars, of Wise, for plaintiff.

Bond & Bruce, of Wise, for defendant.

KELLY, P. On April 5, 1916, J. B. Dingus conveyed to J. J. Moore, trustee, two small tracts of land containing in the aggregate about 13 acres. On the same day J. J. Moore, trustee, conveyed this land to W. A. Cyphers, and received in exchange therefor a deed from Cyphers for a house and four lots known as the "Buchanan property," and two other lots known as the "Oates Cyphers" lots. The decree appealed from, rendered in

a suit brought for the purpose by Dingus, set aside and canceled all three of these deeds and undertook to place the parties as far as possible in statu quo by directing a commissioner to reconvey the respective properties to Dingus and Cyphers.

The ground upon which Dingus sought to have the deeds canceled was that Cyphers, acting for himself and for one H. C. Cornett, procured from him the deed for the 13 acres by false representation, and in pursuance of a fraudulent scheme between Cyphers and Cornett, whereby the subsequent exchange was to be made.

There are no new or novel questions involved, and the decision of the case depends wholly upon the sufficiency of the evidence to support the charge of fraud on the part of Cyphers in procuring the deed from Dingus.

The evidence is voluminous and in many respects conflicting. We shall first state briefly what, as we think, may fairly be called the undisputed facts material to the controversy:

Dingus, Cyphers, and Cornett all resided at or near the town of Coeburn. Dingus and Cyphers were acquaintances and neighbors of long standing. Dingus was a laboring man not much experienced in trading, but was intelligent and thrifty, and in addition to the property here involved owned a tract of about 29 acres, worth perhaps several thousand dollars.

Cyphers was a dealer in real estate, on his own account and as agent for others, owned a good many properties, and was an experienced trader.

Cornett had lived at Coeburn only a short time, was not well known there, but so far as known was generally regarded as something of an adventurer, and of rather uncertain credit and standing. He was the owner of two negotiable notes of \$2,000, executed to him by F. A. and A. C. Shuyler, of Cornelia, Ga., as an advance payment on lumber which Cornett and his associates were to manufacture for the Shuylers.

Cornett had deposited one of these notes with the Miners' Bank of Commerce at Coeburn as collateral security for a loan of \$500 from that bank, but he was pressed for money, and for some time prior to April 5, 1916, had been making continued and strenuous efforts to exchange one or both notes for real estate. He had a number of opportunities to exchange the notes for land at prices acceptable to him, but all of the owners of such lands refused to take the notes as cash, and insisted on retaining a lien to secure the amount in case the notes were not paid. Cornett would not trade that way, giving as his reason that he needed money, and would want to procure a loan on the property, which he could not do if a vendor's lien thereon was retained.

Mr. C. O. Ramsey, cashier of the Miners' Bank of Coeburn, had in former years known Mr. F. A. Shuyler in North Carolina, and regarded him from the reputation he bore there as an honest and upright man, but Ramsey did not know how he was rated in point of financial worth. About the time the Miners' Bank made the \$500 loan to Cornett, Ramsey had some correspondence with the Shuylers and with a bank at Cornelia, Ga., in regard to the notes held by Cornett, and as a result had been informed by the Shuylers that the notes were genuine and good, and would be paid at maturity; and had also been informed by the bank that the Shuylers had been fairly good customers, and were regarded as honest and reasonably safe.

Cyphers was one of the men, and, indeed, to have been the principal one, whom Cornett had endeavored to interest in a trade for the notes, and their negotiations had embraced properties owned by Cyphers individually, as well as properties owned by third persons. Cornett had referred Cyphers to Ramsey for information as to the Shuyler notes, and, while Ramsey would not take the responsibility of advising Cyphers to trade for them, he gave him the information in regard thereto above recited, and Cyphers says he reached the conclusion that the notes were good, and was willing to risk his judgment on them in a trade which he was trying to make with Cornett for land owned jointly by Cyphers and his brother in West Virginia. This latter trade was pending and awaiting communication by Cyphers with his brother in West Virginia when the sale was made by Dingus to Cornett. There were also other negotiations pending at that time respecting various other properties between Cornett and Cyphers, and between Cornett and others.

Some little time before the trade was made with Dingus, Cyphers and Cornett had looked at the 29-acre tract owned by the former, and Cornett seemed to be favorably impressed with it. It seems that they had also at the same time seen the two tracts which we have referred to as the 13 acres. Shortly thereafter Cornett came to the N. & W. pump-house where Dingus worked every day, introduced himself to Dingus, talked to him in a general way about how land was selling in the community, and told him that Cyphers wanted to see him. Still later, but in a very short time, Cyphers went to see Dingus and tried to purchase the 29-acre tract from him, and in the course of the negotiations told him that he thought he could sell that tract to Cornett. Cyphers says he was trying to buy this land on his own account, and turn it over to Cornett at a profit, but the mere fact that they were negotiating, and that Cornett was named as a probable buyer, is all that need be mentioned here, with the addition that the negotiations were abandoned because certain infant heirs had an in-

terest in the 29 acres, and the title thereto was not marketable.

A day or two later Cornett saw Dingus at Kilgore's store and asked for a price on the 13 acres. Dingus named \$2,000 as the price, and Cornett said Cyphers would see him about it.

While there is a direct conflict of testimony as to the circumstances under which Cyphers and Dingus next met, the parties agree that a day or two later they did meet at the pump house, discussed the exchange of the 13 acres for one of Cornett's \$2,000 notes, and on the same day Dingus conveyed these tracts to Moore, trustee for Cornett, in consideration of the \$2,000 note, and that Dingus paid Cornett \$100, which went to him as his compensation for helping to make the deal. It is also admitted that Cyphers prepared all three of the deeds involved in this litigation, that at the time Dingus acknowledged and delivered his deed to Moore, trustee, Cyphers had the two other deeds in his pocket, and that they were all three executed and delivered the same day, although it seems clear that Dingus did not at the time know anything about the exchange. The Buchanan property, which Moore, trustee, got by virtue of the exchange, was one of the properties which Cyphers had offered to Cornett, and about which they had been negotiating just prior to the time of the Dingus trade.

Some time in the afternoon of the day on which Dingus delivered the deed to Moore, trustee, he took the note to Coeburn to place it in the First National Bank, where he kept an account, and was there given information which made him uneasy about its value. He asked Cyphers to indorse it, and upon his refusal brought this suit.

Up to the time of the trade with Dingus nothing more was known about the Shuyler notes than was indicated in the information possessed and given out by Ramsey at the Miners' Bank. It developed shortly afterwards that Cornett defaulted in his contract with the Shuylers, and, furthermore, that they, as well as Cornett, either were or soon became insolvent, and the notes were wholly worthless.

It is difficult for us to reach an entirely satisfactory conclusion in this case. Cyphers denies having made any representations to Dingus about the notes, and claims that he abandoned all his own negotiations with Cornett at the earnest solicitation of Dingus, who, as he claims, was acting independently, had started negotiations with Cornett, and employed him to help complete the trade. He has given an intelligent and clear deposition, which, standing alone, makes a complete defense to all in the charges against him.

On the other hand, Dingus has testified without qualification to the effect that he had offered Cornett the land for \$2,000, and, after Cornett had said that he would see Cyphers about it, the latter came up to his place of

work, said he had come to close the trade, and represented the note to be good, saying (in response to a statement by Dingus that he did not know anything about the Cornett notes):

"They are absolutely gilt edge and good and will be paid at maturity; I have investigated the note thoroughly myself and know what I am talking about."

Further on in his deposition Dingus says again:

"I traded for the note from Cyphers; took his word and honor. He recommended the note to be gilt edge and good and worth 100 cents to the dollar."

Upon many of the details and circumstances bearing upon the execution and delivery of the deed Dingus and Cyphers and their respective witnesses squarely contradict each other. It is not easy to say where the preponderance of evidence lies. Both Dingus and Cyphers are contradicted by other witnesses as to certain statements made by them, but it is perhaps fair to say that the circumstantial evidence, independent of the presumption in favor of the finding of the lower court, turns the scale in favor of Dingus.

The transaction in itself is unusual, and the circumstances by which it is surrounded or set about render it suspicious in itself. Cyphers evidently thought the notes were probably good, but he knew they were risky. He was a real estate trader; he knew Cornett better than Dingus knew him, and he knew that Cornett was anxious to trade the notes for real estate without the retention of a lien. For weeks Cornett had been diligently trying to buy land from or through him on just the terms he got from Dingus, and had failed. The record leaves no room to doubt, and Cyphers must have known, that Cornett was willing to let the notes go for less than their face value if he could get in exchange therefor a deed for real estate without a lien retained to secure the payment of the note. Indeed, while there is no shocking difference in the value of the two properties actually involved here, the Dingus land acquired by Cornett was worth appreciably more than the Buchanan property and the Oates Cyphers lots which Cornett got in exchange. Cyphers had been in close and intimate touch and communication with Cornett up to the very morning of the Dingus trade, and there is little doubt that he knew he could exchange for the note the very property which Cornett that day accepted in exchange for the Dingus land. The face value of the note was more than the value of the property which he gave up in this exchange, and it seems a little strange, if he was really willing, as he says he was, to risk the note, that he did not sell direct to Cornett the property which the latter actually acquired in the exchange. Of course, Cyphers in fact made a still better trade,

for the Dingus property was worth more than his, but the point is that Cyphers was an active real estate dealer, he wanted to sell the Buchanan property, he could easily have sold it and the Oates Cyphers lot to Cornett for the note, and, if he thought the note was a fair risk, this sale would have been an unmistakable bargain. Why then, if he had no advance information or understanding about the Dingus sale and the subsequent exchange, did he pass this bargain?

Again, Cyphers was claiming to act as agent for Dingus, and, while there was nothing inherently wrong in making the exchange, it seems hardly consistent with that confidential relationship to withhold from Dingus the fact (known to Cyphers before the Dingus deed was delivered) that he, and not Cornett, was to get the 13 acres.

According to some of the witnesses, Cyphers had theretofore expressed himself as being afraid of the note, and had referred to Cornett on one occasion as a scoundrel, and on another as a slick duck. The witness, R. L. King, who happened to be present when Dingus delivered the deed, says that immediately after the delivery Cyphers said to Dingus:

"These notes are absolutely gilt edge. I would not be afraid to risk 100 cents to the dollar on them."

Dingus corroborates King by saying that Cyphers told him the notes were good, both before and at the time the deed was delivered. Cyphers denies all this, as well as practically everything else that was said by any witness tending to sustain the theory of fraud and misrepresentation on his part, but in making these denials he has at least in one particular gone further than reasonable credulity can follow. He unqualifiedly and emphatically states that he never discussed the solvency of the Cornett note at all with Dingus until some hours after the trade was made, when Dingus had become dissatisfied and asked him to indorse the note; that the only time the notes were even mentioned between them was when Dingus asked him to help make the trade, and said he expected to get from Cornett a \$2,000 note. It is clear that Dingus knew almost nothing about Cornett, had never investigated the notes, and that all the negotiations with reference to this transaction had been confined to these three parties—Cornett, Dingus, and Cyphers. The latter was a neighbor of Dingus, was a trader, and man of affairs, and it is hard to believe that Dingus, in the several conversations which these two men had in respect to probable sales of Dingus' land to Cornett, would not have asked Cyphers something about the probable value of the paper to be given in exchange. If Cyphers had said that he told Dingus he thought the notes were good, the statement would be consistent and reasonable, but as much can hardly be said

for the statement which he does make in that respect and repeats more than once in his deposition.

[1] It is of course true that the burden of proof is on Dingus. The presumption is in favor of innocence, and not of guilt, and one who charges fraud as a ground of relief must prove it by strong and clear and convincing evidence. This is especially true where, as here, the contract in question has been consummated by the delivery of a deed. These propositions are too well settled to require citation of authority in their support.

[2] The sole question in this case is whether Cyphers represented to Dingus that the notes were good, and thereby induced him to make the conveyance. Dingus says he did; Cyphers says he did not. If there were nothing else in the record, the case would be with Cyphers. It often happens, however, and it happens here, that the question of fraud depends as much upon circumstances as upon the statements of parties directly concerned. The mere fact that the oral testimony relating directly to the execution of a deed is equally balanced in point of the number of witnesses testifying for and against its fair execution does not necessarily mean that the attack must fail.

As was held in *Hale v. Hale*, 62 W. Va. 609, 59 S. E. 1056, 14 L. R. A. (N. S.) 221, when, in a suit by the grantor in a deed to set it aside for fraud in the procurement thereof, the oral evidence of the parties relating directly to the execution thereof is flatly contradictory and wholly irreconcilable, the circumstances bearing on the issue must be allowed unusual prominence and effect, and their controlling force depends more upon their character and power to create mental impression than upon their number and variety.

In *Va. F. & M. Ins. Co. v. Hogue*, 105 Va. 355, 360, 54 S. E. 8, 10, this court, in an opinion by Judge Cardwell, approved the following general statement of the law as to the burden and requisite degree of proof in support of an allegation of fraud:

"According to the overwhelming weight of authority, fraud need not, like the guilt of the accused in a criminal prosecution, be established beyond a reasonable doubt. A preponderance of evidence, as in any civil case, is sufficient, provided the proof is clear and strong enough to preponderate over the general and reasonable presumption that men are honest and do not ordinarily commit frauds, and reasonably to satisfy the understanding and conscience of the judge or jury. If it does this, it is sufficient both at law and in equity." 14 Am. & Eng. Ency. L. 200, and cases cited.

[3, 4] In view of the facts and circumstances above outlined, and the rules of law applicable thereto, we are reasonably well satisfied that the decree complained of is right. To say the least of it, we are unable, after

a thorough examination of all of the evidence, to find enough in it to justify us in holding that the lower court was wrong. We sit as a court of review, the decree comes to us with a presumption of correctness, and we ought not to reverse it if we are not fully satisfied that it is wrong. *Reynolds v. Adams*, 125 Va. 295, 312, 99 S. E. 695; *Britton & Kennedy v. Terry*, 130 Va. —, 107 S. E. 687.

The record shows that the property conveyed to Moore, trustee by Cyphers has been ordered sold in another suit to satisfy certain of Cornett's creditors. The debts owned by these creditors, however, were in existence when the deed was made, and were not created upon the faith of that property. Cyphers was not a party to the suit in which the aforesaid decree of sale was made. Both suits are pending in the same court, and it is reasonable to expect that the restitution undertaken to be made by the decree complained of here can be worked out in such a way as to restore the parties in large measure to the former status.

Affirmed.

(121 Va. 316)

STALLARD v. SUTHERLAND et al.

(Supreme Court of Appeals of Virginia.
Sept. 22, 1921.)

Infants \S 56—No relief from contract induced by fraudulent representations as to age.

Where an infant fraudulently represents that he is of full age, and has the appearance of full age, and the other party is thereby induced to execute a contract, the infant will be estopped in equity by his own fraud to avoid the contract on the ground of infancy to the prejudice of the other contracting party.

Appeal from Circuit Court, Wise County.

Suit by Walter Stallard, by next friend, against G. B. Sutherland and others. Decree dismissing the bill, and plaintiff appeals. Affirmed.

A. M. Vicars, of Wise, and J. M. Quillin, Jr., of Coeburn, for appellant.

Bond & Bruce, of Wise, for appellees.

PRENTIS, J. Walter Stallard, claiming to be an infant, suing by his next friend, instituted his suit, alleging, in substance, that on the 24th day of August, 1914, while still an infant, he was induced to convey a tract of land in Wise county to M. M. Long, trustee, to secure a debt to one J. F. Ford; that no part of the debt was for necessities, and the most of said debt he did not owe, but that it was for goods bought by his brother, one E. T. Stallard, and that none of such goods or proceeds were then owned by or in

the possession of the infant; that the trustee on the 26th day of June, by authority of the deed of trust, sold the property for \$265, and conveyed it to G. B. Sutherland and J. F. Holbrook, two of appellees. The bill prayed for an annulment and vacation both of the deed of trust and of the conveyance made by the trustee to his vendees, and for general relief. Before the case was heard the infant became 21 years of age, and upon his petition was substituted as complainant.

The defendants answered the bill, denying that Walter Stallard was an infant at the time of executing the deed of trust, and alleging in addition that he had for a long time theretofore been engaged in business for himself in his own name, without the aid of either parent or guardian; that he was fully matured and developed mentally and entirely competent and able to transact business for himself; that he was more than 21 years of age at the time of the execution of the deed of trust; that he made oath to that effect before the notary who took his acknowledgment thereto; and that, relying upon these representations of the said Stallard, the creditor was induced to dismiss his action for the recovery of the debt, and to accept the joint note of the alleged infant and the debtor, secured by the deed of trust given as security therefor, and omitted any further effort or proceedings to collect or secure the said debt.

Depositions were taken, and upon the hearing the trial court entered a decree dismissing the bill, from which this appeal was taken.

The pertinent facts shown by the evidence are that the appellant was an infant at the time of the execution of the deed of trust, having been born February 5, 1896. He was therefore about 19½ years of age at the date of the deed of trust in August, 1914. His father and mother had moved from that community to Georgia, but he had returned, was working for himself as a laborer, collecting his wages, depositing his money in bank, writing his own checks, paying his own board bill, and that he appeared to be 21 years of age. The complainant in his testimony does not deny the allegation that he represented himself to be 21 years of age before and at the time he executed the deed, but contents himself with saying that he does not remember whether or not he did so. The evidence to the contrary is convincing, so that the determining question is whether or not under these circumstances, he can secure the aid of a court of equity in his effort to repudiate the deed of trust.

Much has been written upon this subject, and the authorities are not in accord upon the precise question which this record presents. In cases like this, it is proper to remember the oft-quoted language of Lord

Mansfield in *Zouch v. Parsons*, 3 Burr. 1802, 1 W. Bl. 575:

"A third rule deducible from the nature of the privilege, which is given as a shield, and not as a sword, is that it never shall be turned into an offensive weapon to assist fraud and injustice."

Confining the discussion to the question at issue here—that is, whether an infant thus guilty of fraud and deceit is estopped in equity to reassert his title—the English cases all appear to hold that an infant is thereby estopped. The cases are collected in a note to *Lowery v. Cate*, 108 Tenn. 54, 64 S. W. 1068, 91 Am. St. Rep. 744, 57 L. R. A. 685. The American cases are not all consistent, but the weight of authority is in accord with the English rule.

Among the American cases are the following:

Hayes v. Parker, 41 N. J. Eq. 630, 7 Atl. 511, where an infant, by representing himself of age, secured a settlement with his guardian, and executed a discharge. He was not permitted to compel his guardian to account further. This is said there:

"At law * * * he [an infant] is incapable of fraudulent acts which will estop him from interposing the shield of infancy. * * * In equity, however, this rigid rule has its exceptions. Equity will regard the circumstances surrounding the transaction—the appearance of the minor, his intelligence, the character of his representations, the advantage he has gained by the fraudulent representations, and the disadvantage to which the person deceived has been put by them—in determining whether he should be permitted to invoke successfully the plea of infancy."

So in *New York*, where in *Blakeslee v. Sincepaugh*, 71 Hun, 412, 24 N. Y. Supp. 947, the implication in *Spencer v. Carr*, 45 N. Y. 406, 6 Am. Rep. 112, is followed. The infant having stated to the purchaser of the land, of which he was actually the owner, that he had no title to it, it was held that he was estopped to sue in ejectment, because he was "an infant of sufficient age to appreciate his rights and duties."

In *Schmitzheimer v. Elseman*, 7 Bush (Ky.) 298, it is held that an infant who conveyed land, falsely representing himself to be of age, cannot have his deed set aside on the ground of infancy.

In *Ferguson v. Bobo*, 54 Miss. 121, an infant with knowledge of her rights conveyed her land to her father to enable him to borrow money, and her father later conveyed to a mortgagee. She was held estopped to set up her legal title.

In *Goodman v. Winter*, 64 Ala. 410, 437, 38 Am. Rep. 13, an infant remainderman was held estopped from repudiation of a sale of land by the life tenant; the infant having received his share of the compensation.

In Ontario, in *Bennetto v. Holden*, 21 Grant Ch. (U. C.) 222, it was held that, where an infant conveyed land representing herself to be of age, and after majority conveyed to others who had knowledge of the earlier grant, she was bound by her misrepresentations.

It appears that in Louisiana an infant is precluded as effectually as an adult, for in *Guidry v. Davis*, 6 La. Ann. 90, it is said:

"It is an error to suppose that the law can sanction the perpetration of frauds by minors; the truth and reality of bona fide transactions are as binding upon them as upon majors."

In *Rundle v. Spencer*, 67 Mich. 189, 34 N. W. 548, the court avoided putting the decision upon the ground for equitable estoppel, but awarded an injunction to stay proceedings in an action of ejectment brought by one who had sold the land in question while an infant, putting the decision on the equities of that particular case.

In *Harmon v. Smith* (C. C.) 38 Fed. 482, it is said that the doctrine of estoppel does not apply to minors "unless such conduct is intentional and fraudulent."

In the case of *Commander v. Brazile*, 88 Miss. 668, 41 South. 497, 9 L. R. A. (N. S.) 1117, it is held that, where a minor who, by false representations that he is of age, aided by his mature appearance, induces another to enter into a contract with him under the belief that he is of full age, of which he accepts the benefit, he cannot set up his minority in defense of an action upon the contract.

A modern case in which there is quite a discussion of the whole question is *International Land Co. v. Marshall*, 22 Okl. 693, 98 Pac. 951, 19 L. R. A. (N. S.) 1056, where it is held that equity will refuse to lend its aid in any manner to one seeking its active interposition who has been guilty of any unlawful or inequitable conduct in the matter with relation to which he seeks relief, and applies the doctrine to an infant who fraudulently represented himself to be over 21 years of age, when in fact he was only 19 years of age, and refused to cancel a deed in the absence of an offer to refund the amount of money so fraudulently obtained.

There are cases to the contrary, and this statement is deduced from the American cases in 14 R. O. L. 241, 242:

"But where the contract has been executed, and the infant seeks to avoid the title conferred thereby in order to maintain either an action or a defense, the decisions are more conflicting. According to the apparent weight of authority, his right of avoidance is not lost to him by estoppel based on his false assertions as to his age, but there are well-considered cases to the contrary. If the infant is obliged to bring an action in equity to obtain a cancellation of the deed in question, or like equitable relief, the distinctive rule of the equity courts that he who seeks equity must

do equity has often been held to prevent his recovery; but even on this point the cases are not entirely uniform. Of course, to create the estoppel it must be proved that the infant in fact misrepresented his age, that the other party was deceived by the misrepresentations, and that he would not otherwise have made the contract."

The distinction seems to be that, in order to charge the infant with equitable estoppel, he must be guilty of something more than a mere failure to disclose his infancy at the time he enters into the contract. If, however, he fraudulently represents that he is of full age, or actively conceals his minority, and the other party is thereby induced to execute the contract, then it is held that the infant will be estopped in equity by his own fraud to avoid the contract, on the ground of infancy, to the prejudice of the other contracting party. It may be stated as a well-supported general proposition that, where one who, though an infant, has arrived at years of discretion, and by direct fraud or deception has entrapped another who was ignorant of the facts into waiving valuable property rights, such an infant will be estopped thereafter from relying upon his infancy to avoid such a contract. *Williamson v. Jones*, 43 W. Va. 563, 27 S. E. 411, 38 L. R. A. 703, 64 Am. St. Rep. 891; note *Craig v. Van Bebber*, 18 Am. St. Rep. 635; 22 Cyc. 512, 548.

The Virginia case of *Mustard v. Wohlford*, 15 Grat. (56 Va.) 329, 76 Am. Dec. 209, is relied upon by the appellant. While there are expressions in that opinion which can be quoted in opposition to the doctrine which we have indicated as here applicable, in that case no element of fraud or falsehood was involved. There the purchaser of the interest of the infant knew that he had no legal right to convey, and accepted the title upon condition that he was to make the purchaser a good deed with general warranty thereafter upon the day when he should attain the age of 21 years, and the infant's repudiation of his contract was upheld. The instant case presents an entirely different question. Here the infant falsely represented himself to have attained his majority, his appearance confirmed it, and he was in fact holding himself out to the community by his conduct in attending to all his business transactions just as an adult would; and in the transaction in question the false statements of his brother and himself were made to induce the creditor to believe that he was of age and forego the collection of his debt by legal process.

It was in *Watts v. Creswell*, 9 Vin. Abr. 415, that Cowper, said:

"If an infant is old and cunning enough to contrive and carry on a fraud, in a court of equity he ought to make satisfaction for it." 4 Ann. Cas. 536.

In the states of Iowa, Kansas, Utah, and Washington, the doctrine to which we give our approval is enforced by statutes, each of which provides that an infant cannot disaffirm his contract "in cases where, on account of the minor's own misrepresentations as to his majority, or from his having engaged in business as an adult, the other party had good reason to believe him (the minor) capable of contracting."

Mr. Pomeroy appears to give his full adherence to this rule, saying:

"Since an infant is not directly bound by his ordinary contracts, unless ratified after he becomes of age, so obligations in the nature of contract will not be indirectly enforced against him by means of an estoppel created by his conduct while still a minor. On the other hand, an equitable estoppel arising from his conduct may be interposed, with the same effect as though he were adult, to prevent him from affirmatively asserting a right of property or of contract in contravention of his conduct upon which the other party has relied and been induced to act."

And he says this also:

"The incapacity of infants to enter into binding contracts is the same in equity as in law; but such contracts are generally voidable only, and may therefore be ratified after the infant attains his majority. Fraud, however, will prevent the disability of infancy from being made available in equity. If an infant procures an agreement to be made through false and fraudulent representations that he is of age, a court of equity will enforce his liability as though he were adult, and may cancel a conveyance or executed contract obtained by fraud." 2 Pomeroy's Eq. Jur. (4th Ed.) §§ 815, 945.

In *Rice v. Boyer*, 108 Ind. 472, 9 N. E. 420, 58 Am. Rep. 61, it is held that under the Code of Civil Procedure of Indiana the distinction made in the English cases between suits in equity and actions at law is immaterial, and in an action for deceit against an infant applied the equitable rule, saying that the courts there would not inquire as to the form of the proceeding.

Without prolonging the discussion, it is sufficient to say that we prefer to follow, in this conflict in the American cases, that line which tends to discourage and prevent fraud, and which is in accord with equitable doctrines. This infant, who was managing his own business just like an adult, whose appearance indicated that he had attained his majority, who falsely misrepresented his age, who was intelligent enough to appreciate the fraudulent scheme and in conjunction with his brother to attempt its execution, should not be aided by a court of equity to consummate such fraud.

Affirmed.

LOGWOOD et al. v. HOLLAND.

(Supreme Court of Appeals of Virginia.
Sept. 22, 1921).

1. Vendor and purchaser \S 114—Purchaser of orchard held to have waived right to rescind for false representations.

A purchaser of an apple orchard wherein the number of trees had been misrepresented, who failed to offer to return the property and merely sought a rebate from the purchase price, held to have elected to retain the property and to have waived his right to rescind.

2. Logs and logging \S 3(7) — Sale of growing trees is of an interest in land.

Growing trees are part of the realty, and a sale thereof is a sale of an interest in land.

3. Vendor and purchaser \S 334(7)—Pecuniary recovery allowable in equity for mistake resulting in loss of any part of realty affecting purchase price.

While bills in equity seeking a purely pecuniary recovery on account of mutual mistake, or mistake of one party through fraud or culpable negligence of the other, have been confined to shortage of acreage, the principle in a proper case may be extended to mistakes resulting in loss of any part of the realty which affected the purchase price.

4. Principal and agent \S 183—Agent properly joined with vendor in equity suit for shortage of trees in orchard purchased.

In a suit in equity brought against a vendor of an apple orchard and a land immigration bureau which was his agent to recover for a shortage in the number of trees, held, that the bureau was properly joined as defendant; it being charged as primarily responsible for the fraud.

5. Vendor and purchaser \S 176—Rule as to compensation for deficiency in acreage stated.

In cases of deficiency in acreage, in the absence of special considerations, the compensation is to be fixed by multiplying the number of acres lost by the average price per acre, and if exceptional advantages exist, as buildings or springs, their relative value is to be fixed with reference to the contract price for the whole estate.

6. Vendor and purchaser \S 174—Rule of compensation for shortage in number of trees in orchard sold, stated.

Where an apple orchard was purchased under representations that it contained 500 bearing trees, when there were in fact only 332, the value of the trees lost must be determined with reference to the price agreed upon for the whole estate.

7. Reference \S 65—Exception to report properly overruled where no objection was made at hearing.

An exception to the report of a commissioner appointed to assess damages for a shortage of trees in an orchard purchased that the wrong measure of damages was used was prop-

erly overruled, where no objection to evidence on that ground was made until the commissioner had made his finding, and no rebuttal testimony was introduced.

Appeal from Circuit Court, Bedford County.

Bill by W. B. Holland against J. C. Logwood, Jr., and others to rescind a contract for the sale of real estate or for damages. From a decree overruling defendants' demurrer, refusing a rescission, and directing a commissioner to ascertain damages, and a decree awarding a recovery, defendants appeal. Affirmed.

O. C. Rucker, of Bedford City, and Jas. D. Johnston and Jackson & Henson, all of Roanoke, for plaintiffs.

Nelson Sale, of Bedford City, for defendant.

KELLY, P. On January 1, 1916, John C. Logwood, Jr., through the agency of the Virginia Land Immigration Bureau, sold and conveyed to W. B. Holland an orchard property in Bedford county containing about 25 acres. The consideration for this sale and conveyance was \$3,000 paid and to be paid as follows: \$500 cash; \$500 September 15, 1916; \$1,000 January 1, 1917; and \$1,000 January 1, 1918—the deferred payments being represented by Holland's negotiable notes and secured by deed of trust on the property. All of these notes were subsequently paid.

In August, 1917, Holland filed his bill in equity against Logwood and the Virginia Land Immigration Bureau, in which he alleged that he had been misled as to the number of apple trees on the land, and prayed that the court would either set aside the contract of sale and order a refund of the purchase price and the expenses incurred by him in connection therewith, or require the defendants to pay him the sum of \$1,050, the alleged difference between the value of said property as represented to him and its value as shown by an actual count of the trees.

The defendants demurred to and answered the bill, proof was taken on both sides, and the court on April 8, 1918, entered a decree which (1) overruled the demurrer, (2) refused a rescission of the contract, and (3) held that the complainant was entitled to an abatement of the purchase price in an amount equal to the value of the trees which were represented to be, but turned out not to be upon the land, and directed one of the commissioners of the court to ascertain and report such value, the report to be based on the evidence already adduced in the cause, as well as any other evidence offered by the parties which the commissioner might deem necessary and pertinent.

The commissioner, after taking further proof, reported that the value of the short or missing trees was \$1,000. The Virginia Land Immigration Bureau excepted to the report

on several grounds, the one chiefly relied upon being that the commissioner had proceeded on the wrong theory as to the measure of damages; and the court on May 10, 1919, entered a decree reducing the sum fixed by the commissioner to \$925, and awarding the complainant a recovery against both defendants for that amount, with interest from the date of the conveyance.

This appeal calls in question the correctness of the two decrees above recited, and the first assignment of error brings under review the action of the court in overruling the demurrers.

The allegations of the bill, which of course must be regarded as true upon the demurrers, make out a case which in narrative form may be stated as follows:

In the fall of 1915 Holland saw an advertisement of the Virginia Land Immigration Bureau which was as follows:

"Peaks of Otter Orchards.

\$10,000. 25 Acres. No. 1047. Bedford Co., Va. 7 mi. Ry. Terms Satisfactory.

"Located on Peaks of Otter road, near Peaksville, R. F. D. route 1 mile of church, store and near mill; black Porter's loam soil with black subsoil, watered by branch and spring, hard wood timber land, considerable oak and chestnut; land lies gently rolling with a slope to the southeast, 16 acres cleared and in orchard, balance in second growth timber.

"Orchard consist of 16 acres, one of the finest old orchards in the state with 500 bearing trees, 35 years old, nearly all Albemarle pippins, probably 100 Cannon Pearmains; in addition there are 200 Albemarle pippins 2 years old; plenty of pears, cherries, plums, grapes, all bearing and of the best variety.

"Improvements consist of a double dwelling of five rooms and apple house with cellar, barn, and implement house. Improvements are not in the best condition. Fences sufficient for the place and satisfactory for the turning of sheep.

"The most magnificent mountain stream passes through the property. This property is one of the most desirable in the state and the most productive. It has produced \$3,000 worth of apples in one year. It is located right near the Peaks of Otter and between two peaks. The scenery is splendid, and there can be no more attractive or desirable orchard location. and the orchard itself has been pruned, sprayed and kept in good order, always having been scientifically handled. The prospects are sufficient to believe that 1912 stock will give returns to pay half the price of the place."

Holland, who had been contemplating buying an orchard for some time, was attracted by the terms of the foregoing advertisement and decided to look into it. He was a city man residing in New York, had no practical experience or knowledge in respect to orchards and like property, and relied entirely upon what was stated in the advertisement and upon what he was subsequently told with reference to the property.

On November 17, 1915, Holland visited the office of the Virginia Land Immigration Bureau in Roanoke, Va., discussed the property with that concern, was informed that it might be bought for as little as \$3,000, and then came to Bedford county with one Mr. Kinsey, a representative of the Bureau, to visit the orchard. There he met Logwood, the owner, with whom he discussed the property, but who made no direct or important statements or representations to him. Holland remained at the orchard on that occasion for about half an hour looking over it in a somewhat casual manner, but made no attempt to count the trees.

After making this inspection Holland returned to his home in New York, and on December 11, 1915, by appointment and in company with Dr. W. J. Quick, general manager, and George D. Wingfield, local agent of the Bureau, he made a second visit to the property. At that time Dr. Quick stated to Holland that he was a practical scientific orchardist; that the orchard was a very fine one; that in one year \$3,000 worth of apples were sold from it; that he counted the trees with one Mr. Cummins, who had bought the orchard about three years prior thereto, and that there were then about 495 old bearing trees; that possibly a few had died or been blown down since that time, and that he believed that it would be safe to say that there were at the time they were talking not over 490 or 495 trees, but that 200 young trees had been planted. On the next day Holland visited the orchard again, but the weather was very cold and disagreeable, the ground was covered with snow, and Holland did not attempt to make any count of the trees, and did not consider a count necessary because of the above-recited representations made to him by Dr. Quick. He returned to New York, and on December 17, 1915, wired Dr. Quick that he would take the property at the price and on the terms mentioned in the conveyance of January 1, 1916, hereinbefore set out.

Holland did not visit the orchard after his purchase until June, 1916, and did not make a very full inspection at that time because of weather conditions; but he had placed a man named Clark on the property to care for it, and was informed by him some time in July, 1916, that there were only 320 bearing trees on the place. It does not appear that he made any complaint about this fact until September, 1916, when he saw Dr. Quick and mentioned this shortage to him and asked if he did not think he [Holland] should have a rebate, to which Quick replied: 'You certainly should have if the count is short as you say, but I cannot believe that they can be that short.'

During the next two or three months Holland mentioned to Dr. Quick on several occasions the shortage in the trees in an effort to get some settlement on that account, and

Dr. Quick led him to believe "that something could be done in the matter, but that it would have to be passed on by the board of directors of the Virginia Land Immigration Bureau," and Holland was "put off in that way from time to time"; and "this proposition for a settlement or rebate on account of this shortage continued on through the fall of 1916, until January 2, 1917." In the meantime the purchase-money note for \$500 due in September, 1916, was paid by Holland "under the impression and belief that the shortage in trees would be made good to him."

On January 2, 1917, Holland and the said George D. Wingfield, at the former's request for an accurate count of the trees, made such a count and found that there were only 332 old bearing trees, and this fact was reported to Dr. Quick, who stated that the matter would be taken up with the board of directors the next day. After that meeting Quick wrote Holland that "the board of directors declined to make any settlement."

It is further alleged that when the purchase-money note due January 1, 1917, became due, and in order to avoid a sale of the property under the deed of trust, it became necessary to pay not only that note, but all of the remaining purchase money, whether at that time due or not.

The bill further alleges that, by reason of the false advertisement, representations, and inducements on the part of the Virginia Land Immigration Bureau, Holland was grossly and fraudulently deceived concerning the property and the number of trees thereon, and thus persuaded to give much more for the property than he would otherwise have given and much more than its true value, and was thereby defrauded and cheated out of \$1,050.

The prayer of the bill, after naming the Virginia Land Immigration Bureau and John C. Logwood, Jr., as defendants, and calling upon them to answer, but waiving answer under oath, was as follows:

"May the said contract of sale as above set forth as having been induced by false and fraudulent representations be set aside, declared null and void, and your complainant be refunded the sum of \$1,000 expended by him in and about said purchase, and your complainant's purchase money of \$3,000 be returned to him, or, if said sale is confirmed, may the defendants be required to pay to your complainant the sum of \$1,050, the difference between the value of said property as shown and estimated by said advertisement and the true value of said property by an actual count of the trees upon the same; may all proper accounts be ordered and taken, and all such other and general relief be granted to your plaintiff as to equity seems fit and good conscience may require."

The chief ground relied upon in support of the demurrer is that the bill shows on its

face that it was not good as a bill for rescission, and asserts a purely legal demand for damages cognizable only in a court of law.

[1] We think it reasonably clear that the bill does not state a proper case for rescission. It alleges that after the complainant was appraised in July, 1916, by his own representative and caretaker, Clark, as to the shortage in the number of old trees, he neither at that time nor at any other time before the bringing of this suit offered to return the property, or even intimated any desire to do so. Upon the contrary, he made no request or suggestion, so far as the bill indicates, for any settlement or redress except a rebate on the purchase price. Under these circumstances he must be regarded as having elected to retain the property, and to have thereby waived his right to have a rescission of the contract. *Hurt v. Miller*, 95 Va. 32, 41, 27 S. E. 831.

[2, 3] But it does not follow from this conclusion that the demurrer was improperly overruled. The bill states facts entitling the complainant to relief in another view of the case. It is well settled in this state that growing trees are a part of the realty, and that a sale thereof is a sale of an interest in land. *Stuart v. Pennis*, 91 Va. 688, 690, 22 S. E. 509. It is probably true, as contended by counsel for appellants, that bills in equity seeking a purely pecuniary recovery on account of mutual mistake (or mistake of one party caused by fraud or culpable negligence of the other) have heretofore in this state been confined to cases involving a shortage of acreage, or loss of part of the acreage contracted for by title paramount. Some of the cases, however, have expressly recognized the propriety of considering improvements or other items of special value in fixing the abatement, and we are unable to see any reason why this principle, so sound and just in itself, and so well established as to shortage of acreage, should not be extended in a proper case to mistakes resulting in loss of any part of the realty which affected the purchase price. The underlying reason for allowing an abatement when there has been a loss of acreage is that the estimated amount influenced the price. *Blessing v. Beatty*, 1 Rob. (40 Va.) 304; *Watson v. Hoy*, 28 Grat. (69 Va.) 698, 705. The allegations in the bill show that the sale in this case was made upon an understanding that there were a certain number of trees on the land, and, independent of the *prima facie* presumption that in the sale of an orchard the number of trees influences the price, the bill further affirmatively shows that this was in fact true, and to a very material degree.

If we were warranted in treating the mistake as to the number of trees as being controlled by the principles governing a mistake in acreage—and we cannot doubt that we are—then there can be no question as to the jurisdiction in equity to afford relief by an

abatement of the purchase money, or, as in this case where all the money had been paid, by a money recovery for the deficiency. The equitable jurisdiction in such cases is perfectly well settled and is not questioned here. *Blessing v. Beatty*, supra; *Boschen v. Jurgens*, 92 Va. 756, 24 S. E. 390; *Hull v. Watts*, 95 Va. 10, 27 S. E. 829.

The ground of the jurisdiction as clearly stated in the cases cited is that of mistake, "whether the mutual mistake of the parties, or the mistake of one of them occasioned by the fraud or culpable negligence of the other." This ground plainly exists here. The Virginia Land Immigration Bureau by its advertisement, and by the subsequent representations of Dr. Quick, relied upon by the complainant, led the latter to believe that there were approximately 500 bearing trees on the land, the greater part of which the evidence clearly shows were understood by Holland to be Albemarle pippins, when as a matter of fact there were 168 trees less than that number, and only 128 Albemarle pippins. The bill charges that these representations were false and fraudulent. They were certainly false; whether designedly so or not is immaterial. If Dr. Quick did not know them to be false, there was a mutual mistake; if he knew, or ought to have known, that they were false, then there was a mistake on one side occasioned by fraud or culpable negligence on the other.

[4] It is insisted that in any event the bill should have been dismissed as to the Virginia Land Immigration Bureau because it was neither a party to the contract or the deed, but was simply an agent for the grantor. This position is not tenable. The bill shows that the agent was primarily responsible for the alleged fraud, and fraud on its part is distinctly charged. It was therefore clearly proper to join the Bureau as defendant. 31 Cyc. 1624. And we may add in this connection that when the proof was taken it appeared that the Virginia Land Immigration Bureau, while not the owner of the property, had a direct interest in it and was to receive all of the proceeds of the sale over and above \$2,100.

The proof sustains the material allegations of the bill. We do not understand it to be seriously contended that upon the facts the complainant is not entitled to proper compensation for the loss of the trees both against the principal, Logwood, and his agent, and if there were any such contention we would have no difficulty in rejecting it. The only questions in this case are as to the form of procedure and the measure of relief.

We come now to the only other assignment of error requiring attention, and under this assignment it is claimed that, if the defendants were liable to the plaintiff, "the value of 168 trees without reference either to the purchase price paid for the property or the value of the property actually received by the

plaintiff is not the true measure of the plaintiff's damages."

We have held that this case is controlled by the same principles as if part of the acreage instead of part of the trees had been short; and the measure of recovery must be fixed accordingly.

The evidence shows that the false representations affected the substance of the thing contracted for, and the purchaser therefore originally had two remedies—he could restore the property and have a rescission of the contract, or he could keep the property and have compensation for the loss. He has by his conduct elected to adopt the latter remedy. What, then, is to be the measure of his compensation?

[5] In cases of deficiency in acreage, unless there be special considerations requiring a departure from the rule, the compensation is to be fixed by multiplying the number of acres lost by the average price per acre. *Blessing v. Beatty*, supra; *Watson v. Hoy*, supra. If there be exceptional circumstances, such, for example as the existence of valuable buildings, springs, or bridges and fisheries, on the land involved, then the relative value of such things is to be fixed with reference to the contract price for the whole estate, and compensation therefor determined accordingly.

In *Hoback v. Kilgores*, 26 Grat. (67 Va.) 442, 21 Am. Rep. 317 (a suit for a specific performance), there was a shortage of acreage, but there were upon a portion of the land acquired by the vendee improvements consisting of a dwelling house, outhouses, a tanyard, and a gristmill, the value of which had evidently influenced the purchase price. This court, in an opinion by Judge Moncure, while recognizing the general rule as laid down in *Blessing v. Beatty* that in cases of mere deficiency in quantity compensation is to be awarded according to the acreage value of the land, held that the improvements above mentioned required a departure from the general rule, and said:

"In this case the just and true measure of compensation is according to the average value of the land without the improvements, considering both together to be worth the contract price of \$1,400, estimating the quantity of the land, as the parties did, at 127½ acres."

In *Watson v. Hoy*, 28 Grat. (69 Va.) 698, 713 (a judicial sale in which the purchaser after confirmation was allowed an abatement of the purchase price for a deficiency of acreage), the court, in an opinion by Judge E. O. Burks, after calling attention to the fact that there were on the land actually acquired by the purchaser certain valuable buildings, bridge privileges, and fisheries, which must have entered largely into the agreed price for the entire estate, held that in fixing the amount of the abatement the relative value of these improvements should be deducted

from the entire purchase price for the whole estate, and the sum remaining should be used in determining the average price per acre.

In *Yost v. Mallicotte*, 77 Va. 610 (a suit for an abatement of price on account of deficiency in the acreage), this court, in an opinion by Judge Lacy, applied the general rule of the average price per acre, and reversed the lower court, which had fixed the compensation for the deficiency by first ascertaining and deducting from the price of the whole the value of the improvements, the latter court having apparently followed *Hoback v. Kilgores*, supra, and *Watson v. Hoy*, supra. Upon the facts it is difficult to reconcile the court's refusal to give any consideration to the valuable improvements in *Yost v. Mallicotte* with the rule of decision as settled in the other two cases last above cited, but the rule itself was not in any way changed by the *Yost* Case, because that case expressly recognized the rule as laid down in the other two cases and disregarded the improvements because, as the opinion held, they were not of sufficient importance to constitute an exception to the rule.

In the case of *Grayson v. Buchanan*, 88 Va. 251, 13 S. E. 457, the vendor had represented the tract to contain 140 acres when it contained only 126 acres, and it also represented that half of a certain spring was situated on the tract, when as a matter of fact no part of the spring was so situated. The purchaser was sued for the purchase price, and the defendant offered an equitable plea seeking an abatement for the false representations as to the acreage and as to the spring. In an opinion by Judge Lewis this court held that as to the acreage the usual rule based upon the average price per acre applied and abated the price as to the acreage accordingly; but as to the loss of the spring the abatement was fixed by taking the total price of the property and determining how much less than the whole price the land would be worth by reason of the loss of the spring.

The rule as gathered from the foregoing cases seems to be that, when improvements or other features of peculiar value form a part of the realty sold, the value in fixing compensation for a deficiency in the substance of the thing sold is to be based upon the agreed price for the whole estate, and this rule seems to us to be entirely in accord with reason and justice.

[6] In the instant case it follows that the value of the trees lost must be determined with reference to the price agreed upon for the whole estate, and a substantial variation from this rule would constitute error. It is fairly deductible from the record, however, that there has been in fact no substantial departure from this rule.

[7] The decree of reference found as a matter of fact that the complainant (who was shown to have bought for a total price of

\$3,000) made his calculation to buy and was induced to buy on the belief that there were 500 bearing trees (the greater part of which were represented as Albemarle pippins), when in fact only 332 bearing trees were on the land, and of these only 126 were Albemarle pippins. With these facts before the court it ordered the commissioner to report "the value of the 168 trees." The clear meaning of the court was that the commissioner was to determine the relative value of the trees which were short. More than this, the two witnesses whose evidence was relied upon chiefly in fixing the value made their examination of the property at the request of counsel for the complainant, who had informed them in writing that he had paid \$3,000 for the land, that the orchard contained 25 acres, and that trees of certain varieties and in certain numbers had been represented as being on the land, and asked them to ascertain the proportionate loss. And it is manifest that these two witnesses, as well as practically all of the witnesses who testified upon this point, did so with the original cost price in view, and that upon the evidence as a whole the court could not reasonably have fixed the damages at less than \$925 even if the rule contended for by counsel for the defendant had been specifically laid down in the decree and followed by the commissioner and the court. The evidence which was introduced on behalf of the complainant to establish the damage does not appear to have been objected to on the ground that the complainant was following the wrong measure of damage until after the commissioner had made his finding, and no evidence at all was introduced before the commissioner on the part of the defendant to rebut the evidence thus introduced by the complainant, or to fix the damage by any different rule. Under these circumstances the exception was properly overruled. See *Jeffress v. Virginia Railway & Power Co.*, 127 Va. 694, 732, 104 S. E. 393, 405, and cases cited.

It is insisted that the commissioner's allowance of \$1,000 for 168 trees means that, if the whole 500 trees had been lost, the damage would have been equal to the entire purchase price of the land, and the purchaser would have received the land and the young trees free. This contention is not sound. It must be remembered that the value of the land itself was very small. The property was valuable chiefly as an orchard, and the evidence clearly shows that the 168 trees must have been regarded as worth relatively more than the average value of all the trees contracted for. Neither the commissioner nor the court attempted to follow the exact figures or the precise method of calculation adopted by the witness. The commissioner reported that it was "impossible to figure the exact valuation of these trees, in view of the differences of opinions expressed by the witness-

es," that after carefully considering all the evidence he was of opinion that the value of the 168 trees which were short could safely be placed at about \$1,000, and that he accordingly reported that sum as the proper amount to allow complainant as damages for the loss sustained. The court, "having fully read and considered all the evidence upon which the report of the master commissioner was based, being of opinion from the evidence that the amount of damages to which the plaintiff is entitled, whether based upon the relative value of the shortage in the number of trees to the purchase price, or based upon the difference between the actual value of the land and trees upon the day of sale and the total amount paid by the plaintiff for said property, is \$925," sustained the exceptions to the report to the amount of \$75 and awarded a recovery against both defendants for the former sum.

There is no error in the decree to the prejudice of the appellants, and it must be affirmed.

Affirmed.

BURKS, J., absent.

(121 Va. 570)

OLIVER v. COMMONWEALTH.

(Supreme Court of Appeals of Virginia.
Sept. 22, 1921.)

Intoxicating liquors \Leftrightarrow 236(6½, 7, 20)—Evidence held insufficient to support conviction of possessing, transporting, and offering for sale.

In the prosecution for illegally possessing, transporting, exposing for sale, and soliciting orders for ardent spirits in violation of the Prohibition Law, evidence held insufficient to support a conviction.

Error to Hastings Court of Richmond.

J. J. Oliver was convicted of violating the prohibition law, and he brings error. Reversed and remanded for new trial.

Mapp & Mapp, of Keller, and L. O. Wendenburg, of Richmond, for plaintiff in error.

John R. Saunders, Atty. Gen., J. D. Hank, Jr., Asst. Atty. Gen., and Leon M. Bazile, Second Asst. Atty. Gen., for the Commonwealth.

BURKS, J. Oliver, the plaintiff in error, was convicted of violating the Prohibition Law (Acts 1918, c. 388) by having unlawful possession of, transporting, exposing for sale, and soliciting orders for ardent spirits, and sentenced to be confined in jail for 30 days and to pay a fine of \$250.

There are a number of assignments of error, among them that the trial court erred in refusing to set aside the verdict for lack of evidence to support it. We are of opinion that this assignment of error is well taken. It will be unnecessary, therefore, to consider the other assignments.

Oliver and S. L. Chase were prohibition inspectors, and, amongst other things, were charged with the duty of destroying stills and apprehending persons engaged in violation of the prohibition law. On Saturday, October 18, 1919, after a successful week's work in counties near Richmond, they discovered a still in Amelia county on a tract of land of which Charles W. Venable was the tenant. Two men were found at the still, but they made their escape. Oliver and Chase, however, took possession of one five-gallon keg and three one-gallon jugs or bottles of whisky and of the still, loaded them into the Ford machine in which they were traveling, and carried them to the city of Richmond, to the office of the prohibition commissioner. Before leaving the farm they endeavored to find Venable, but he and his family were absent from home. A colored man, however, was there, who had been plowing for Venable that day, and Oliver left a note and also a verbal message for Venable, saying that they had found a still and a five-gallon keg of whisky and three one-gallon jugs of whisky, and advising him to go to the court house in Amelia county and surrender himself to the attorney for the commonwealth, or to come to the prohibition commissioner in the city of Richmond. This note appears to have been signed by Oliver in his own name and also that of Chase. Venable could not read, but had the note read to him by his wife, and testified that the verbal message was also delivered to him, describing, as aforesaid, what they had captured: i. e., the still and the kegs and jugs of whisky aforesaid. They started for Richmond late in the evening, and arrived at the office of the prohibition commissioner about 10:30 p. m. They unloaded the still and put it in the office of the prohibition commissioner, and also a bag of apples which they had purchased. Just at this time, and before the whisky had been unloaded, "Nubby Arnold" appeared on the scene and stated to them that he knew where 3 or 4 cases of bottled in bond whisky was, just brought in that day, and that he could take them to it. Arnold had shortly before that (about two or three weeks) given them information as to the location of a lot of bottled in bond whisky, and as a result of this information they had taken 41 quarts of whisky and captured the man who had it in charge. There was no place at the prohibition office where the whisky could be left with safety, and after a brief conference between Oliver and Chase they determined to take Arnold with them in the machine along with the whisky, and go after that which Arnold had spoken to them about. Arnold got in the car with them and directed the route to be taken, until they were far out on the outskirts of the city, when he asked them to stop and wait a minute, and with that he got out of the car and

went diagonally across the street to the house, which turned out to be that of a colored man, William Stewart, whose house had been several times searched for whisky. Down to this point there is absolutely no controversy about the facts. What thereafter transpired is in many respects in great doubt and uncertainty. The chief witness for the commonwealth was Policeman Chinault, of the city of Richmond, who was not only flatly contradicted by other witnesses on the most material points of his testimony, but also, time and again, made statements on trial in conflict with his testimony before the police court on the preliminary examination of the case, which testimony had been taken down by a stenographer, and was admitted by the attorney for the commonwealth to be correct. Notwithstanding these contradictions, it was the province of the jury to hear and consider all of the testimony, and settle the disputed questions of fact. According to the testimony of Chinault, which seemed to have been accepted by the jury, he and Policeman Porter were in that section of the city, and heard the engine of an automobile running, and rode up to where it was, and found Oliver sitting at the wheel, and inquired of him why his rear light was not burning. Oliver made some excuse for his delinquency and got out of his machine to light his rear light. In doing so, he exposed a pistol in his hip pocket, which Policeman Porter reached down and pulled out, and asked what he was doing with it, and he replied that they were prohibition officers, and exhibited his badge. The pistol was then given back to him. The automobile had no side curtains, and the keg and three jugs were sitting in the space between the two seats open to observation. Chinault asked Oliver what was in the car, and Oliver replied there was not anything in the car. At that time, however, Chinault had seen what was in the car. About that time Chinault saw William Stewart walking along the street not far from the automobile, and stopped him and asked him what was coming off, and Stewart replied, "Not anything." Chinault said to him then, "Come clean, don't give me that stuff," and Stewart replied:

"Well, the man Arnold that just went up the hill is the man that was at my house and tried to sell me some whisky at \$20 a gallon and I refused to buy it, and he dropped to \$17 a gallon."

Just before this Arnold had come out to the machine where Chase and Oliver were, and Chinault had inquired of Oliver if Arnold was with him, and Oliver replied, "No." And Arnold was told to go on, which he did. Arnold also, in reply to a question from Chinault, had stated that he was not with them. After Arnold left, Chinault put the defendant under arrest, and walked over to where the car was, and Oliver told him that there were

eight gallons of whisky in the car, and also gave him an account of the capture of the whisky that day. There is much other testimony relating to what took place at the time of the arrest and subsequently, but it is not deemed necessary to set it out here. William Stewart was also examined as a witness for the commonwealth, and states that Arnold came to his house and offered to sell him eight gallons of whisky, but nowhere in the testimony for the commonwealth does it appear that Oliver or Chase ever offered to sell any of the whisky to any person, or authorized any other person to make such sale. Arnold undoubtedly did go with them, and if the evidence of the commonwealth is to be accepted as true that they denied that fact, then they simply lied as to that question. But this is far from establishing the fact that Oliver offered whisky for sale, or authorized Arnold to offer it for sale. They were dealing with a suspected party, and used their own devices to entrap him, and if Arnold lied in this conversation, that is no ground for convicting Oliver of offering the whisky for sale.

Evidence was also introduced by the commonwealth to show that in September, 1919, the accused offered to sell F. D. Kelly one or two cases of whisky in pint bottles, and that in the latter part of September he offered to sell George W. Smith some whisky known as "Four Roses."

It should be said in respect to the offers to sell to Kelly and Smith that it appeared in the evidence that on neither occasion did Oliver have any whisky with him to sell, and that the offer was merely an effort to entrap these parties.

Oliver and Chase had the undoubted right to take the whisky along with them for safekeeping while they were in search for the additional whisky which Arnold said he could find, and it seems incredible that they should attempt to sell that whisky after having left both verbal and written evidence of what they had captured on the afternoon of that day.

The Attorney General, after making a statement of the evidence offered on behalf of Oliver, concludes this branch of his argument as follows:

"This is a fair summary of the evidence in this case. We are frank to say that the fact that, before coming to Richmond, the accused left written evidence of his possession of the whisky, and the fact that the prohibition commissioner investigated the matter after the arrest of the accused, yet kept the inspectors in his employ, all of which is undisputed, raises some question as to whether there was sufficient evidence to support the verdict that the accused was offering for sale ardent spirits. However, the jury passed upon this, and we do not feel that we can say that the verdict was without evidence to support it."

It seems fairly plain that the only reason that the Attorney General did not confess error was because the jury had found the prisoner guilty on the evidence, and he did not think that under these circumstances he should confess error founded entirely on the testimony.

The evidence on behalf of the commonwealth may be consistent with the guilt of the accused, but it is very far from being inconsistent with his innocence.

Upon the whole case, we are of opinion that the evidence was not sufficient to support the finding of the jury, and for this reason the verdict of the jury and the judgment of the Hustings court will be set aside, and the case remanded to that court for a new trial, if the attorney for the commonwealth shall be of opinion that he can make a better case on another trial than at the former hearing.

Reversed.

(131 Va. 208.)

MATNEY et al. v. YATES.

(Supreme Court of Appeals of Virginia. Sept. 22, 1921.)

1. Trusts \S 372(3)—Evidence held to show release from trust of agent taking title in himself.

Where complainants, desiring to acquire the interest of certain heirs in a tract of land, procured respondent to act as agent, but, the heirs demanding more money than he was authorized to pay, respondent took title in himself, risking a repudiation of his agency by complainants, in a suit wherein complainants sought to hold respondent as trustee, evidence held to sustain a finding that complainants, by refusing to pay respondent a reasonable remuneration as agreed, thereby released him from his trust.

2. Equity \S 427(1)—Dismissal without disposition of affirmative defense not supported by evidence not error.

Where respondent in a suit involving title to land set up an elder title in himself, it was not error, on dismissal of complainants' suit, to fail to take action respecting such title, where there was no evidence of its existence.

3. Evidence \S 343(7)—Copy of county clerk's record of land patent held inadmissible.

Code 1904, \S 2367, referring to the recordation of new grants only, held not to authorize the recordation of an original land patent from the commonwealth in the office of the county clerk, so as to make a certified copy of such record admissible in evidence under section 3334, in lieu of the original.

4. Equity \S 418—Refusal to take bill as confessed for want of answer held not error.

Where a third amended bill was filed without leave and no process issued thereon, and the cause was brought to trial subject to ob-

jection to the bill, which objection was not passed on, and the substance of the bill was covered by the answer to the previous bills, it was not error not to take such bill as confessed for want of an answer.

Appeal from Circuit Court, Buchanan County.

Suit by John H. Matney and another against Richard Yates. From a decree of dismissal, complainants appeal. Affirmed.

This is the sequel to Matney v. Yates, 121 Va. 506, 93 S. E. 694. The case as made by the pleadings as they then stood was dealt with on that appeal. The facts of the case as they were taken to be admitted on demurrer and the questions thus put in issue and decided on that appeal fully appear from the report of the case just cited and need not be repeated here.

When the case went back to the court below the appellee, Richard Yates, by leave of court by order entered November 20, 1917, filed his answer to all of the bills then in the cause, to wit, the original and first and second amended bills.

This answer is a long one, and its positions need not be set forth in detail. It is sufficient to say that it put in issue all three claims of appellants made in their bills at that time filed in the cause, which were, in substance, that appellants were the complete owners of the 241-acre tract involved in the cause: First, by title by adverse possession; secondly, by reason of the lost or destroyed deed mentioned in the report of the case on the former appeal and the acquisition by appellants of the Walter Matney title to said land, as also set forth in such report of the case; and, thirdly, by reason of the alleged agency of appellee and the resulting trust as growing out of such agency because of which it is alleged in said bills that the appellants were entitled to have a decree compelling the appellee to convey to them the interests of the Richard Yates, Sr., heirs at law in said land which were extant if the appellants failed both in proof of adverse possession and in furnishing sufficient proof to set up said lost or destroyed deed. And thereupon the answer went further and attempted to set up a superior title to that of appellants to the said 241-acre tract of land derived under an alleged grant from the commonwealth of a larger body of land which included all but about 10 or 15 acres of such 241-acre tract, such grant bearing date December 1, 1858, and having been made to one E. F. Harman and one Peter L. Surdam, which superior title, the appellee claims in said answer, was acquired by him by deed dated February 25, 1914, from Henry C. Stuart and wife and Harman Newbery, who, as the answer alleged, were the then owners of such title through mesne conveyances and descent from one party to an-

other, all as set out in such answer in detail. This alleged title will be hereinafter referred to as "the Stuart title."

Thereafter, on July 18, 1919, the appellants filed their third amended bill in the clerk's office, without any leave of court first obtained and without any process having issued thereon, but it appears from an order of court entered in the cause on August 5, 1919, that the cause then came on to be again heard "on the proceedings heretofore had herein and papers heretofore filed herein and on the third amended bill filed by the complainants in the clerk's office of this court on July 18, 1919, by agreement of the parties hereto, but counsel for defendant reserved the right to move to strike out the last amended bill. * * *

The third amended bill was substantially the same in its allegations as those contained in the original and first amended bills in so far as they concern the matters in controversy between the parties at the time the pleadings were filed which were involved in the former appeal; the only difference in the former pleadings and the third amended bill as to these matters being this: Whereas the second amended bill admitted that "all of the parties who were connected with and who knew anything about" the execution of the alleged partition deed by Richard Yates, Sr., conveying all of his interest in the 241-acre tract of land involved in the cause to Walter Matney (being the alleged lost or destroyed deed aforesaid) "are dead, and your orators are unable to prove that this deed was made," the third amended bill did not contain this admission, but returned, in substance, to the allegations of the original and first amended bills on this subject and claimed under and sought to set up such deed as a deed which had been executed and delivered about the year 1875 and subsequently recorded and destroyed by the fire which destroyed the records of Buchanan county in the year 1885, as well as the positions that the appellants had acquired title to the land by adverse possession, and that the appellee, Richard Yates, the grandson of Richard Yates, Sr., was the agent of appellants when he obtained the conveyance to himself in 1913 of the interests of the Richard Yates, Sr., heirs at law, and must be held to occupy the position of a trustee for appellants as to such interests, and hence was compellable to convey the same to appellants, all as substantially set forth in the original and first amended bills and as appears from the report of the case aforesaid on the former appeal.

The appellants introduced in evidence the depositions of a number of witnesses upon the subjects of the claims of appellants aforesaid of title to the 241-acre tract of land by adverse possession, by reason of the lost or destroyed deed aforesaid, and concerning the existence of the alleged agency of appellee,

Richard Yates, aforesaid, etc., and the appellee introduced his own deposition which had reference especially to his claim of the non-existence of the aforesaid alleged agency on his part, and the acquisition of the Stuart title aforesaid, and the deposition of one other witness in his behalf.

Upon consideration of the whole case the court below on October 21, 1919, entered the decree under review on the present appeal, which provides as follows:

"* * * Being of opinion that the complainants (the appellants) have failed in their proof, which therefore renders it immaterial as to whether or not the court shall sustain or reject the last amended bill on account of repugnance or inconsistent allegations, it is now adjudged, ordered, and decreed that this cause be, and the same is, dismissed at the cost of complainants."

Of the evidence in this case in reference to the claim of appellants of title by adverse possession aforesaid, it is sufficient to say that it wholly fails to show the acquisition of title by such possession, even of any part of the 241-acre tract; and this is expressly admitted in the petition of appellants for the present appeal.

The petition for the present appeal calls attention to the fact that the third amended bill "alleges and seeks to set up the partition deed between Walter Matney and Richard Yates, Sr.," and contains statements of abstracts of what it is claimed that four old witnesses for appellants and J. H. Stinson, one of appellants, testify in the case on the subject of such deed; but we do not find that the petition takes the position that such evidence is sufficient to establish the execution and delivery of such a deed. Such being the attitude of the petition for appeal, it is deemed sufficient to say that it appears from the testimony of the witnesses just referred to that the statement contained in the second amended bill on this subject is correct, namely, that "all the parties who were connected with and knew anything about the transaction are dead, and" appellants were "unable to prove that this deed was in fact made," if it was made.

On the subject of the alleged agency aforesaid, there is some conflict in the testimony, but very little, if any, on material points.

The testimony for appellants is to the effect that the appellant John H. Matney had seen some of the Richard Yates, Sr., heirs, before the appellee, Richard Yates, Jr., was approached on the subject of acting as agent for appellants in getting such heirs to execute a release deed or conveyance of their possible interests in the 241-acre tract of land, and John H. Matney testifies that he found "that it was all right and agreeable and they would sign up theirs," and it was then that he (Matney) "got Richard Yates," the appellee, "and he said he could see them

all and they would sign the deed for him."
* * * I got him to go ahead and take the deed for me."

The following from the deposition of the appellant John H. Matney will show the positions taken by him on this subject:

"Q. I will ask you to detail the conversation or conversations you had with Richard Yates, the defendant in this suit, relative to obtaining a release deed from the heirs of old man Richard Yates.

"A. Well, one morning I was here in town, and I met Richard here on the street, and he asked me had I seen any of the heirs, and I told him I had seen some of them, there were three of the heirs that I had seen, and I had a talk with them and it was all right. Richard told me that they were to sign it up, as well as I remember, and we were discussing the matter, and I knew that he was one of the heirs in it, and he said he would sign over his interest in it, and I forgot now just which one mentioned it first, but Richard told me that he could get all of them to sign up the release deed without any trouble. I had to go away in a couple of days, and I didn't have time to see all of the heirs, and I told Richard that would be all right if he could do that. I had to go to Pond Creek to work for Riley Lester. He would see all of the heirs, and that probably all of them would meet him at Stone Coal, and that they would sign a release deed for him. I told him I would pay him for the trouble, and asked him what he would charge me, and he said he wouldn't charge me anything much, and I asked him if \$10 would pay him for his trouble, and, as well as I remember, he said \$10 would be liberal payment, and I told him I would pay him if he would see all of the heirs and get them to sign the deed.

"Q. Did you have prepared a release deed and turn it over to Richard Yates?

"A. I told him that Mr. Stinson would prepare the deed when he got ready to get out and get them to sign it. I went and we went up to Mr. Stinson's office.

"Q. You say we went up to Mr. Stinson's office; do you mean that Richard Yates went with you?

"A. Yes, sir.

"Q. Now, I will ask you to detail as nearly as you can the conversation with Richard Yates after you went to Mr. Stinson's office?

"A. Well, after we went up there I told Mr. Stinson that Richard said that he could get the heirs to sign a release deed for us without any trouble, and explain it to them, how he was one of the distant heirs, and didn't have anything in it much, if anything at all, and that as I had to go away that he would get out and get the heirs to sign up the deed, and he had promised to do it.

"Q. Was Mr. Stinson present during this conversation?

"A. Yes, sir; he was present.

"Q. Did he prepare the deed then?

"A. No; as well as I remember, he didn't prepare the deed then.

"Q. What arrangement was made about the preparation of this deed, if anything?

"A. Well, Mr. Stinson told Richard he would prepare the deed when he, Richard, got ready for to have them sign it up, and prepare the deed and send it to him.

"Q. Do you know whether or not Mr. Stinson prepared this deed?

"A. He didn't prepare that deed right that day, that I know of, but he prepared it later on.

"Q. Did Richard Yates secure the heirs of Richard Yates, Sr., to sign this release deed?

"A. The one that Mr. Stinson prepared him a deed and sent it to him, and he sent it back, said that he had left out one of the heirs, and he went ahead then and had a deed prepared himself and got the heirs to sign it.

"Q. What did Richard Yates do with this deed?

"A. As well as I remember, I believe he sent it back to Mr. Stinson.

"Q. And was the deed that he secured from the heirs of old man Yates to himself?

"A. He had it made to him, and told the heirs that he would make it over to us when we would pay him for doing the work.

"Q. Did he make the deed over to Mr. Stinson and yourself?

"A. No; he did not make it over to us.

"Q. Did you ever talk to Richard Yates about this release deed that Yates secured from the heirs?

"A. Yes, sir.

"Q. What did he say about it?

"A. While I was gone I had heard that Richard had took the deed up in his own name, and that he was going to make it over to us when we paid it over for doing the work. At that time I didn't have the money right at present, and was aiming to raise the money and pay him when I got back. I didn't know exactly when he would get all the heirs to sign the deed, and when I come back he had the deed made in his name and put on record.

"Q. Did you talk to Richard Yates afterwards about the matter?

"A. Yes, sir; he said he wouldn't make the deed over to us for the amount agreed upon, \$10.

"Q. What reason did he give, if any, for refusing to make the deed over?

"A. He said that after he got to looking into the matter of the land that he found that the Yates heirs had a better title than he thought they had, and I believe he said it would cost him a little more to buy them out than he had thought, and he couldn't sign the deed over to us to what he had paid the heirs for \$10, but he said he would make the deed over to us for \$400, and he would assign the deed over to us if we would pay him \$400.

"Q. Did he say how much it had cost him to secure the release deed?

"A. About \$10 to the heirs, as well as I remember.

"Q. Were you ready to pay Mr. Yates the \$10 and the amount that he had paid the heirs for the release deeds?

"A. Yes, sir; when I came back to see him later on I was ready to fix up the matter and pay him for it.

"Q. Did Mr. Yates ever present the deed to you with a bill?

"A. No, sir; he never presented me a deed or bill. He told me that he wouldn't make it over, and I told him that I felt the Matneys had owned the land long enough and had been in possession of it, as we had always had in it quiet possession, and everybody, as well as myself, regarded the land as belonging to the Matneys heirs.

"Q. And what did Richard Yates say, if anything?

"A. I told him that we could win the land and hold it by law, and I said, as it was our land, we had been paying the taxes on it, and nobody had ever been disputing our right to this land, and also regarded it as our land.

"Q. Well, now, what did Richard Yates say?

"A. Richard told me that we didn't have any deeds for it, had been burnt up, and there wasn't anything to prove that old man Walter Matney and Richard Yates had swapped land or traded their lands. This was the conversation between us, as well as I remember. He told me if I would pay him \$400 he would make the deed over to us."

Cross-examination:

"* * * A. Well, he wouldn't agree to take what we offered to do the work for us. I was aiming to pay him when we got the money.

"Q. You didn't give him a penny with which to buy the interest of these heirs, did you?

"A. No; not at that time. I was getting ready to furnish him the money. I didn't know how much it would take me.

"Q. Well, you went to Pond Creek about that time?

"A. Yes, sir.

"Q. Did you write him a letter back and tell him that you had changed your mind about the matter?

"A. Well, I believe that he wrote to me; that I received a letter from Richard, stating that it would take more than we had figured on buying some of them out, and I didn't have quite enough money at that time, and I believe that I wrote him to delay the matter, or stop until I came up; at least that is what I meant, that to wait until I came and seen him.

"Q. But you wrote and told him not to take the matter up at that time, didn't you?

"A. Well, I think I did write to him. Of course, I meant to wait until I came and advanced him the money and get me to back it up.

"Q. I am not asking you what you meant, I am asking you what you wrote Richard Yates, and it is true, when he wrote you and told you that it would take more money to buy the interest of these heirs than you had figured or anticipated, you wrote and told him to let the matter alone, and not to take it up at that time, didn't you?

"A. Yes; right at that time. I thought he was going ahead, and I wanted to come up and make arrangements with him.

"Q. Now, I didn't ask you what you thought; I am asking you what you wrote Richard Yates. You wrote him just what I have stated to you above in these questions, didn't you?

"A. Yes; I remember writing him that. Of course, when I wrote him I didn't mean for him to lay the matter down.

"Q. Do you mean to say that you would write a man and tell him not to do a thing, and you would then expect him, in the face of that writing, to go on contrary to your instructions and do the thing? Is that what you mean?

"A. No, sir; of course, when I wrote him I didn't have the money right then, and couldn't get off, and decided I would get him to delay it until I came up, and I didn't know how much it would take and everything.

"Q. But you didn't mean you intended to do nothing after you wrote him to stop and let the matter alone, did you?

"A. Well, I am not sure; I guess I wrote him that; I remember that I was trying to get ready in a few weeks to come up, and I wanted him to wait.

"Q. Did you write him your construction and what you meant and had in your mind that you wanted him to do, which was contrary to the writing which you were sending him?

"A. I know I wrote him two or three letters; I am not sure how many letters I wrote him.

"Q. You intended him to obey your writing, didn't you?

"A. Yes; what I meant, for him to stop right then for a while that I was in a hurry to do the work.

"Q. He did stop, and didn't undertake any further to get the deeds for you, did he, after you wrote him that?

"A. I thought he would wait until I got back to proceed with his work.

"Q. You didn't write him and tell him to stop and then expect him to go on, did you?

"A. I didn't expect for him to go on until I come back.

"Q. He did write you that it would take more money than you expected to put up to buy the interest, didn't he?

"A. As well as I remember, he wrote me that.

"Q. And it was in response to that letter that you wrote and told him to not go further with the matter?

"A. Yes, sir; right then.

"Q. And then when you saw Richard Yates next he had bought this to you, hadn't he, and had taken his deed for it?

"A. Yes, sir.

"Q. And when you talked to him he told you that upon receiving your letter he turn the deed back to Mr. Stinson, which Mr. Stinson had given him at your instance to get the Yateses to sign?

"A. No, sir; I don't remember of him telling me that.

"Q. You found out that was true, didn't you?

"A. Well, I found out that he returned the deed back to Mr. Stinson, because one of the heirs was left out that was why he turned it back. * * *

"Q. I am not asking you how you felt about the matter, but I am asking you what you done. When Richard Yates next saw you, after he had taken the deed in his own name, and after you had wrote him to stop, he told you that he had had the title looked into, and found that it was different to what you thought it was, didn't he?

"A. After he got the deed in his own name, he told me that.

"Q. He told you that he found that your grandfather had willed the Watkins Branch land to his daughters, didn't he?

"A. Well, we had so much conversation about it, I am not sure about it.

"Q. He also told you that a number of the heirs of Richard Yates contended that their father never did dispose of his interest in the Bear Tree Hollow land, didn't he?

"A. Yes; I remember him saying that, but if they had the deed were burned up.

"Q. Anyway, he told you that different ones of these heirs which he had seen had contended

that their father had not sold his interest in the Bear Tree land, but that he owned it at his death, and that it would take more money to buy their interest than to make a mere release deed to him, didn't he?

"A. Well, I remember him saying that he couldn't turn us and get the deed for what he had to pay the other heirs. The Yates heirs that he had talked to wouldn't sign it for the money that we agreed for.

"Q. Didn't he write you in that letter to Pond Creek and tell you in that letter that the heirs of Richard Yates, Sr., had informed him that their father had not disposed of his interest in that land, and for that reason that they would have to have more money if they sold their interest than you had agreed?

"A. Well, I believe he did write me as to one or two of the heirs might have to have more money."

The following from J. H. Stinson's, the other appellant's, deposition, will show the positions taken by him on the same subject:

"Q. What did you do with reference to securing a release deed from the heirs of Richard Yates, Sr., if anything?

"A. I had a talk with John Matney about it; we talked two or three times about it, I expect; and one day John Matney come into my office, and said he had been talking to Richard Yates, and that Richard Yates had agreed to get parties to sign the deed, and said he was in town, and I told him to go out and bring him in my office, and he went out, and he and Mr. Yates come into the office.

"Q. What was said, if anything, by Richard Yates, relative to obtaining the release deed?

"A. I explained to Mr. Yates what Mr. Matney had said, that he was willing to get this release deed for us, and that I had a conversation with John Matney, and had agreed to get the deed, if we wanted him to, and I asked him what he thought about it, and he said that he felt like he wouldn't have any trouble to do it, and John Matney spoke up at the time, and said that Richard was related to the parties, he would probably do the work better than we could, and he said also that he believed that he could do it better than we could, and said that he was willing to do it, and that he thought they would sign the deed without any trouble.

"Q. What arrangements, if any, did you make with Richard Yates relative to obtaining this release deed?

"A. He agreed to go and get the parties to sign it, and, as I understood it, he and Mr. Matney had agreed on \$10 for his services, and I told him that I was willing to pay him any amount and pay him any additional expenses that he was out and any amount that was right for his services, and if he was out anything we would pay him that additional, and he said that was all right, and we agreed on so much, and I believe it was \$10 an heir, except the John R. Yates heirs. John R. Yates was one of Richard Yates' heirs, who had died leaving some several heirs, and we were to pay them \$2 each. Richard Yates being one of them, and he agreed to take \$2 for his interest, and I took the list of the names of the heirs to prepare the deed from, and prepared the deed and mailed it to him, and I was going away at the time, and when I come back home I re-

ceived the deed back; he had either left it there at the house or sent it; anyway the deed was at the house when I got back, and stating that there were two or three of the heirs' names left out. I don't know whether Richard had failed to give them to me in the memorandum, or whether it was an oversight in preparing the deed. I don't remember, and I was not well at that time, not able to do anything much, had gone away for a little while, and I come back, and another time that I come back, I don't remember just how long, I prepared another deed, and I saw Richard and named it to him, and he said that I needn't give it to him, that he had already taken the deed, and that he had gotten Dolphus Smith to prepare a deed, and he had taken in his own name. I think he told me that Dolphus prepared it; I think that is what he said. I was at one other time on the street somewheres, and I met Richard, and he said something or other about some money, and I was starting for some place or other, and I said I haven't got any money with me, and I told him that if he would put the money up and pay them that I would give him a check for it, and would pay him for the use of his money, and he agreed with me that he would do it, and that is the only time that he ever called on me for money.

"Q. Did he ever intimate to you that he was obtaining the deed in his own name?

"A. He did not.

"Q. When you saw him on the occasion that he told you that he had already taken the deed to himself, did he say why he had done this?

"A. I don't believe he did; if he did, I don't remember.

"Q. What did he say at that time about making you and Mr. J. H. Matney a release deed for the land?

"A. He first said he wouldn't make it, and I talked to him awhile, and he said he thought it was his, and he had the deed for a one-half interest in it, and he would sell it to us. I told him that wouldn't be treating us right, and I didn't think that he was that kind of a man to do that way, and after talking some he talked like he would take \$400 if we would give it to him, and I told him that I thought that was too much. * * *

"A. I had no such conversation with Richard Yates, except that I told him that when to take the deed, and asked me \$400, and I told him I could set it up cheaper than that, and I would do it. That is the only time I had any conversation of that kind with Mr. Yates, and the conversation that you refer to that I had with him at Matney, or in the street of Grundy. I know I was going some where and met Mr. Yates and something was said about some money, and I told him I didn't have the money with me, and if he would advance the money I would give him a check for it, and he agreed to do so.

"Q. How much was he to advance?

"A. Whatever was necessary to get the deed, We had an agreement with them to pay them so much a piece.

"Q. How much a piece?

"A. The Yates heirs, Richard and his brothers and sisters, was to be paid \$2 apiece, I mean the agreement we had with Richard Yates, and I understood that it was satisfactory with all of them, and my recollection is that the others was \$10, and it was \$10 for Richard

Yates' heirs, but there were probably six or seven of them we agreed to pay \$2 apiece. * * *

"Q. You haven't paid one cent?

"A. I have not.

"Q. And you have never fixed any amount with Richard Yates to pay him?

"A. I offered to pay him what was right and reasonable for his services and to pay him all of his money back, and he refused to make us the deed at all, except just sell us his interest in it, but after discussing the matter with him a while agreed to make us the deed for \$400."

Richard Yates, the appellee, testified, in substance, that he did have the conversation with the appellants as to which the latter testified, and that he did agree to act as agent for them in getting the Yates heirs to sign a deed or release deed conveying their interest in the 241-acre tract of land to appellants, but that he (the appellee) did not agree to put up the money for appellants. Then follows the following testimony of appellee:

"Q. You may state what was done by you and Mr. Matney and Mr. Stinson in reference to procuring this release deed.

"A. I saw some of the parties, nearly all of them, and they said they would release it, and I spoke to Mr. Stinson, and he prepared me a deed and left it in the mail box, and then I saw him at Matney on the same day, and he wanted me to put up the money and go and get it up, and I told him 'No,' I would not go.

"Q. Did you tell him you would not put up the money?

"A. Yes, sir.

"Q. After you saw Mr. Stinson at Matney did you see some of the Yates heirs immediately following that?

"A. Yes, sir.

"Q. You can state what ones you saw?

"A. Uncle William Riley Smith and Aunt Marinda Smith.

"Q. You may state if Marinda Smith was one of the Yates heirs?

"A. Yes, sir.

"Q. When did you see them in reference to the time you saw Mr. Stinson at Matney, and the time he informed you he left the deed in your mail box?

"A. The same evening.

"Q. I will ask you if they agreed they would execute the release deed?

"A. They asked me if I had the money, and I told them I did not, and they says, 'Will you stand good?' I said, 'I won't,' and then said, 'You need not present any deed to us until you present the money.'

"Q. At that time did you see the deed?

"A. No, sir.

"Q. Immediately following that conversation with Mr. and Mrs. Smith on the same evening did you get the deed from the mail box?

"A. Yes, sir.

"Q. What did you find when you received the deed in reference to the parties to the deed?

"A. Some of the heirs' names were left out of the deed.

"Q. What did you do then?

"A. I brung it back to Mr. Stinson's office

and gave it to Mr. Lindsay, or gave it to Mr. Stinson on the road; I don't know which.

"Q. Did you inform Mr. Stinson or Mr. Matney either that the deed was not correctly written as to the parties?

"A. I informed Mr. Stinson. I met him on the road between here and where I live, and told him some of the heirs' names were left out.

"Q. At the time you returned the deed to Mr. Stinson, I will ask you if he said anything further to you in reference to getting the release deed?

"A. No, sir.

"Q. I will ask you if, after returning this deed to him, you understood and considered at any time you were to do anything further in reference to the matter.

"A. No, sir.

"Q. Did Mr. Stinson or any one for him or Mr. Matney pay to you one cent with which to obtain this title at any time?

"A. No, sir.

"Q. At the time you returned the deed to Mr. Stinson and at the time you say you considered the matter was at an end, so far as you were concerned, did you then know the status of this Yates title?

"A. No, sir.

"Q. I believe you say you are not clear to just whom you returned the deed to, either Mr. Stinson or Mr. Lindsay; am I correct?

"A. Yes, sir.

"Q. I will ask you if the Mr. Lindsay you refer to was a law partner of Mr. Stinson's?

"A. I think so.

"Q. Was he working in Mr. Stinson's office?

"A. Yes, sir.

"Q. After you returned the deed to him you may state if you gave him information and instructions as to the names being left out of the deed or not.

"A. I don't remember whether I did or not.

"Q. However, you do remember, if I understood your evidence, that you saw Mr. Stinson and told him as to the condition of the deed; am I correct?

"A. Yes, sir.

"Q. After you had returned this deed and informed Mr. Stinson that the deed was not correct, and after you say you considered the whole matter at an end so far as you were concerned, I will ask you if you took any steps to ascertain the condition of this Yates title to the 241-acre tract.

"A. Yes, sir.

"Q. You may state what you did in reference to obtaining this information.

"A. I came to Grundy one day and got you (meaning Mr. Daugherty) to look the record up, and see if it was what it had been reported to me, and you did, and found it was different from what it had been reported to me. * * *

"Q. Upon finding that the correct status of the title to this tract was entirely different to what they had represented it to you to be, you may state whether or not your counsel advised you that in his opinion the legal title rested in the Yates heirs according to the information he had received from the records to an undivided one-half interest in this tract. * * *

"A. Yes, sir.

"Q. Following the opinion and advice of your counsel, you may state then what you did in reference to a purchase of the interest of the Yates heirs to this land.

"A. I went and bought it for myself. I found that I had an interest in it myself and saw that it was different.

"Q. I will ask you what Mr. Stinson and Mr. Matney proposed to pay, if anything, for the release deeds to this land.

"A. Matney told me, if I would go and see the parties and see what they would do, he said, 'I will make you a present of \$10 and will pay you extra for your trouble, and will take the matter up with Mr. Stinson,' and Mr. Stinson told me the same thing. * * *

"Q. You may state the total cost of obtaining the Yates branch of this title.

"A. It cost me \$200. * * *

Cross-examination:

"By Mr. Pobst:

"Q. Mr. Yates, you first undertook to procure the release deed from the heirs of Richard Yates, Sr., for and on behalf of complainants in this suit, John H. Matney and J. H. Stinson, did you not?

"A. Yes, sir.

"Q. When you started out to procure this deed and to see these heirs you were working for John H. Matney and J. H. Stinson, were you not?

"A. Yes, sir.

"Q. Did you ever tell John H. Matney and J. H. Stinson that you had decided to quit working for them and procure the deed for yourself?

"A. No, sir; not before I brung the deed back to them, I did not.

"Q. Did you ever tell them before you got your deed from the heirs?

"A. No, sir."

The testimony of Wm. Riley Smith, although a witness for appellants, on the subject of requiring the money to be paid him before he executed the deed to appellants, etc., is as follows:

"A. Well, he [appellant] come here before that time. He come here first and said he wanted to know what we would take for it, and said he was buying it for Stinson and Matney, and we told him we would take \$12 for our interest, and he come back after that, maybe six months afterwards, and fetched the deeds from Stinson for us to sign, and I asked him if he had the money, and he said that he did not have it, and said that they would send, said that Stinson said he would pay for it, and I told him, 'I will make the deed if you have the money,' and he said he did not have it, and I said, 'We are not going to make it,' and we didn't, and it was *two or three months after* that he passed out by the gap and said, 'I have taken a notion to buy that myself,' and said, 'Will you make me a deed?' and I said, 'We will sell to anybody that will pay us the money.'" (Italics supplied.)

Floyd Matney, another witness for the appellants, testified as follows with respect to statements made by appellant at the time the latter obtained the deed from the witness:

"Q. I wish you would state what Mr. Yates said. What did Dick say to you relative to his name appearing in the deed as a grantee?

"A. Well, Dick, when he come over there with

the deed, and the magistrate, I just thought he was coming to take it up for John Stinson, but we got into a talk, and he asked me if I would care to sign the deed, that he was taking it up in his own name, and he would let them have it, as he had been trying to get John Stinson to put him up the money, that they would sign the deed, and that, as they hadn't done it, and Dolphus Smith was about to take it up, was thinking about taking it up, and taking care of it, that he would let them have it, and could do it all just as easier as he could to get his interest, and he was putting his own money in it, and all he wanted was a reasonable profit for the use of his money.

"Q. Did he represent to you that he was going to obtain the release deed for John Matney and J. H. Stinson? * * *

"A. Yes, sir.

"Q. Well, now, I will ask you to state exactly what he said about letting Stinson and Matney have the land?

"A. Well, he said he would let them have it; pay him back his money and a reasonable profit for his trouble; that he would let him have it.

"Q. Why did he say he was taking the deed in his own name?

"A. To be safe with his money."

The evidence of the existence of the elder patent, of date December 1, 1858, to E. F. Harman and Peter L. Surdam, and other pertinent matters are referred to in the opinion of the court.

H. Claude Pobst, of Grundy, for appellants.

A. A. Skeen, of Clintwood, and W. A. Daugherty, of Grundy, for appellee.

SIMS, J., after making the foregoing statement, delivered the following opinion of the court:

The chief question presented for our decision by the assignments of error is the following:

[1] 1. Did the appellants have the right to claim that the appellee held the conveyance from the Yates heirs in trust for appellants after appellee offered to convey the interests in the 241-acre tract thus acquired and also his own interest in such land derived by descent, if appellants would refund to him his actual outlay of \$200 and pay him \$200 for his services?

This question must be answered in the negative.

The law of the case was determined by the opinion and decision of this court on the former appeal as appears from the report of the case above referred to (121 Va. 506, 93 S. E. 694), and that holding need not be set forth here, except to say that it was based on the assumption of the correctness of the allegations of the pleadings of appellants, among which was the allegation that they had offered to pay appellant for his services and to reimburse him in full for all cost and expense which he had incurred in connection with the matter.

We are therefore now concerned solely with the facts of the case.

There is no controversy about the fact that at some time, over three months before appellee thought of or undertook to obtain the conveyance from the Yates heirs to himself, the appellee did undertake to act as agent for appellants in getting the Yates heirs to execute the deed to appellants. And, while there is some controversy as to what compensation the appellant Matney first agreed to pay the appellee for his services, the preponderance of the evidence clearly shows that before appellee undertook to act as agent in the matter both of appellants agreed to pay him a reasonable compensation for his services. Nor can there be any doubt, as we think, that the sum of \$200 was but a reasonable compensation for appellant's services under the circumstances disclosed by the evidence.

The circumstances last referred to, as established, as we think by the preponderance of the evidence, are as follows: By the terms of the agency agreement entered into between appellee and appellants in the appellant Stinson's office, the purchase price to be paid to the respective Yates heirs was strictly limited to certain specific sums. Appellee was not authorized to obligate the appellants for anything more. Indeed, it was not then anticipated that any of the Yates heirs would demand any greater payment. It clearly appears that at that time the appellee did not agree to advance for appellants any of this purchase money. Both Matney and Yates in substance concede this in their testimony. The agency of the appellee was a mere ministerial one, not coupled with any interest. He could not go on with the contemplated purchase from the Yates heirs any longer than the appellants wished him to do so. The whole matter was executory. They had the right to abandon the undertaking at any time by not consenting to be bound for, or by not putting up the purchase money when called upon to do so. Stinson does testify that on a subsequent occasion, when the appellee "said something or other about some money," he (Stinson) requested appellee to put up the money, and that appellee agreed to do it. Appellee in his testimony positively denies that he made such an agreement, and says, in substance, that he affirmatively stated to Stinson when the latter made that proposition that he (the appellee) would not go on with the agency undertaking any further. At this time appellee had found that it would cost more money to obtain the conveyance from the Yates heirs than had been anticipated as aforesaid. Therefore the money Stinson says appellee mentioned as aforesaid must have been the greater prices which appellee had found would have to be paid. Now, if it had been then agreed between appellee and Stinson, as Stinson

says was the case, that appellee undertook to go ahead and put up the money upon Stinson's authorization that he should so do, and upon Stinson's personal promise to repay him the loan, there was no occasion for appellee to have had the correspondence with Matney on the subject shown in evidence, which in effect, asked that appellants put up the purchase money. Matney admits in his testimony that this correspondence occurred. This is conduct ante motam litem, which is a most convincing character of evidence; and, as we think, turns the scale in weighing the conflicting evidence, consisting of the statements of appellee and Stinson aforesaid, so that there is a preponderance of evidence in favor of the correctness of the testimony of appellee on this subject. We therefore conclude that the testimony of Stinson aforesaid on this subject must be discarded, and that the established fact is that appellee at no time agreed to supply any of the purchase money. The testimony of Stinson on the subject being discarded, we must and do also conclude the fact to be that, after appellee informed appellants that it would take more money than had been anticipated to acquire the Yates heirs deed, neither Stinson nor Matney authorized appellee to pay such enhanced price. Matney admits in his testimony that he was noncommittal on the subject, to say the least. As the matter stood thereafter, following the letter of Matney to appellee asking the latter "to delay the matter or stop until I (Matney) came up," neither Stinson nor Matney were obligated to refund to appellee one cent of the price necessary to be paid if he went on with the purchase of the Yates heirs. As aforesaid, appellee had no authority to go on with the purchase, or make appellants debtors to him without the authority from them to do so. In this situation the appellee found that some one else was contemplating making this purchase if he did not. In that emergency he decided to act and take the risk of having the appellants fail to ratify his action in going on with the purchase. This he did when he furnished the purchase money and took the deed to himself. He thus risked the loss both of the money paid out and the value of his time occupied about the matter, if his agency should be repudiated by appellants and the Yates heirs' title should prove to be inferior to the elder title under the lost deed claimed by appellants.

Further, while the evidence for appellee would not perhaps be considered as sufficiently specific to establish that his outlay in cost and expenses incurred in obtaining the conveyance from the Yates heirs aggregated the sum of \$200, making up the sum of \$400, if that had been made an issue in the case, this should be said: The appellants did not base their refusal to accept appellee's offer presently to be mentioned on the ground that such outlay did not amount to \$200, and

hence did not make that an issue in the case.

And, aside from the question of whether the agency aforesaid was or was not terminated by the failure of appellants to put up the purchase money found necessary to acquire the Yates heirs' deed, or to authorize appellee to pay that price, the following is the fact admitted by both of appellants in their testimony, namely: After appellee had obtained the deed from the Yates heirs to himself, he informed appellants of this and offered to convey the Yates heirs' interests thus acquired over to the appellants, if the latter would reimburse the appellee his expenditures aforesaid, which he claimed aggregated \$200, and would pay him the additional sum of \$200 for his services aforesaid in procuring the deed, which services consisted not alone of personal services about the matter, but also of the service of putting up and risking, as aforesaid, the loss of the purchase money paid out by him. This the appellants positively declined to do, not because they denied that the expenditures aggregated the amount of \$200, but because they were unwilling to pay appellee \$200 for his services.

The decision of the question under consideration turns, then, upon the decision of whether the sum of \$200 was a reasonable compensation to appellee or an unreasonable sum. We have no hesitancy in holding that it was no more than a reasonable compensation under the circumstances, and that when appellants refused to pay it they released the appellee from his trust relationship to them growing out of his former agency, and that appellee thereafter, and at the time the suit was instituted and the decree was entered, had the right to hold as his own the conveyance aforesaid from the Yates heirs.

The remaining questions presented to us for decision by the assignments of error will be disposed of in their order as stated below.

[2] 2. Did the court below err in taking no action with respect to the alleged Stuart title, and in not requiring the appellee to convey to appellants a half interest in the Stuart title sought to be set up by appellee in his answer as the superior title, on payment by appellants, to appellee of half of the purchase money paid by the latter for the Stuart title?

This question must be answered in the negative.

There were various positions on the subject of the Stuart title taken in the cause by appellants: First, they denied that there was any evidence in the cause that the alleged elder patent on which this claim of title by appellee is based had any existence; secondly, they claimed that if the first position was untenable there was a broken link in the chain of this title from the patent to appellee by reason of a certain tax deed being void for certain reasons which need not be here set out; and, thirdly, they claimed that

if both the first and second positions were untenable, the appellee should be held to have purchased the Stuart title for the joint benefit of himself and appellants and be compelled to convey a half interest in such title to appellants on payment by them to appellee of half the purchase money the latter paid for the Stuart title.

The appellee took issue with the appellants upon all of these positions, and these several matters were argued at length in the petition, in the briefs, and orally by counsel for the respective parties, and numerous authorities have been cited on the different questions raised; but, in view of the objection made by the appellants themselves that there is no evidence in the cause of the existence of the elder patent in question, and of our view that this position is well taken, we cannot in this case enter upon any consideration of these various questions, other than the single one of whether there is any evidence in the cause of the existence of such patent.

Confining ourselves, therefore, to this single matter, as bearing upon the question next above stated and now under consideration, we find the situation to be this:

The only evidence in the record of this cause of the existence of the alleged elder patent mentioned is what purports to be a copy from a patent book in the clerk's office of Buchanan county, certified by the deputy clerk of that county in the following form: "A copy teste: W. L. Dennis, Clerk, by J. W. Deskins, D. O."

The evidence in this cause was introduced, and indeed the decree under review was entered, prior to the Code of 1919, and hence, the subject under consideration is governed by the statute law as it then existed. Section 3393, Code 1919, had not then been enacted.

By section 3334, Code 1904, the following is provided:

"A copy of any record * * * in the clerk's office of any court * * * may be admitted as evidence in lieu of the original. * * *"

[3] The question is: Was an original grant from the commonwealth such as that in question, as the law then stood, authorized to be recorded in the clerk's office of any court, so as to become a "record" in such clerk's office?

It is contended for appellee that section 2367, Code 1904, gives such authority; but we think not. An examination of that section discloses that it has reference only to new grants, issued in pursuance of the preceding sections 2365 and 2366 of Code 1904, based on decrees of court in suits to supply lost or destroyed records or papers forming links in titles, which constitute a different character of grants from that of the grant in question before us.

Section 2350, Code 1904, provides that such

a grant as that in question before us shall be recorded by the register of the land office in his office; and section 2352 provides that he shall keep a separate index for each county of all patents for lands lying in this state.

We are of opinion that, in accordance with the statute law as it stood at the time the question under consideration arose, the grant in question was not authorized to be recorded in the clerk's office of Buchanan county; that it was therefore not a "record" in such office; so that the certified copy aforesaid from such office cannot be regarded as evidence of the original. Hence there is no evidence in the cause before us of the existence of such a patent.

Therefore, aside from all other questions involved, we are of opinion that there was no error in the action of the court below in taking no action with respect to the alleged Stuart title. The numerous other questions with respect to the Stuart title raised by the parties in this cause were moot questions before the court below, and they are moot questions before us. Hence we do not pass, and must not be understood as passing, upon any of them.

[4] 3. But one other matter remains to be disposed of. The petition for appeal calls attention to the fact that no answer was filed by the appellee to the third amended bill, and it is contended that the court below erred in not taking that bill for confessed as against the appellee.

We think there was no error in the action of the court in this regard. The third amended bill was filed in the clerk's office without leave of court. No process issued thereon against the appellee. The cause was brought on for hearing upon it by agreement of parties, subject to the reserved right of appellee to move the court to reject the bill, which motion was afterwards made. The court never passed on that motion, so that the time never arrived where it was incumbent upon appellee to answer such bill. Meanwhile the answer of appellee filed in the cause put in issue all the material allegations of the third amended bill, as they were the same in substance as those of the original and first amended bills, and no objection was made by appellants to the admissibility of the testimony introduced in behalf of appellee bearing on such issues on the ground that such testimony was not within the issues in the cause; and appellants, indeed, introduced proof bearing upon the same issues.

The decree under review will be affirmed, without prejudice to either the appellants or appellee to assert and rely upon the existence or nonexistence of the elder patent aforesaid, and any rights they may claim respectively under or as against the Stuart title, or to take and have hereafter determined any positions they may choose respective-

ly on the subject of the alleged right of appellants to require the appellee to convey to appellants a half interest in such title on payment by appellants to appellee of half of the purchase money paid by the latter for such title as freely as if this case had not been decided as it has.

Affirmed.

BURKS, J., absent.

(89 W. Va. 96)

STATE v. SNYDER.

(Supreme Court of Appeals of West Virginia.
Sept. 20, 1921.)

(Syllabus by the Court.)

1. Statutes \S 161—Older of two statutes dealing with same subject so repugnant that both cannot coexist repealed by implication.

Repeal of one statute by another by implication is not favored, yet such method is allowable when the statutes deal with the same subject-matter and are so repugnant that both cannot coexist, and if so, the older must yield to the later, it being the last legislative declaration upon the subject.

2. Divorce \S 320—Statute prohibiting divorcee's remarrying within time prescribed by the statute and the decree repeals prior act exonerating from criminal liability.

Section 14, c. 73, Acts 1915 (section 14, c. 64, Code 1918; Code Supp. 1918, \S 3648a), relating to the right of a divorcee to remarry within the time prescribed by the section and by the decree, except to the plaintiff in the proceeding, unless the decree is modified in that respect as therein provided in the section, impliedly repeals section 2, c. 149 (section 5306), Code, exonerating a divorcee from the criminal liability for the violation of the section immediately preceding the latter.

3. Divorce \S 320—Legislature may authorize decree prohibiting remarriage of party at fault within five years unless with leave.

The Legislature lawfully may authorize a provision in a divorce decree prohibiting the remarriage of the party at fault within five years from the date of the decree except to the plaintiff, unless after the expiration of one year from such date the court modifies the restraint upon the application of such party supported by proof that "by reason of his or her life and conduct since the date of the decree" he or she "is entitled to such relief."

4. Divorce \S 320—Divorcee remarrying within time prohibited by statute and decree is criminally liable as in the absence of divorce.

A remarriage of such person contrary to the prohibition, unless the decree is so modified, renders him or her "criminally liable the same as if no divorce had been granted."

(Additional Syllabus by Editorial Staff.)

5. Divorce \S 320—Indictment for violation of law prohibiting remarriage of divorcee need not allege cohabitation.

In a prosecution of a divorcee under Code Supp. 1918, c. 64, \S 14 (section 3648a), for

remarrying within the time prohibited by statute and by decree, the indictment need not allege that the defendant has cohabited with the party whom she married within such time, since the statute is against the solemnization of the marriage within the forbidden period, and its violation is complete without cohabitation.

Certified from Circuit Court, Barbour County.

Amanda Belle Snyder was indicted for a felony for marrying within the time in which she was forbidden to marry by a divorce decree under Code 1918, c. 64, \S 14 (Code Supp. 1918, \S 3648a). Defendant's demurrer to and motion to quash the indictment were overruled, and the court certified its action for review. Rulings on demurrer and motion to quash approved, and cause certified to circuit court.

E. T. England, Atty. Gen., and R. Dennis Steed, Asst. Atty. Gen., for plaintiff.

George & Wilcox, of Philippi, for defendant.

LYNCH, J. Marion L. Snyder and Amanda Belle Cross duly entered into the marital relation in Barbour county, this state, in the year 1910, and thereafter until 1920 remained husband and wife, when at the suit of the husband the circuit court of that county, at the 1920 September term, granted him a divorce from her and in the decree forbade her, as the party at fault, to remarry within five years from its date except to the plaintiff. This prohibition she disregarded or ignored, and within a few days after the date of the dissolution order intermarried with William Harvey in Barbour county, and this indictment charging her with having thereby committed a felony soon followed. The authority for the accusation, if any, is section 14, c. 73, Acts of 1915, now section 14, c. 64, Code 1918 (section 3648a, Code Supp. 1918):

"Neither party to a divorce suit shall again marry within six months from the date of a decree of divorce; but this provision shall not apply to, or prohibit the divorced parties from being remarried to each other at any time. The court may further prohibit the guilty party from marrying within a certain time, to be fixed in the decree, not to exceed five years from the date of the decree; and any marriage contracted by the parties, or either of them, except a remarriage by the divorced parties to each other, within the prohibited period, shall be void, and the party shall be criminally liable the same as if no divorce had been granted. The court may, at any time after the expiration of one year, modify the restraint imposed upon the guilty party, upon it being shown that such person, by reason of his or her life and conduct, since the date of the decree, is entitled to such relief."

[5] To the indictment and each of its two counts defendant demurred and moved to quash it. Each challenge to its sufficiency having been overruled, the court certified here its action thereon for review. The first point considered is the omission of an averment of cohabitation in this state by the parties to the subsequent marriage, a relation prohibited by the decree until after the expiration of five years unless the restraint be removed in the manner provided by the statute. There is in the section no hint of the necessity for such an averment. It is against the solemnization of the marriage, the uniting of a divorced husband or wife whose conduct made necessary and expedient recourse to the suit for relief, that the statute inveighs. So considered, the offense is complete when the prohibited ceremony is performed. Cohabitation is not an element of the criminal act when committed within this state, as in this instance it was. Had the defendant and Harvey entered into the marriage relation in another state in order to escape the consequences of the forbidden act, their return to and cohabitation in this state may have had some effect upon the guilt of the accused. But no such case is presented for decision.

[3, 4] The right and duty of the Legislature to provide just and reasonable regulations for marriage and divorce is imperative for the sake of morality and decency as matters of public concern and for the safety of those more immediately affected. No institution has a more direct influence or a more important relation in life than marriage. Civilization in large measure depends upon it, and governments are solicitous to preserve and safeguard its sanctity. They have also taken the utmost precaution to prescribe the causes and regulate the manner for the annulment of marriages. From an early period the English Parliament reserved to itself the right not merely to prescribe the causes warranting divorce from the bonds of matrimony, but to grant the annulment of marriages for such causes, as did also the legislative assemblies of the American colonies prior to the Revolution. Now the judiciary of the several states may grant divorces, subject, however, to such regulatory enactments as the state Legislatures may deem necessary or expedient for the protection of the public and the parties interested. It was for this purpose that section 14 became a part of the laws of this state. Its provisions are not unusual or extraordinary.

Illinois, Kansas, and Virginia have similar laws. Some of them authorize the inhibition of the marriage of the party whose disloyalty to the marriage vows warrants the dissolution of the marriage alliance during the lifetime of the party not so at fault, unless the provision in the decree is modified subsequently upon the application of the party so prohibited. These statutes the high-

est courts of the states named have upheld as valid and enforceable against the transgressor though with some relaxation where the rights of the innocent issues of the marriage were involved or the marriage was solemnized in a state other than the one that enacted the statute. See *Olsen v. People*, 219 Ill. 40, 76 N. E. 89; *Hobbs v. Hobbs*, 279 Ill. 163, 116 N. E. 629; *Durland v. Durland*, 67 Kan. 734, 74 Pac. 274, 63 L. R. A. 959.

In *Musick v. Musick*, 88 Va. 12, 13 S. E. 302, the Supreme Court of Virginia held valid an act conferring upon the courts of the state authority to prohibit the marriage of the guilty party at any time while the decree remained in full force and effect. In all such legislation provisions appear for the relaxation or modification of the inhibition upon the application of the party restrained supported by proof sufficient to show reformation on his or her part, as does section 14 of chapter 64, Code 1918.

[1, 2] The main, if not the most serious objection to the indictment, is the character of the charge against the accused. For her the argument is that according to section 2 of chapter 149 (sec. 5306) of the Code she cannot be proceeded against as for a bigamous marriage entered into after the date of the divorce decree, and that she can be prosecuted, if at all, for no offense other than a misdemeanor. That section considered alone does tend to support her contention. But does not section 14 of chapter 64 repeal, at least by implication, section 2 of chapter 149? The first two sections of that chapter appear with slight alterations in language in the Code of 1860 and subsequent Codes, especially since 1882. If the law in this state is as she contends, the marriage between her and Harvey is not bigamous, or perhaps, more properly, not polygamous. Section 2 of chapter 149 is an old statute; section 14 of chapter 73, Acts 1915, now section 14 of chapter 64 of the Code, a much later one, and contains the usual repealing clause. They deal with the same subject, the effect to be given to section 1 (section 5305) of chapter 149 when the party indicted is a divorcee. The first or older section exonerates her from criminal liability; the later one in effect repeals the other, and fixes liability upon her. They treat of the effect of a divorce. Their provisions are repugnant, each to the other, and their inconsistency is too palpable to admit of their coexistence as the law applicable to the facts averred in the indictment. If they cannot stand together, one must fall. In such case the later law must prevail as the last expression of the legislative will on the subject. This is true though the repeal of the prior statute is by implication, a method of repeal not favored, but sanctioned only where the repugnancy is obvious. See 12 Enc. Dig. for Virginia and West Virginia, p. 780.

There seems to be no valid objection to the second count, at least as urged in argument. Our opinion, then, is to approve the rulings upon the demurrer and motion to quash, and to certify the result of our investigation to the circuit court of Barbour county.

(89 W. Va. 78)

DE PUE v. STEBER et al. (No. 4125.)

(Supreme Court of Appeals of West Virginia.
Sept. 20, 1921.)

(Syllabus by the Court.)

1. Witnesses \S 159(7)—In administrator's action to recover property claimed as a gift, defendant is incompetent to testify as to transactions with deceased.

In an action by the administrator of a deceased person, for the recovery of specific personal property, against one claiming it by gift inter vivos from the intestate, the alleged donee is not competent to testify to the alleged gift, nor to any conversation or declaration of either of them, respecting the same, on the occasion thereof or afterwards; the gift, if any, being a personal transaction, and the conversations personal communications, between him and a deceased person.

2. Witnesses \S 140(14)—In administrator's action for property claimed as gift by defendant, party executing forthcoming bond is incompetent to testify to deceased donor's admissions.

A person who, in such an action commenced in a justice's court and carried by appeal into a circuit court, executed a counter bond with condition to have the property forthcoming to answer the judgment in the action, is incompetent, by reason of interest, to testify to declarations or admissions of the alleged gift by the donor; they being personal communications between him and a deceased person.

3. Evidence \S 123(7), 273(5)—In action to recover property from deceased donor, donee's statements as to gifts held not admissible as res gestæ.

A declaration by the alleged donee, to the effect that the property had been given to him as claimed, made on the day of the alleged gift, and very soon afterwards, but not at the place thereof, is not admissible, it being no part of the res gestæ; but his declarations of ownership of the property while in his possession are admissible.

4. Evidence \S 268, 269(2), 271(17)—Self-serving declarations of deceased donor and while intoxicated not proof of character of transaction, but admissible to show state of mind.

Self-serving declarations of a deceased person from whom a gift is claimed, made soon after he relinquished his possession of the property and while intoxicated and suffering from delirium tremens, are not admissible, or rather cannot be used, for proof of the character of the transaction between him and the alleged

donee, but are admissible as bearing upon his state of mind at the time thereof.

5. Evidence \S 269(2)—Declaration of deceased donor against donee's interest, after transaction and recovery of mental vigor, held inadmissible.

Declarations of such donor against the interests of the donee, made after the transaction and after restoration of his full mental vigor, are not admissible at all.

6. Evidence \S 269(2)—In administrator's action for property claimed as gift, evidence of unwillingness that property go to relatives held admissible.

In such case, declarations of the donor, indicative of unfriendliness on his part toward his brothers and sisters and his unwillingness that they should have any of his property, though not shown to have been made in anticipation of impending death and therefore not strongly probative, are admissible.

7. Trial \S 85—General objection to evidence good in part properly overruled.

A general objection to evidence available for some purposes in the trial, but not for others, is properly overruled.

(Additional Syllabus by Editorial Staff.)

8. Witnesses \S 139(12)—In action to recover alleged gift, defendant witness held not disqualified because he was the father of the defendant donee.

In an administrator's action against a father and his minor son to recover a diamond ring claimed by defendants to have been given by the decedent to such son, defendant father was not disqualified as a witness to personal communications between himself and the decedent respecting the alleged gift by reason of his relationship to his son.

Error to Circuit Court, Roane County.

Action by H. W. De Pue, as administrator of the estate of Fred M. De Pue, deceased, against Flem Steber and another, in detinue before a justice of the peace, in which a judgment was rendered for the plaintiff and an appeal taken to the circuit court where, on second trial, judgment was for the defendant, and plaintiff brings error. Judgment reversed, verdict set aside, and cause remanded for new trial.

S. P. Bell, of Spencer, for plaintiff in error.

Geo. F. Cunningham, of Spencer, for defendants in error.

POFFENBARGER, J. The complaint on this writ of error goes to a judgment for the defendant in an action of detinue for the recovery of a diamond ring, commenced before a justice of the peace, in whose court the plaintiff prevailed, and tried a second time on appeal, in the circuit court of Roane county, in which the defendants prevailed.

The real defendant is Frank Steber, a

youth of 14 or 15 years and the son of the defendant, Flem Steber. His claim of title is based upon an alleged gift of the ring to him by Fred M. De Pue. Apparently, the father with whom the boy resides has advised and encouraged him to assume the attitude he has taken and supports him in his effort to maintain it. It seems to be uncontroverted that on February 26, 1919, De Pue delivered the ring to the boy in his father's barber shop. One of the issues involves the mental condition of the alleged donor, at that time, and another the purpose of the delivery. De Pue's heavy drinking some days before the alleged gift brought on delirium tremens with its hallucinations, according to the evidence adduced by the plaintiff, and this mental and nervous condition continued for some time thereafter. Exposure incident to his conduct brought on pneumonia, of which he died March 26, 1919. One of the plaintiff's theories is that the delivery was made under the influence of an hallucination incident to the affliction and in a period of mental derangement and irresponsibility, and the other is that of a mere temporary deposit for safe-keeping.

The case went to the jury without instructions and the assignments of error relate for the most part to the competency of witnesses and the admissibility of evidence.

[1] For determination of the issues raised upon these theories, the plaintiff introduced much evidence pertaining to the mental condition of the alleged donor, immediately before and after the transaction in question, all of which was clearly admissible. Testimony by which he set up a number of self-serving declarations of the alleged donor was objected to, and admission thereof is assigned as error. On the other hand, the plaintiff objected to the testimony of Flem Steber and Frank Steber, relating to personal transactions and communications between him and them, concerning the alleged gift, on the ground of disqualification by reason of interest in the controversy. Certain testimony of the boy's mother to declarations made by him, was admitted over an objection of the plaintiff, on the ground that it constituted a part of the *res gestæ*. Evidence of a declaration of the decedent, indicative of a state of unfriendliness between him and members of his family, was also admitted over an objection by the plaintiff.

Inadmissibility of part of the testimony of Frank Steber is admitted in the brief filed on his behalf. That the gift of the ring from De Pue to Frank Steber, if made, and all of the conduct of both on that occasion, were personal transactions between them and excluded by the rule disqualifying witnesses on the ground of interest, is perfectly obvious; Frank Steber being interested in the result of the trial, and De Pue be-

ing dead. It is equally manifest that anything said by either of them, on that occasion, relating to the ring and a gift thereof, was a personal transaction within the meaning of the law, to which Steber could not testify under the circumstances.

[2, 3] Flem Steber was not disqualified as a witness to personal communications between himself and the decedent, respecting the matter in controversy, by reason of his relationship to Frank Steber. *Cooper v. Cooper*, 65 W. Va. 712, 717, 64 S. E. 927. The record discloses, however, that he together with another person executed a counter bond in the penalty of \$200, for the purpose of having the property left in the hands of himself and Frank Steber, pending the determination of the action, and with condition to have the same forthcoming to answer the judgment against them, if any. The record, as sent up from the justice's court, included this bond. The statute, section 168, c. 50, of the Code, requires a justice, in case of an appeal, to certify a complete transcript from his docket, of all the proceedings before him, and to transmit the same, together with the appeal bond, the pleadings, depositions, and all original papers in the cause, to the clerk of the circuit court of the county. By its recitals, this bond shows that the Flem Steber executing it is identical with the Flem Steber who is a party defendant along with Frank Steber. It is hardly necessary to say that the question of competency of a witness is always one for the court. Even though the jury may not have been able to notice the bond, the court could resort to it, for the purpose of ascertaining whether or not Steber was interested in the result of the action. By the execution of this bond, he became a person interested in the result. In an action upon that bond, a judgment for the plaintiff in this action would be conclusive upon him, and that is the test of the liability of a surety or other person, not having or claiming an interest in himself. 1 *Greenleaf*, Ev. § 390; *Miller v. Montgomery*, 78 N. Y. 282. Under this rule, a surety in a guardian's bond is incompetent to testify against the ward, in respect of transactions and communications had by him with a deceased person. *Crawford v. Parker*, Adm'r., 96 Ga. 156, 23 S. E. 196. Guarantors of a tenant are incompetent to testify against the personal representative of a deceased lessor. *Grommes v. St. Paul Trust Co.*, 147 Ill. 634, 35 N. E. 820, 37 Am. St. Rep. 248.

[3] Admissibility of the mother's testimony to a declaration made by Frank Steber on the day of the alleged gift and shortly thereafter, depends upon whether or not the declaration was a part of the *res gestæ*. The transaction between De Pue and Frank Steber took place in Flem Steber's barber shop, when Flem was absent from the shop; he

having gone to his evening meal. On his return he found De Pue and Frank in the shop. On his arrival, De Pue took the chair to be shaved and Frank left. After his departure, Flem says De Pue called for Frank and, being informed of his absence, stated that he had given him a small diamond ring. The mother testified that, on that evening, Frank came running upstairs with the ring and said, "Look here, Mother, what I have got." Thereupon she said, "What is that?" And he replied, "A diamond ring," and said, "Fred De Pue gave it to me." That this declaration was made after completion of the transaction is obvious. The boy had left the scene thereof. Nothing connected the declaration with the transaction, except the boy's possession of the ring and possibly an excited state of mind. His mental condition is not the subject of investigation. The fact to be determined is whether or not a gift of the ring had been made. The boy's feelings immediately afterwards constituted a mere incident or consequence of the transaction. That the declaration was a mere narrative of a past event is clear beyond doubt. Under the rule adopted by this court, in *Hawker v. Baltimore & Ohio R. R. Co.*, 15 W. Va. 628, 36 Am. Rep. 825, and the precedents therein cited, this declaration is clearly excluded on the ground of narration of a past event and remoteness in time.

The declaration admitted in *Thomas' Adm'r v. Lewis*, 89 Va. 1, 57, 15 S. E. 389, 18 L. R. A. 170, 37 Am. St. Rep. 848, could not have been admitted by this court, as a part of the *res gestæ*, consistently with the rules and principles announced in our case above referred to, and it was not admitted in that case upon the sole ground that it was a part of the *res gestæ*. The declaration was made the next morning after the gift, many hours after the transaction. The opinion does not indicate how or why it constituted a part of the *res gestæ*. It was no doubt admissible to repel inferences against the donee, arising from silence imputed to her, respecting the alleged gift, by the testimony of witnesses of the opposite party, and that is one of the grounds upon which admission thereof was approved. The rule announced by this court in *Roane Lumber Co. v. Lovett Adm'r*, 72 W. Va. 828, 78 S. E. 102, may tend to show the correctness of that ruling.

Her testimony to the effect that the boy then claimed to be the owner of the ring and put it among his other possessions was admissible by way of explanation of his pos-

session. *Martin v. Martin*, 174 Ill. 371, 51 N. E. 691, 66 Am. St. Rep. 290. She could testify that he claimed it as his own, but not that De Pue had given it to him.

[6] No ground is perceived upon which testimony to De Pue's declaration of unfriendliness to his brothers and sisters could be excluded. It seems to be relevant as having some bearing upon the motive he may have had in parting with his ring, but its probative value is diminished or limited by lack of proof of a gift in anticipation of death. The weight of evidence is not the test of its admissibility, however.

[4, 5, 7] Though De Pue's declaration to the effect that he had given his money away and his ring to Frank Steber, for safe-keeping, under the belief that robbers were pursuing him, made shortly after the alleged gift, and while his mind was affected by intoxication and delirium tremens, as testified to by numerous witnesses, are self-serving in their nature and effect, they are nevertheless admissible for the purpose of proving his mental condition and state of mind. *Lane v. Moore*, 151 Mass. 87, 23 N. E. 823, 21 Am. St. Rep. 430; *Shailer v. Bumstead*, 99 Mass. 112; *Potter v. Baldwin*, 133 Mass. 427; *Lewis v. Mason*, 109 Mass. 169; *May v. Bradlee*, 127 Mass. 414; *Pickins v. Davis*, 134 Mass. 252, 45 Am. Rep. 422. They are not admissible, however, or rather cannot be used, to prove directly the fact of the gift, or the character of the transaction, the vital issues in the case. *Lane v. Moore*, cited. As they are admissible only for certain and limited purposes, a general objection to them was unavailing. *State v. Hood*, 63 W. Va. 182, 59 S. E. 971, 15 L. R. A. (N. S.) 448, 129 Am. St. Rep. 964; *Bluefield v. McLaugherty*, 64 W. Va. 536, 543, 63 S. E. 363. In admitting them the court, if requested, and possibly without request, should have advised the jury, by instruction or otherwise, that they were not to be considered as evidence of a deposit of the ring merely for safe-keeping, nor against the theory of an absolute gift, but only as bearing upon the alleged donor's state of mind, including his intention. Declarations of that kind made when he was not so affected are not admissible at all. 6 Ency. Ev. 213, citing well-considered decisions sustaining the text.

For the errors in the rulings as to evidence, herein indicated, the judgment will be reversed, the verdict set aside, and the case remanded for a new trial.

(89 W. Va. 70)

WINNING v. SILVER HILL OIL CO. et al.(Supreme Court of Appeals of West Virginia.
Sept. 20, 1921.)*(Syllabus by the Court.)*

1. Executors and administrators \S 524(1)—
Foreign executor cannot proceed on petition
and published notice to authorize transfer
of property from lawful custody in this state
to another state.

An executor of the will of a person domiciled in a state other than this, at the time of his death, appointed by a court of such other state, in which the will was probated, but not shown to have been appointed in this state, seeking recovery of gas well rentals arising from a lease of an undivided interest of an infant devisee under the will, in a tract of land belonging to the estate of the testator, made on his behalf by his guardian duly authorized to execute it, from such guardian, and an adjudication of his right to future rentals under said lease, cannot proceed merely by petition and upon published notice, for such relief, under the provisions of sections 3, 4, and 6 of chapter 84 (secs. 3981, 3982, 3984) of the Code, authorizing transfers of property and estates from custody in this state to proper custody in other states, by such procedure, nor any of them.

2. Executors and administrators \S 524(1)—
Foreign executor may sue for transfer of
property from personal representatives but
not for any other purpose.

Although a foreign executor is authorized by said section 6 to sue in equity for the transfer of property of his testator in the hands of a personal representative in this state, he is not thereby authorized to maintain a suit in this state for any other purpose.

3. Executors and administrators \S 524(1)—
Foreign personal representative can only sue
in this state when empowered by statute.

Unless empowered so to do by a statute, a foreign personal representative cannot sue in the courts of this state.

4. Executors and administrators \S 524(1)—
Nonresident suing in this state as foreign
executor or trustee must comply with our
practice statute requirements.

Though a person acting in the dual capacity of executor and trustee of an estate may sue in the courts of this state as trustee, he must comply with the requirements of our practice in order to institute and maintain his suit.

5. Executors and administrators \S 524(3)—
Executor suing as trustee to recover prop-
erty must follow statute as to naming nec-
essary parties defendant.

A paper filed by a foreign executor against a resident guardian of a nonresident infant and a lessee, as a petition for transfer to the executor in his capacity as trustee of his testator's estate of funds in the hands of the guardian arising from gas well rentals as aforesaid, and for adjudication of his right to rentals to accrue from the lease in the future, upon the

theory of superior title in the executor and trustee, which, although praying relief against the guardian and lessee, does not in any way name either of them as a defendant, nor pray that either of them be made such, nor that either of them be required to answer it, cannot be treated as a sufficient bill in equity as to them.

6. Executors and administrators \S 524(3)—
Bill held defective for not making infant
party.

To a bill having for its purpose the relief above indicated the infant is a necessary party, and, if the paper were otherwise sufficient as a bill, it would be defective for its failure to make him a party.

7. Appearance \S 20—Demurrer of guardian
and lessee to paper regarded as a bill held
not a waiver of process.

The appearance and demurrer of the guardian and lessee to such paper regarded as a bill does not amount to a waiver of process, and, no process having issued upon it, there is a total lack of jurisdiction of the persons of the parties interested adversely to the petitioner.

Certified from Circuit Court, Wetzel County.

Action by Ross J. Winning, as executor of the estate of Edward D. Winning, deceased, against the Silver Hill Oil Company and others. Demurrer to petition by executor sustained, and cause certified. Order affirmed.

A. C. Chapman, of New Martinsville, for plaintiff.

Thos. H. Cornett, of New Martinsville, for defendants.

POFFENBARGER, J. The decision certified for review in this cause involves an inquiry as to the right of an executor appointed in the state of Ohio, under a will probated in that state, and who is not shown to have qualified as executor in this state, nor given any bond in the state in which he was appointed, to have awarded and transferred to him certain property, rentals arising from an oil and gas lease, some of which have already accrued and been paid to the guardian of a nonresident infant, who is a devisee and legatee under the will, and to obtain an adjudication of his right to future rentals. That inquiry has been raised and submitted by an order of the court below sustaining a demurrer to the petition filed by the executor for such award or transfer and adjudication.

The will designated two persons for executors, a son of the testator and a friend, the latter of whom is dead. It also dispenses with the requirement of any bond.

Dated February 27, 1908, probated in Jefferson county, Ohio, May 15, 1909, and recorded in the clerk's office of the county court of Wetzel county, W. Va., August 11, 1910, the

will first provides for payment of the debts and expenses of the last sickness and burial of the testator. The second item reads as follows:

"It is my wish that the residue of my estate after settling my indebtedness shall be held by my executors hereinafter named for the term of six years after my decease and that they shall have full authority to use revenues derived from the estate as their judgment may determine to be for the interest of the heirs; and if any effort is made by any one claiming to have an interest in the estate, to interfere with the provisions of this item or any other provision of this will, then such interest or interests shall be forfeited to the other heirs."

Subject to this provision, the third item disposes of the testator's estate as the law would have disposed of it in the absence of a will. The fourth item charges one of the interests with the sum of \$350 in favor of some of the other beneficiaries.

The application for the transfer of the sum in question was resisted and has thus far been defeated by James B. Clark, guardian for Gerald W. Townsend, an infant and resident of the state of Illinois, and the Silver Hill Oil Company, a corporation. Townsend was a minor at the date of the filing of the petition, but he attained his majority before the decision in question was rendered. The object of the petition was to require the guardian of Townsend to pay over to the petitioner a certain sum of money, which had come into his hands from gas well rentals on a tract of land in which Townsend owned an undivided eighth interest by virtue of the will, and to obtain an adjudication of the right of the petitioner to future rentals accruing on the lease.

[1] The estate of Edward D. Winning, the testator, included a tract of land situated in Wetzel county and containing 450 acres. By an agreement made October 10, 1918, all of the devisees of his will, except Gerald W. Townsend, joined in a lease of said tract of land to the Silver Hill Oil Company, for oil and gas purposes. At about the same time Townsend's guardian appointed in Wetzel county, instituted and prosecuted to a final order a summary proceeding to obtain authority to lease his undivided interest in the land to the same corporation, and, after having obtained such authority, he executed the lease, and this action on his part was ratified and confirmed by the court. This lease, as well as the one executed by Townsend's co-owners, provided for the usual one-eighth of the oil as royalty, and an annual cash rental for each producing gas well, the first one \$300 per year, payable in four equal installments, and the other \$37.50, payable in like manner. At the date of the filing of the petition now under consideration there were three producing gas wells on the property, and some rentals had been paid to the guard-

ian under the lease of Townsend's interests, effected as aforesaid.

The ostensible and avowed purpose of the petition is effectuation of a transfer of funds, under the provisions of sections 3, 4, and 6 of chapter 84 (secs. 3981, 3982, 3984) of the Code, is clearly not within any of those provisions, because it discloses a state of facts to which their terms are not applicable. The third and fourth sections contemplate the transfer of funds or property in the hands of a guardian or committee appointed in this state belonging to a minor or insane person residing out of it, and funds of an infant, insane person, or cestui que trust invested, or required to be invested, under the direction of a court of this state. They also contemplate the filing of a petition by a guardian, committee, or trustee lawfully appointed and qualified in the state or county of the residence of said infant, insane person, or cestui que trust. This petition was not filed by any person falling within these designations. The petitioner is an executor of a will, appointed in Jefferson county, Ohio, and the infant in question resides in the state of Illinois. These two provisions relate to transfers of funds and property in definite, specific, and limited cases. Under no rule of construction now recalled can their operation be extended to other cases. Section 6 is broader and more general in its terms, but it does not contemplate a transfer of funds in the hands of a guardian appointed in this state. It provides for transfer of personal estate in this state vested in a trustee resident herein, or who acts by virtue of a deed, will, or other instrument, recorded or probated in this state, and assets of a decedent, domiciled at the time of his death in another state, in the hands of an administrator or executor appointed in this state. Clark, the guardian proceeded against, is not a trustee within the meaning of said section 6, because he is a guardian actually and technically, and falls within the express terms of sections 3 and 4, and not a trustee, nor a personal representative. Being an executor, and possibly a trustee, the petitioner falls within the terms of section 6, providing for transfer and delivery of estate or assets, or any part thereof, to a non-resident trustee, administrator, or executor appointed by some court of record in another state. But even here he may not be within further terms apparently requiring the trustee, administrator, or executor to have been appointed by some court of record in the state in which the beneficiaries reside. If he is a trustee under the will probated in the state and county in which the testator was domiciled at the time of his death, he may be within the contemplation of the statute, upon the presumption that the beneficiaries of the trust reside in that state, and it may not be material that one of them resides in a

third state, Illinois. As to this we decide nothing, however, since we are of the opinion that, for other reasons already indicated and yet to be elaborated, the case attempted to be made out in the petition is not within the provisions of section 6.

[2] Manifestly the attitude of the petitioner is hostile to the claims of the infant named in the petition and his guardian. He claims a title or right of possession superior to theirs by virtue of a provision of the will. The petition does not present the usual case of a guardian or committee appointed in another state coming into this state with an admission of the title of the infant or insane person and a mere demand for a transfer of the custody of the ward's property from this state to proper custody in another state. It asserts right in the executor, by virtue of the second item or clause of the will, to keep the estate of the testator intact and undivided, notwithstanding the expiration of the six-year period therein described, because all of the debts of the estate have not been paid, and it is not in condition for distribution, and has not been distributed or divided among the devisees. At the same time it discloses claims of superior right in the nonresident infant, Gerald W. Townsend, and his guardian. It charges the fact that the funds in the hands of the latter belong to the estate, which he, acting as guardian of Townsend, refuses to deliver up to the petitioner. No doubt this refusal is based upon the theory of lack of right in the petitioner to the possession and custody of the fund. If Clark were a trustee or a personal representative of the same testator that the petitioner represents, the procedure adopted might be within the contemplation of said section 6; but the averments of the petition negative the existence of any fiduciary or trust relation. It is not predicated upon the theory of any such relation, express or implied, between the petitioner and the guardian; nor is the petition that of a nonresident executor against an administrator or executor in this state, for Clark is neither an administrator nor an executor, nor did the funds come to his hands in that capacity. He has never been appointed as the administrator or executor of E. D. Winning, nor does he profess to act in that capacity. He was duly appointed guardian for Townsend, in which capacity, and no other, he professes to act. This status is admitted by the petitioner.

[3, 4] The suggestion in argument that the petition may be treated as a bill, notwithstanding its form and designation, is wholly untenable, for several reasons. Under the provisions of section 6, the party entitled to relief may proceed either by petition or by a bill in equity; but in either case he must seek either enforcement of a trust or a transfer of property from a resident personal representative to a nonresident personal represen-

tative. Neither a bill in equity nor a petition is authorized by this section in any other kind of a case. Of course, under general equity jurisprudence, a bill may be filed in other cases, and it may be that a sufficient bill could be predicated upon the facts disclosed in the petition. But a foreign executor cannot maintain a suit in this state, unless authorized so to do by this statute or some other. *Oney v. Ferguson*, 41 W. Va. 568, 23 S. E. 710; *Andrews v. Avory et al.*, 14 Grat. (55 Va.) 229, 239, 73 Am. Dec. 355. A statute, section 4 of chapter 85 (sec. 3991), Code, seems to imply that a nonresident, under the circumstances disclosed, may be appointed an executor in this state; but the petitioner is not shown to have been so appointed. If appointed, however, he would not sue under section 6 of chapter 84. He would sue independently of that statute. But, if he is more than a foreign executor, if the will makes him also a trustee, he could sue without having been appointed as an executor in this state. Whether he is a trustee is a debatable question upon which adverse parties are entitled to be heard.

[5] A bill, however, must have parties and bring before the court as parties all persons who have any interest in the subject-matter. The petition does not name any person as a party to it, nor pray that any person be made such a party. If the prayer for relief against J. B. Clark, as guardian, and the Silver Hill Oil Company, as lessee, could be regarded as a sufficient designation of them as parties, it would still be insufficient for omission of the ward, Gerald W. Townsend, who is vitally interested in the subject-matter. He is the real claimant of the rentals in question arising out of the lease executed on his behalf. Even though the paper contains a prayer for specific relief against the guardian and the lessee and a prayer for general relief, it cannot be treated or regarded as a bill in equity to which they are made parties. The requisites of a good bill as to parties are very clearly and learnedly stated by Judge Brannon in *Cook v. Dorsey*, 38 W. Va. 196, 18 S. E. 468. As defined by general equity practice unmodified by statute, they go far beyond the form and substance of this paper. It contains no prayer for process against anybody, nor does it name anybody as a defendant. Under the Virginia practice, it seems to have been necessary to name some person as defendant and require him to answer the bill. This paper makes no such demand upon the parties against whom relief is asked. Our statute (section 37, c. 125 [sec. 4791] of the Code) prescribes a simple form of bill and dispenses with some of the requirements as defined in ancient practice. Under it the parties may be named in the caption and the naming of a defendant therein suffices. The instrument need not contain any prayer that a person no named may be

made a defendant and required to answer the bill. As to parties, a bill must follow the chancery practice in use before the enactment of this section, or the form prescribed by it. *Cook v. Dorsey*, cited. This paper does neither; wherefore it is insufficient to make anybody a party to it.

[8, 7] It is hardly necessary to observe further that nobody can be a party to a bill, even though sufficiently named in it, without process thereon against him, unless it be waived by an appearance. There is no pretense of any process against the infant whose rights are assailed by the bill. By their appearance to it and demurrer the guardian and lessee did not waive its insufficiency of designation of themselves as parties. *Cook v. Dorsey*, cited.

For the reasons stated, the demurrer was properly sustained, and this conclusion will be certified to the court below.

LYNCH, J., absent.

(89 W. Va. 123)

TROBIE v. RITER-CONLEY CO.
(No. 4298.)

(Supreme Court of Appeals of West Virginia,
Sept. 27, 1921.)

(Syllabus by the Court.)

1. Trial \S 359(1)—Special verdict will not overthrow general verdict unless findings are irreconcilably inconsistent.

A special verdict, made up of interrogatories and the answers of the jury thereto, will not overthrow a general verdict, unless such special findings are irreconcilably inconsistent with such general verdict, and clearly exclude every conclusion that will harmonize the special findings with the general verdict.

2. Master and servant \S 90, 297(2)—Special finding held not in conflict with general verdict; care required of master defined.

A special finding by a jury that the master, in the performance of certain work, has exercised that care which his foreman in charge of the work considers sufficient for his own protection, as well as for that of the other employees, is not in conflict with a general verdict in favor of the plaintiff. The due care required of the master is that care which a man of ordinary prudence would exercise in the performance of the particular work, and not what any particular man pointed out by the defendant believes to be ordinary care.

3. Master and servant \S 278(4)—Negligence in doing work in charge of foreman question for jury.

The question whether or not the master has exercised due care towards his servants in the doing of a particular work in which they are engaged is ordinarily for the jury, and the fact that the jury may believe that the defendant's foreman in charge of the work exer-

cised such care as he considered to be proper under the circumstances does not preclude a finding that the master was guilty of negligence in the performance of his duty in that regard.

4. Appeal and error \S 837(7)—Where the general charges pleaded were reduced to specific fact issues by evidence, evidence may be considered when interpreting an interrogatory.

While ordinarily, in the interpretation of a special verdict, made up of interrogatories and the jury's answers thereto, the court may look only to the pleadings, the general verdict, the special interrogatories, and the answers thereto, still where the pleadings are general in their nature, and the parties by the evidence introduced in the case have reduced these general charges to a specific and definite issue of fact, the court may, in interpreting an interrogatory, look to the evidence to determine exactly what the issue was between the parties upon the trial before the jury.

Error to Circuit Court, Ohio County.

Action by Andrew Trobie against the Riter-Conley Company. Judgment for plaintiff, and the defendant brings error. Affirmed.

Hubbard & Hubbard and Erskine, Palmer & Curl, all of Wheeling, for plaintiff in error.

J. Bernard Handlan, G. Alan Garden, and P. J. McGinley, all of Wheeling, for defendant in error.

RITZ, P. This writ of error brings up for review a judgment of the circuit court of Ohio county in favor of the plaintiff for damages for a personal injury received by him while in defendant's employ.

The defendant, a contracting company, was engaged in making repairs to a furnace of the Wheeling Steel & Iron Company, and as part of the work it was necessary to remove from the furnace certain refuse matter which had accumulated at the bottom thereof. It appears that this matter had formed a solid mass, and before it could be removed it had to be broken up with charges of dynamite, and then the pieces raised out of the furnace and conveyed away. This matter is called in the record a salamander. At the time the accident happened to the plaintiff the salamander had been broken up and considerable thereof had been removed, and the defendant was engaged in removing the remainder. In doing this work blocks were fastened up in the furnace, and the pieces of the salamander being removed were raised by this means to the level of the ground surrounding the furnace, and then another rope, called an outhaul, was attached to the cable by which the salamander was suspended, and by means of blocks used in connection with the outhaul rope the salamander was pulled horizontally to a point without the furnace, and there dropped on

the ground to be further removed by other means. On the occasion of the accident resulting in plaintiff's injury the piece of salamander being removed had been raised vertically to the desired height, and the outhaul rope had been attached to the appliances, which had theretofore engaged the salamander, by means of a large iron hook fastened in a block through which the outhaul rope operated, and the power had been applied at the other end of the outhaul rope, and the salamander had been pulled out about three feet from the vertical position, when the hook which fastened the outhaul apparatus to the cables supporting the salamander suddenly broke, and the block to which this hook was attached, being thus suddenly released from the strain upon it, flew with great violence against the plaintiff, striking him on the left side of the face, knocking out his left eye, and otherwise severely injuring him.

The plaintiff brought this suit, charging in his declaration that the defendant was negligent: First, in that it did not use ordinary care, diligence, and skill in doing the work; second, in that it did not provide reasonably safe, proper, and fit machinery and appliances; third, in that it did not reasonably and seasonably inspect the machinery, appliances, and instrumentalities; fourth, because it did not maintain the machinery and appliances in a fit and suitable condition for doing the work; fifth, because it subjected the machinery and appliances to a greater strain than they were suitable to withstand and resist; sixth, because it selected incompetent servants and employes for carrying on this work. Upon a trial a general verdict was rendered in favor of the plaintiff for the sum of \$5,000, and the jury answered five certain interrogatories submitted to them, said interrogatories and the answers thereto being as follows:

"(1) Was the injury proximately caused by the breaking of the hook? Answer: Yes. (2) Did the foreman Drummond have reason to expect the breaking of the hook? Answer: No. (3) At the time of the accident was the plaintiff in as safe a position as the foreman Drummond? Answer: No. (4) Did the foreman take the same care to provide for the safety of the plaintiff as for his own safety? Answer: Yes. (5) Were the plaintiff's injuries proximately caused by reason of any incompetency on the part of the man at the niggerhead handling the outhauling rope? Answer: No."

The defendant moved the court to render judgment in its favor upon the special verdict, consisting of the interrogatories and the answers thereto, upon the ground that such answers were entirely inconsistent with the general verdict, and decided the issues involved in its favor; and, if this motion should be overruled, then that the verdict of the jury be set aside upon the ground

that the court had misdirected the jury on motion of the plaintiff. The circuit court successively overruled each of these motions, and rendered judgment in favor of the plaintiff on the general verdict.

[1] Upon this writ of error the defendant assigned as error the action of the court in refusing to render judgment in its favor upon the special verdict, and also the refusal of the court to set aside the verdict upon the ground of misdirection of the jury. Upon the hearing it has withdrawn the latter assignment of error, and desires to stand solely upon the contention that it is entitled to a judgment in its favor upon the special findings. It contends that the answers to the interrogatories decide every issue raised in the case in its favor, and are in irreconcilable conflict with the general verdict. If this contention is correct, of course it is entitled to a judgment upon the special verdict, notwithstanding the general verdict.

[2, 3] The defendant insists that in considering the question whether or not the answers to the interrogatories are in conflict with the general verdict nothing but the pleadings, the special findings, and the general verdict may be looked to; and cites the case of *Peninsular Land Co. v. Franklin Ins. Co.*, 35 W. Va. 666, 14 S. E. 237, to support this contention. The judge, delivering the opinion in that case, did make use of the language quoted by counsel, but it may not be susceptible of as literal interpretation as counsel would give it. However, suppose we consider the answers to the interrogatories in connection only with the declaration and the general verdict. The effect of the general verdict, of course, is to find that the defendant was guilty of negligence in some one or all of the particulars averred in the declaration, and that this negligence was the efficient cause of the plaintiff's injury. Do the answers to the interrogatories negative this view?

The first interrogatory is, "Was the injury proximately caused by the breaking of the hook?" to which the jury answered, "Yes." Of course, it is perfectly patent that this question and answer determined nothing of importance in this case. It is clear that when the jury stated that the breaking of the hook proximately caused the injury it meant no more than that the plaintiff's injury was occasioned by the hook breaking, which permitted the block to fly and hit him in the face. It did not and could not mean that the hook was the efficient cause of the injury. This language is not used in the question in the sense in which it is ordinarily used in the law of negligence. Every count in the declaration alleges that the plaintiff's injury was produced from a blow received by him from the block which was released by the breaking of the hook. The pertinent inquiry was, what caused the hook to break,

and no special interrogatory propounds this question to the jury.

But the defendant urges that the answer to the second interrogatory is conclusive of every issue in its favor when read in connection with the answer to the first of such interrogatories. The second interrogatory is, "Did the foreman Drummond have reason to expect the breaking of the hook?" and the answer thereto is, "No." Looking to the pleadings alone, we cannot see just what relevancy the expectations of the foreman Drummond might have. The pleadings do not refer to him, nor does it appear therefrom how his conduct and expectations might in any way control the case in favor of the defendant. It may be assumed from the interrogatory that he was foreman of the defendant on the work, but whether in the full charge of it or not does not appear, except from the evidence, which counsel say we cannot look to. It must be borne in mind that the declaration charges negligence in several different particulars. It might be, so far as the pleadings are concerned, that the duty of an inspection of the appliances did not devolve upon foreman Drummond, or that the duty of controlling certain parts of the work did not devolve upon him, or that the duty of providing reasonably efficient means for doing the work did not devolve upon him; and, if his duties as a foreman did not include any or all of these things, then, of course, he would have a right to assume that they had been properly performed by the defendant, and would have no reason to contemplate an accident therefrom, unless he had actual knowledge that the party charged with the performance of them, or some of them, had been derelict in his duty. To understand the effect of this interrogatory it is necessary to look to the evidence. When we do this we find that foreman Drummond, referred to in the interrogatory, was in sole and exclusive charge of this work. He was charged with the duty or employing the men and seeing that the work was properly done, and proper appliances used for the doing of it, and these appliances properly and seasonably inspected. But even then, is the answer to the interrogatory inconsistent with the general verdict? We find, both from the pleadings and the evidence, that one of the principal grounds upon which the action is based is the alleged failure of the defendant to properly inspect the hook which broke prior to the accident. We also find that another basis for the action is that due care was not being used in the doing of the work, which lack of due care resulted in the breaking of the hook and the consequent injury to the plaintiff. We find upon further examination that there was a defect in this hook at the point where it broke, which some of the witnesses testify was observable from an examination of the

hook before it broke, and even the witness which the defendant introduced for the purpose of showing that the defect was a latent one and undiscoverable, upon being shown the hook, testified that he was not able to say that a careful inspection of it before it broke would not have discovered the defect. Now Drummond says he did inspect all of the machinery on the 28th day of every month, except such of it as was actually in use at the time, and which could not be easily inspected, and that he also made some kind of an inspection or examination of each piece of machinery and each appliance at the time it was put in use, and that nothing was discovered wrong with this hook. This accident occurred on the 11th of December, so that the last general inspection before this time would have been on the 28th of November. Whether this particular hook was inspected at that time does not appear. Many of the appliances were at that time actually in use, and this hook may have been so in use at that time, and not have received any inspection then. Whether it was inspected at that time or not, it is apparent that there was a defect in it, and from the evidence the jury could very well find, in fact we may say that the weight of the evidence is to the effect, that a careful inspection of the hook would have disclosed the defect prior to the accident. The material question then is, was the hook subjected to that reasonable inspection which the law requires? The answer to the interrogatory finds that Drummond did not have reason to expect the hook to break, and it is argued that it necessarily follows from this answer that the hook had received the reasonable inspection required by the law. This does not follow at all. The most that can be said for this answer is that in Drummond's opinion he had submitted the hook to reasonable inspection, and from that inspection he had no reason to expect the breaking of the hook. But to make this conclusive of the issue involved would make Drummond's opinion of what was a reasonable inspection binding upon the jury. This is not the law. The answer to the interrogatory does not preclude the jury from finding that the hook was not reasonably inspected prior to the accident. All that can be said for this answer is that it finds that Drummond submitted the hook to such inspection as he thought was reasonable, but, when we take this in connection with the general verdict, the jury could have found, and may have found, that this inspection was not a reasonable and proper one.

Again, there is a contention that proper care was not exercised in doing the work, and this allegation is supported by evidence to show that the hook was fastened to the steel cable supporting the load by the tip end of the hook, thus throwing a very much greater strain upon the hook at the point at

which it broke than would have been upon it had the hook been properly fastened to the cable. The jury may very well have found that this was not a reasonably careful way to do this work. Drummond did not know that the hook was attached to the rope in this manner, and, of course, not knowing it, he would have no reason to expect it to break from that cause. But, aside from the evidence, the answer would mean no more than that the work was being properly done in his opinion. It is quite apparent from what we have said that this interrogatory is entirely too narrow to cover either the case made by the pleadings or that made by the proof introduced in support of them, and that there is therefore no irreconcilable conflict between this special finding and the general verdict.

Interrogatory No. 3 is, "At the time of the accident was the plaintiff in as safe a position as the foreman Drummond?" to which the jury answered, "No." The fourth interrogatory is, "Did the foreman take the same care to provide for the safety of the plaintiff as for his own safety?" to which the jury gave an affirmative answer. The answers to these interrogatories conclude nothing. They are simply an attempt to substitute the care exercised by Drummond, the defendant's foreman, in doing this work for the care required by law. The test of due care is not what any particular man may think is due care, but what a reasonably prudent man believes to be due care under the particular circumstances, and these interrogatories assume, if they are to have any force in this case at all, that Drummond is the reasonably prudent man by whose conduct due care must be measured in the doing of the work. The very gist of the action is that the defendant, by its representative Drummond, was negligent, and for the court to assume that whatever Drummond did was done in the exercise of due care would be to deny the plaintiff's right to recover. This measure of due or ordinary care which is required to be exercised by the master must be determined in each particular case by the surrounding facts, and is such care as an ordinarily prudent man would exercise in the doing of the work under the conditions shown to have existed. Defendant by these interrogatories attempts to set Drummond up as this ordinarily prudent man. The ordinarily prudent man by whose conduct due care is to be measured in a particular case must be created by the jury trying the case where there is a question to go to the jury on this issue. Each member of the jury, of course, considers himself that ordinarily prudent man, and in their deliberations they evolve an artificial, composite personage made up or compounded of their respective ideas of what constitutes an ordinarily prudent person. Of course, in different cases

before different juries, this composite person will vary because the composite opinion of any 12 men will not ordinarily be the same as such composite opinion of another 12. But experience teaches that this is perhaps the only practicable way to arrive at a standard from which to work. It has served a beneficent purpose thus far in the administration of the law, and we do not now conceive of any better standard by which to determine what is due care under a particular state of facts.

[4] The fifth and last interrogatory is, "Were the plaintiff's injuries proximately caused by reason of any incompetency on the part of the man at the niggerhead handling the outhauling rope?" to which the jury gave a negative answer. Looking to the pleadings alone, this interrogatory and this answer conclude no issue in the case. The pleadings show that the defendant employed a number of servants in doing this work, and that it was negligent in the selection of incompetent servants for the purpose, by reason of which negligence the hook broke and produced the injury complained of. This interrogatory limits the finding of the jury to one particular servant. So far as the pleadings are concerned, the jury may have found that all of the other servants employed by the defendant were incompetent, and that the defendant was negligent in their employment. The issue made by the evidence, however, is, so far as the employment of incompetent servants is concerned, confined to the particular man referred to in the interrogatory, so that, when we interpret this interrogatory in the light of the issue made by the evidence, it does conclude the question it was intended to settle, that is, that the defendant was not negligent in the employment of its servants, out, under the rule which the defendant lays down for our guidance in construing these interrogatories and the answers thereto, this special finding means nothing. We think, however, that the rule is a little too narrow. Where general allegations of negligence are made in the pleading, and these are met by a plea of not guilty, in construing the special finding of the jury upon the issue thus made we see no reason why, if the parties have narrowed the issue to a particular and distinct act of negligence, the court may not look to the evidence for the purpose of determining just what the issue was that the jury was called upon to decide. In reviewing the special interrogatories and the answers thereto, we have interpreted them in the light of the pleadings alone, and feel that they are not in conflict with the general verdict, and we have also considered them in the light of the evidence introduced in support of the issues, with a like result. The defendant, therefore, was not entitled to have a judgment in its favor upon the spe-

cial verdict. Inasmuch as this is the only error now relied upon, the conclusion follows that the judgment complained of will be affirmed.

(89 W. Va. 111)

HASTINGS v. GUMP et al. (No. 4299.)

(Supreme Court of Appeals of West Virginia.
Sept. 27, 1921.)

(Syllabus by the Court.)

1. Judgment \S 184—Notice of motion for judgment serves both as process and pleading.

A notice of motion for judgment, given pursuant to sections 1-8, c. 121 (sections 4721-4728), of the Code, serves the double purpose of process and pleading.

2. Judgment \S 184 — Notice of motion for judgment must state necessary facts.

The rule to view with indulgence such notice as a pleading will not excuse the pleader from stating facts necessary to show a good cause of action against defendant.

3. Bills and notes \S 396—To render endorser liable requires presentment and notice in the manner specified.

To render an endorser liable on a negotiable note, it must be presented at the particular time and place specified therein and timely notice of its dishonor given the endorser, unless it is alleged and proven that he in some way waived such notice.

4. Bills and notes \S 469—Notice of judgment against endorser failing to allege presentment, etc., is insufficient.

If such notice for judgment against an endorser fails to allege presentment thereof and notice of dishonor or waiver of such notice by him, the cause of action is not sufficiently pleaded, and a demurrer thereto or motion to quash on grounds going to the right of recovery should be sustained.

Error to Circuit Court, Ohio County.

Action by Jerry J. Hastings against James F. Gump and others. Defendant Gump's motion to quash a notice for judgment against him as indorser on a note overruled, and he brings error. Judgment reversed, and motion to quash treated as a demurrer to the pleading, and the case remanded, with leave to plaintiff to amend.

T. S. Riley, of Wheeling, for plaintiff in error.

Neely & Lively, of Fairmont, for defendant in error.

MILLER, J. The first question presented is whether the court below erred in overruling Gump's motion to quash the notice for judgment against him as endorser upon the

note of N. F. Clark, payable to and endorsed by him to Hastings, for \$925.12.

The ground of Gump's motion to quash went to the right of plaintiff to recover and not to the sufficiency of the notice as process to answer the complaint, in that it was not alleged that the note was on the day of maturity presented for payment at the Exchange Bank of Mannington, W. Va., and notice of its dishonor given him, or waiver by him of such notice, so as render him liable as endorser.

[1, 2] In our practice the notice of such motion, given pursuant to the provisions of sections 1-8, chapter 121 (sections 4721-4728) of the Code, serves the double purpose of process and declaration or pleading. *Security Loan & Trust Co. v. Fields*, 110 Va. 827, 87 S. E. 342. As process in this case the notice is not challenged; its substance is, and it is claimed it does not state a good cause of action against Gump, endorser on the note. It is contended, however, that the statute, intended to give a speedy and summary remedy, is to be viewed with indulgence, and that strict rules of pleading should not be applied. While this is true, the rule can not be carried to the extent of exempting the pleader from stating the facts necessary to show a good cause of action against the defendant. *Shepherd v. Brown*, 30 W. Va. 13. 21, 3 S. E. 186; *Anderson v. Prince and others*, 60 W. Va. 557, 55 S. E. 656, and cases cited; *Security Loan & Trust Co. v. Fields* supra.

[3, 4] To render an endorser liable on such a note, the statute, sections 1-197, chapter 98A (sections 4172-4368) Code, requires presentment and notice of dishonor. *Thompson v. Curry*, 79 W. Va. 771, 91 S. E. 801; *Russmell v. White Oak Stave Co.*, 80 W. Va. 400, 92 S. E. 672, L. R. A. 1917F, 453; *Deming National Bank v. Baker*, 83 W. Va. 429, 98 S. E. 438.

In the case at bar the notice does sufficiently connect the defendant Gump with the note, as endorser, and conditionally liable thereon. But his liability was only conditional, and depended on the due and proper presentment of the note at the time and place of payment, and notice to him of the dishonor thereof, or waiver of notice, which are not alleged, and the cause of action against him is inadequately pleaded. *Security Loan & Trust Co. v. Fields*, supra. It was so held also in *Galbraith v. Shepard*, 43 Wash. 698, 86 Pac. 1113.

We reverse the judgment; and the motion to quash, treated as a demurrer to the imperfect pleading, is sustained, and the case remanded, with leave to plaintiff to amend the pleading if so advised, with costs to plaintiff in error in this court.

(89 W. Va. 101)

(198 S.E.)

NATIONAL METAL EDGE BOX CO. v. THE HUB. (No. 4189.)(Supreme Court of Appeals of West Virginia.
Sept. 27, 1921.)*(Syllabus by the Court.)***1. Trial \S 359(1)—Special jury findings must be inconsistent with verdict to be controlling.**

Special findings of a jury must be inconsistent with the verdict in order to be controlling, and such inconsistency must appear after excluding every reasonable conclusion that would authorize the verdict.

2. Appeal and error \S 837(7)—Under the condition of the record, held that the evidence will be considered to determine relevancy of special findings.

In assumpsit, where the declaration contains the common counts only, with bill of particulars filed, and defendant pleads the general issue without filing particular grounds of defense, and there is a verdict for plaintiff, accompanied by special findings relative to some controversy not fully ascertainable from the pleadings, the court will inspect and consider the evidence in order to ascertain the relevancy of such special findings, and to throw light upon their consistency or inconsistency with the verdict.

3. Appeal and error \S 837(7)—Evidence considered to determine whether there was a real conflict between special findings and verdict for plaintiff.

Where the verdict is for plaintiff in an action of assumpsit for pasteboard boxes sold and delivered, on which certain printing in brown ink was ordered, accompanied by a special finding that the printing was not done by plaintiff in a workmanlike manner for the purposes intended, such special finding is not necessarily in irreconcilable conflict with the verdict, as it does not preclude a waiver of inferior workmanship in the printing by the defendant; and where the pleadings do not specifically raise this issue, the court will consider the evidence in order to interpret the special finding, and ascertain if there be any real conflict with the verdict.

Error to Circuit Court, Ohio County.

Action by the National Metal Edge Box Company against The Hub. Verdict and judgment for plaintiff, and the defendant brings error. Affirmed.

James W. Ewing, G. Alan Garden, and J. Bernard Handlan, all of Wheeling, for plaintiff in error.

A. E. Bryant, of Wheeling, for defendant in error.

LIVELY, J. Judgment for plaintiff having been rendered on a verdict accompanied by answers to special interrogatories, defendant prosecutes this writ of error.

Plaintiff received an order from defendant for 11,000 pasteboard boxes to be used for

the purpose of containing clothing and other merchandise in which defendant's customers could carry away purchases made by them. The order was for three sizes to be made of gray granite jute board (same material as defendant had for several years purchased from plaintiff) with certain printing, "printed top and bottom as had (formerly printed) with exception printed with brown ink in place of blue." The total price for this order amounted to \$394.40, the amount for which this action was afterwards instituted. Defendant, for six or seven years prior to this order given in 1913, had been purchasing similar boxes from plaintiff, with the same printing thereon in blue, but having changed its other advertising matter to brown, desired the printing on these boxes to be of like color—hence the notation on the order, "printed with brown ink in place of blue." It is over this change in the color of the printing that this litigation arises. Upon the receipt of the first shipment of 6,150 boxes, defendant, The Hub, promptly wired plaintiff, the Box Company:

"Let us know what disposition you want us to make of boxes just received, they are printed in red in place of brown as ordered and we cannot use same. Answer at once."

This telegram was followed by a letter of the same import to the effect that the boxes were printed in red instead of brown as ordered; that the boxes would not be used for that reason, and asking for instructions to be given the transportation company to which the boxes had been returned. The box company immediately replied that it had followed the instructions contained in the order, and had used a printing ink known as Brown No. 2110x, prepared by Johnson & Co., ink manufacturers and dealers; that upon inquiry at their factory they found that 2,000 more of the boxes had been prepared and printed with the same ink, but that if The Hub wanted the remainder of the order printed in any other color of ink, the same would be promptly filled, and asking The Hub to reconsider and use those already sent, and those already cut and printed and at the factory. Considerable correspondence followed, The Hub insisting that the color of the printing was not what was wanted, and the box company insisting that the printing was in brown ink as ordered. Finally The Hub refused to take or pay for any of the boxes, placed the same order elsewhere at a less price, and invited litigation to test liability. The defendant, The Hub, in all this correspondence, placed the refusal solely upon the reason that the color was not what was ordered. No claim was made by it that the material used in the boxes or workmanship in the printing was not satisfactory. The claim of inferior material and unwork-

manlike manner of printing was not made or attempted to be asserted until after the first trial in 1914, when the jury failed to agree. Action of assumpsit was promptly instituted, the declaration containing the common counts only, defendant asked for bill of particulars, which was furnished, the general issue of non assumpsit was pleaded, and the case went to trial in 1914, and the jury disagreed. The following year another trial was had on the same pleadings, and the jury disagreed. The following year this trial was had, resulting in a verdict and judgment for plaintiff for \$190. Interrogatories were asked by the plaintiff and given to the jury and answered as follows:

"Question 1: Did the plaintiff, in furnishing the quality of material used in the boxes, substantially comply with the terms and conditions of the order?"

"Answer: Yes.

"Fred F. Cowl, Foreman.

"Question 2: Did the plaintiff, in printing the boxes in question, print them in a workmanlike manner for the purposes intended?"

"Answer: No.

"Fred F. Cowl, Foreman.

"Question 3: Did the plaintiff, in printing the boxes in question, use the ink whose color is classed as brown?"

"Answer: Yes.

"Fred F. Cowl, Foreman."

[1] Defendant moved for judgment notwithstanding the verdict on the ground that the answer to question 2, being in the negative, was inconsistent with the general verdict and was controlling. The motion was overruled, and defendant excepted. Other motions, including one for new trial, were overruled and exceptions taken. Exceptions were also taken to the action of the court in giving and refusing to give instructions. These are all assigned as error, but none of them is pressed here in argument except assignment No. 4, relating to the refusal of the court to enter judgment for defendant, notwithstanding the general verdict, because of the answer to question 2, which is asserted to be controlling; and, under the well-known rule of this court, only that assignment of error will be considered; the others not being briefed or insisted upon in argument.

It may be stated here that the main controversy seems to have been over the color of the printing, quite a number of expert witnesses having been examined on each side, some testifying that the color was red, others maroon, and others brown. Samples of the printing were exhibited to the jury, which found that the ink used was of a color classed as brown. The order for the boxes required the printing to be "with brown ink in place of blue."

Defendant insists that in considering its fourth assignment of error this court should follow the dicta found in the opinion of

Judge Holt in the case of *Peninsular Land Co. v. Franklin Ins. Co.*, 35 W. Va. 666, 14 S. E. 237, which reads:

"Upon motion for judgment no question is entertained as to their inconsistency with the evidence, nor is the evidence considered, but only the pleadings, special findings, and general verdict."

It will be seen that Judge Holt took his epitome of the rules and proceedings, where special findings are sought, from Thompson on Trials, who bases his text upon certain decisions of the Indiana Supreme Court. It may be instructive to examine these decisions. They indicate that the evidence will not be reviewed, but, if from inspection of the pleadings, the special findings, and the verdict, it may be seen that any antagonism between the special findings and the verdict could have been removed by any legitimate evidence admissible under the issue, then the verdict will be upheld, and the apparent inconsistency repelled. They seem to consider evidence given, which might have been given. The tendency is to uphold the verdict upon any reasonable theory, or view that will harmonize the special finding therewith. We cannot see why the evidence cannot be inspected and considered if light may be given thereby, especially where the pleadings are general, and it is not clear therefrom what cause induced the special inquiry.

Murray v. Phillips, 59 Ind. 53, holds that where the special findings are not inconsistent with the general verdict then a motion for judgment on the special findings will not be sustained on the ground that the special findings are not in accord with the evidence. It is apparent that there would be no necessity or propriety in going to the evidence for any purpose; the special finding being in accord with the general verdict.

In *Cox v. Ratcliffe*, 105 Ind. 374, 5 N. E. 5, a suit for possession of land, the special findings were to the effect that plaintiff had legal title to the land, but that there was an agreement between the parties that defendant should have a reconveyance of the land if he paid to plaintiff the money he had paid out and expended. The general verdict was for the defendant. The plaintiff moved for judgment on the special findings, "and documentary evidence in the cause," which motion the court denied, holding that the special findings were not necessarily inconsistent with the general verdict. The defendant might have been lawfully entitled to the possession notwithstanding plaintiff's legal title as shown by the documentary evidence.

In *Pennsylvania Co. v. Smith*, 98 Ind. 42, the court held that in reviewing a ruling on motion for judgment upon answers to interrogatories notwithstanding the general verdict, the evidence could not be inspected, but in order that the answers must control and override the verdict, there must be be-

tween them an antagonism which could not be removed by any evidence admissible under the issue. While the court would not inspect the evidence, it would presume that evidence had gone to the jury sufficient to override any antagonism, if the antagonism was such as could have been removed by evidence. The court presumes that done which might have been done.

In *Pittsburgh Cln. & St. L. Ry. Co. v. Martin*, 82 Ind. 476, it was held:

"In considering a motion for judgment on special findings, notwithstanding a general verdict, no reference can be had to the evidence given, but if by any conceivable evidence admissible under the issues the special findings can be reconciled with the general verdict, the motion should be denied."

The court further said (82 Ind. 480):

"The general verdict prevails over the special findings, if there could have been, under the issues, proof of supposable facts, not inconsistent with those specially found, sufficient to reconcile the general verdict with the special findings"—citing various authorities.

In *Peninsular Land Co. v. Franklin Ins. Co.*, supra, the refusal of the lower court to permit certain interrogatories to go to the jury was under review, and Judge Holt held that, even if the questions had been answered in favor of the defendant, their apparent antagonism to the verdict could have been reconciled by evidence properly admitted under the issues. The suit was on an insurance policy, and interrogatories were asked and refused, which, if submitted and answered in the affirmative (favorably to defendant) would have found that notice of the loss was not given by the assured forthwith, and due diligence was not exercised in giving notice of loss; and that no reason existed for the delay in giving such notice. Notice of loss under the policy was vital to recovery. And the court said:

"But may not the general verdict say the giving of any notice or a more timely notice was waived by the defendant, if there was any evidence tending to show such waiver, and thus render such special finding immaterial?"

Another group of questions if given and answered most favorably to defendant was to the effect that the assured had not given a particular account of the loss within 30 days, nor a particular account within a reasonable time thereafter, and that there was no reason for such delay. Judge Holt held that such findings would not necessarily be inconsistent with the verdict, if there was any tendency of any evidence, reasonably and fairly considered, to show a waiver of these policy requirements. The issue on this group of questions was made up by plaintiff's pleading, wherein it specially replied and relied upon a waiver. Then the judge reviewed the testimony and found no evidence

of a waiver, and concluded that this group of interrogatories should have been given, the pleadings having made an issue, a vital issue, of the matters covered by these interrogatories. In the very case where the dicta above quoted is found, the judge considered the evidence to see if the proposed interrogatories were pertinent.

[2] Is it necessary to look to the evidence in the case at bar? Can we say that the answer to interrogatory No. 2 is irreconcilably inconsistent with the verdict, and therefore controlling? We must remember that special findings only override the verdict when both cannot stand, and the antagonism must be apparent on the face of the record, beyond the possibility of being removed by any evidence legitimately admissible under the issue, before judgment can be rendered non obstante verdicto. 2 Thompson on Trials (2d Ed.) & 2691. In view of this salutary principle, can we say that this special finding that the plaintiff did not print the boxes in a workmanlike manner for the purposes intended is necessarily inconsistent with and controlling of the verdict under the issue? Could there have been a waiver by the defendant, either express or implied, of this deficiency in the workmanship in the printing? Let us consider this question of waiver.

"Strict compliance with the terms of a contract on the part of one party may be waived by the other either expressly or by acts or declarations indicating a relinquishment of the provisions of the contract." And "Where a party makes specific objections to the sufficiency of performance he is held to waive any other objections he may have." O. J., vol. 13, p. 694, title "Waiver of Defects."

[3] Any party to a contract for whose benefit anything thereunder is to be done may dispense with any part of it or circumstance in the mode of performance. 6 R. C. L. § 358. We think it well settled that a waiver of the benefit of any part of a contract may be made. Then if such waiver could have been shown, would the fact that the printing was not done in a workmanlike manner, as found by answer to interrogatory No. 2, be controlling of the verdict? It would not be, if we follow the rule laid down by the Indiana courts. The interrogatory could have been properly refused.

"Such judgment [on special findings] is enterable only when the special findings and the general verdict cannot be reconciled with each other, under any supposable facts provable under the issues." 15 R. C. L. p. 609, § 49.

Special findings will not control the verdict unless invincibly opposed to it. No presumptions will be allowed in their favor. 2 Thompson on Trials, § 2693. The Indiana rule would make it not necessary to look at the evidence. But the action is in assumption

on the common counts with bill of particulars, to which defendant pleaded the general issue, which does not give any intimation of any special ground of defense, and the question of the workmanship in the printing is not sharply drawn by the pleadings; and we think, under such pleadings, that the evidence ought to be looked to in order to ascertain the relevancy and effect of such finding. We are not in accord with the holding of the Indiana court, especially where the pleadings are so general as to make it necessary to intelligently ascertain the issue or contention which inspired the interrogatory. And when we look to the evidence, as was done by Judge Holt in *Peninsular Land Co. v. Franklin Ins. Co.*, supra, in order to ascertain if certain interrogatories should have been given, we find ample proof that defendant, in the inception, when the first shipment of boxes was delivered, made no objection to the workmanship in the printing, but repeatedly stated, as sole cause for refusal, that the printing was in red, and not in brown, as it intended to order, and the record shows that no claim or defense of defective workmanship was made until after the first trial in 1914, when the jury failed to agree. It was clearly a defense afterwards thought of to defeat recovery.

"Where a party gives a reason for his conduct and decision, touching anything involved in a controversy, he cannot, after litigation has begun, change his ground, and put his conduct upon another different consideration." *Hixson Map Co. v. Nebraska Post Co.*, 5 Neb. Unoff. 388, 98 N. W. 872, citing *Ohio & M. R. Co. v. McCarthy*, 96 U. S. 258, 24 L. Ed. 693; *Frenzer v. Dufrene*, 58 Neb. 432, 78 N. W. 719; *Ballou v. Sherwood*, 32 Neb. 666, 49 N. W. 790, 50 N. W. 1131.

The same principle is announced in *Bradley v. Cole*, 6 Hun (N. Y.) 660; *Olcese v. Mobile Fruit & Trading Co.*, 211 Ill. 539, 71 N. E. 1084. Moreover, similar boxes and similar printing (except in blue) had been furnished to defendant by plaintiff for about seven years prior to this delivery, without objection or question as to quality or printing, and the plaintiff was, under this order, which specifically stated "same as had," only required to deliver the boxes reasonably fit for the purposes for which they were to be used. So, it is a reasonable conclusion, warranted by the evidence, that although the jury, in response to the interrogatory, found that the workmanship in printing the boxes was not up to standard, yet the jury could find that plaintiff was not required to make them conform to any particular standard, or that defendant had waived this defect and his defense based thereon, and consequently the verdict should be for plaintiff. It is significant to note that, although the first shipment of 6,150 boxes and the 2,000 boxes made, printed and not delivered on account

of refusal to accept, amounted to \$283.20, the jury found in the sum of \$190, which is \$93.20 less than they might have found. Some reason existed for this reduction of the agreed purchase price. Hence, in the light of the evidence upon this issue of good workmanship, we cannot say that the reply to interrogatories is irreconcilable with the general verdict. The special finding must exclude every reasonable conclusion that will authorize a recovery on the verdict.

Further evidencing that the reply to interrogatory No. 2 is not irreconcilable with the verdict is the fact that by instruction No. 2, given to the jury on behalf of the defendant, the court told the jury that if plaintiff "did not print the boxes ordered by The Hub in brown ink, or did not print the same on granite gray jute board, or did not do such printing in a workmanlike manner, the defendant was justified in refusing the shipment when it was received, and is not obliged or bound to pay for the same." Evidently the jury found that plaintiff had done the printing in a workmanlike manner, sufficient under the circumstances, and for the purposes for which they were printed, or considered that defendant had waived that defect, if any, and found for plaintiff, and yet could consistently say with their verdict that the printing was not done in a workmanlike manner.

But it is insisted that because the court did not require specification of defense under section 46, chapter 130, Code (sec. 4906), and because plaintiff did not object to the evidence of defendant's witnesses on the question of good workmanship, when tendered, it made an issue and ought to be bound thereby. The answer to this contention is that plaintiff had, by its evidence to support its account for goods sold and delivered, showed that defendant had refused to accept the goods for the sole reason that the printing was red instead of brown, and as a legal consequence had thereby waived its after-discovered defense of bad workmanship. Until it was shown that defendant had not waived this defense, the question of inferior workmanship in the printing was immaterial, and any controversy or issue thereon was false, confusing, and improperly raised. It often occurs in the hurry and confusion of jury trials that irrelevant and improper evidence goes to the jury without objection, or without being perceived by the court. The defendant originated this false issue, but the jury, while responding to it, did not lose sight of the true issue, and rendered its verdict accordingly.

We hold that the special finding of the jury is not inconsistent and irreconcilable with the verdict, under the pleadings and evidence, and affirm the judgment entered on the 13th of May, 1920.

Affirmed.

(88 W. Va. 113)

BROWN et al. v. ERWIN et al.
(Nos. 4116, 4116-A.)(Supreme Court of Appeals of West Virginia.
Sept. 27, 1921.)*(Syllabus by the Court.)*

1. Equity ¶181—Notwithstanding return of commissioner's report and readiness for hearing, defendant in default may file answer.

Notwithstanding the return of a commissioner's report in a chancery cause and readiness of the cause for hearing thereon, a defendant in default may file his answer to the bill.

2. Equity ¶371—Where answer is limited to collateral branch, proceeding may go to decree in main cause and matter in answer be continued.

If an answer so filed is not defensive of the main cause of action and is limited in its defense to a collateral branch thereof, susceptible of postponement without interference with or delay of a decree in the main cause, such decree may be entered and the matter arising upon the answer continued for a later hearing thereof.

3. Equity ¶208—Answer to bill to enforce judgment lien impeaching claim of attorney's lien, held not a cross-bill requiring or authorizing special reply.

An answer to allegations in a bill for enforcement of a judgment lien, impeaching an asserted claim of an attorney's lien on such judgment and denying the existence thereof, responsive to such allegations and contradictory thereof, is not a cross-bill nor an answer in the nature thereof, requiring or authorizing a special reply thereto.

4. Appeal and error ¶1039(11)—Decree passed on full hearing of evidence before commissioner will not be reversed for lack of a general replication.

A decree based upon a full and fair hearing upon evidence taken before a commissioner upon a proper reference will not be reversed for lack of a general replication to an answer.

5. Attorney and client ¶182(2)—Attorney obtaining decree has lien on fund arising from its enforcement by another attorney.

An attorney by whom a judgment or decree has been obtained has an attorney's lien upon a fund arising from the enforcement of the lien of such judgment or decree against the land of the debtor, in a suit prosecuted for the plaintiff, by another attorney.

6. Infants ¶116—Attorney may have lien upon decree for fee although creditor is an infant.

It is immaterial in such case that the creditor is an infant suing by his next friend.

7. Infants ¶116—Attorney paying costs and expenses is subrogated to right of next friend to reimbursement, if acting in good faith.

A next friend incurring costs and expenses in the prosecution of a suit is entitled to

reimbursement from the infant, and, in equity, the attorney paying such costs and expenses is subrogated to the right of the next friend against the infant, and may have a decree against the fund, for his services and such costs and expenses, provided the next friend has acted in good faith and with reasonable caution, in efforts to protect the interests of the infant.

8. Attorney and client ¶186—Attorney's failure to obtain specific relief sought and taking alternative relief do not preclude his lien for fee.

Failure of an attorney to obtain the relief specifically sought in a suit in equity and necessity of his taking alternative relief, under the prayer for general relief, do not preclude right in him to a lien on the decree actually obtained.

9. Attorney and client ¶184—An attorney has a prior lien on fund arising from enforcement of decree procured by a subsequently employed attorney unless expressly or impliedly assenting otherwise.

An attorney by whom a judgment or decree was obtained for his client has a lien upon a fund arising from enforcement of such judgment or decree against the land of the debtor, by another attorney employed by his client, prior and superior to the lien thereon of such subsequently employed attorney, unless he has expressly or impliedly assented to such subsequent employment or, in some way, relinquished his right further to represent his client in the matter, or, by negligence or other misconduct warranting his discharge, has lost it.

Appeal from Circuit Court, Doddridge County.

Suit for enforcement of the lien of a decree by Tina V. Brown and others against Rule Edna Erwin and others, and from a decree in favor of the plaintiffs the defendants appeal. Affirmed.

L. W. Chapman, of West Union, for appellants.

J. V. Blair, J. V. Blair, Jr., and J. Ramsey, all of West Union, for appellees.

POFFENBARGER, J. The subject-matter of the controversy brought up by this appeal is a claim of a lien for attorney's fees and expenses, upon a fund brought into the hands of the court below, through a sale of real estate by one of its special commissioners. Originally, it was a claim of a lien upon a decree obtained by one attorney, having the dignity, force, and effect of a judgment, and now upon a fund realized upon the decree by a sale of the property upon which it was a lien, in a subsequent suit prosecuted by another attorney, for some of the original plaintiffs, who also claims a lien upon part of it for his services.

This cause is predicated upon the result of the decision in *Hansford v. Tate*, 61 W. Va. 207, 56 S. E. 372, prosecuted for the plain-

tiffs by J. V. Blair, as attorney, and closely follows it in order. Its primary object, annulment of a judicial sale, on the ground of fraud in the procurement thereof, having failed in respect of the right of the purchaser and the decrees in the suit in which the sale had been made, *Freeman v. Hansford*, having been set aside only in so far as vacation thereof did not affect the title of the purchaser, Tate, a right to have restitution of the proceeds of the sale arose in favor of the plaintiffs, which the trial court and this court both recognized. That cause was disposed of in this court, January 15, 1907, but no further steps therein are here shown to have been taken until July 16, 1908. On that date, a personal decree was entered therein, in favor of the plaintiffs, against A. S. Hansford and Joseph Freeman; but, as it was disclosed that Hansford had received all of the money obtained by the sale of the land, it was provided that nothing should be collected from Freeman until after exhaustion of all of Hansford's property. This being a final decree, as to the liability of Hansford and Freeman, there were no doubt preliminary proceedings between the date of the remand of the cause and the entry thereof, which have not been brought up.

In the meantime, March 11, 1908, two of the plaintiffs, Tina V. Brown and Essie M. McDonald, are alleged to have entered into a contract with L. W. Chapman, an attorney, by which they employed him to collect any money due them from Freeman, Hansford. Harvey Smith, next friend in the suit against Tate and others, and J. V. Blair, an attorney in that suit, and obligated themselves to pay him one-half of any sum recovered. These two of the six original plaintiffs, all of whom were infants, thus separated themselves from the other four. At the date of this contract, Tina V. Brown had become of age and married one W. A. Brown. Essie M. McDonald, though still under age, was also married. In her deposition, taken before the commissioner to whom this cause was first referred, Tina V. Brown swore her husband had made this contract and signed her name to it without her knowledge or consent. He was also put into this suit as the next friend of Essie M. McDonald.

The object of this suit was enforcement of the lien of the decree for \$1,730 against Freeman and Hansford, obtained by Blair for the Hansford children in their suit against Tate, Freeman, Hansford, and others, by way of restitution of the proceeds of the sale of their land, in the suit brought by Freeman against Hansford, as for enforcement of a vendor's lien, in pursuance of a fraudulent agreement between Hansford and Freeman. Tina V. Brown and Essie M. McDonald, the latter suing by her next friend, W. A. Brown, are the plaintiffs, and all the

other beneficiaries of that decree, as well as Freeman, Hansford, Blair, and the Carter Oil Company are defendants. Upon sufficient allegations, the bill asserted a lien of the decree upon two small tracts of land owned by Hansford and sought enforcement thereof. In connection with this relief, it assailed Blair's claim of a lien upon that decree, charging that Blair had been employed by Harvey Smith as the next friend of the plaintiffs in the suit in which the decree was obtained, and had agreed to look to him for his fees and compensation, and had also assumed payment of the costs.

On a date not disclosed by the record, Blair interposed a demurrer to the bill. No other defense seems to have been made until after the cause was referred to a commissioner, for ascertainment and report of the facts usually requisite for a decree in such causes. The commissioner reported the lien of the decree upon said tracts of land and upon certain town lots in Harrison county, W. Va.; Blair having had abstracts thereof recorded in both Doddridge and Harrison counties. He also divided the lien among the six owners thereof, giving each \$380.87, and allowed Chapman a lien against each of the interests of Tina V. Brown and Essie M. McDonald, for the sum of \$190.43, as attorney's fees, by virtue of his alleged contract with them.

An order entered July 17, 1914, recited adjudication of Blair's lien, a second reference of the cause to another commissioner to ascertain the amount thereof, and omission of actual entry of such order, and directed the same to be entered nunc pro tunc, as of the last day of the March term, 1914. By the same order, the court sustained an objection to the filing of a special reply to Blair's answer, tendered by the plaintiffs, and rejected the same.

The commissioner's report was filed in the clerk's office of the court November 25, 1913. According to a recital in an order entered in the cause, J. V. Blair filed his answer to the bill December 1, 1913. After it was filed, the cause came on to be heard upon the report of the commissioner, and Blair then excepted to the report; but his exception was overruled and the report confirmed. By the same order, however, the matters arising upon his answer and petition were continued for consideration and determination after the sale of the real estate, so as to bring the fund into court. A decree of sale was then entered, in which Chapman was made the special commissioner to execute it.

Before the commissioner's report made on the second reference was returned, the real estate of Hansford was sold, the sale confirmed, and a deed made. The amount realized from the sale was \$744. Though there is no order filing it, there appears in the printed record a petition of L. W. Chapman,

claiming a lien in his favor, on this fund, for attorney's fees. He bases this claim upon the contract alleged to have been made between him and his clients. In this petition, he also attacks the lien claimed by Blair. The printed record discloses a paper signed by Chapman in his individual capacity and as special commissioner, purporting to be his answer to the answer filed by Blair. In that paper, he again sets up his claim and denies the validity of the claim of Blair and also attempts to interpose the statute of limitations to the latter claim. This petition seems to have been filed by the final decree, which says the cause came on to be heard upon it and other papers. Another paper printed in the record and not filed by any order purports to be an answer of Tina V. Brown, L. D. Griffin, administrator of Essie M. McDonald, who died pending this suit, and L. W. Chapman as special commissioner and in his own right, to the petition of Harvey Smith filed in this cause, for an allowance to him, for services rendered as next friend of the infant plaintiffs, in their suit against Tate and others.

[1, 2] The first, second, and third assignments of error are based upon the tardiness of Blair in the filing of his answer and his failure to make his defense before the commissioner and the effect of the confirmation of the first commissioner's report. Neither of them is tenable. A defendant may file his answer at any time before final decree. Code, c. 125, § 53; *Ash v. Lynch*, 72 W. Va. 238, 78 S. E. 365; *Waggy v. Waggy*, 77 W. Va. 144, 87 S. E. 178. This right in a defendant to delay the filing of his answer cannot be exercised in such manner as to postpone the hearing of a cause that has been matured in all respects by the plaintiff. In other words, if the plaintiff's case is fully made up in respect of proof as well as pleadings, so as to give him clear right to relief, the defendant cannot postpone the hearing to take his proof, by the filing of an answer as to which he is in default. Reference of a cause to a commissioner to report facts upon which a decree can be based is only a preliminary step in the preparation of the cause for hearing. It is not perceived how it can stand upon any footing different in legal status and effect from other preliminary proceedings. Hence it did not preclude right in Blair to file his answer. The continuance of the issue made by the answer, respecting the claim of a lien for attorney's fees, did not delay procedure in the main cause, the object of which was sale of Hansford's real estate, to bring the fund, on which the other liens are claimed, into court. There was an immediate decree of sale and it was executed, pending the controversy over attorney's liens. This delay occurred in a purely collateral branch of the cause. Nor did the second reference to ascertain the amount of the

Blair lien in any way delay the main cause. Confirmation of the first commissioner's report allowing Chapman a lien upon two of the interests was not an adjudication in his favor, beyond the power of the court to alter. The order of confirmation was interlocutory, and therefore subject to change and correction. There was no decree of payment or allowance in his favor, upon the report, after confirmation thereof.

[3] As the special replication to Blair's answer, tendered by the plaintiffs and rejected by the court, does not appear in the record as made up here, it is impossible, of course, to say whether it was good or bad. However, it may be safely said that the answer was not such as called for a special replication. In other words, it was not a cross-bill nor an answer setting up new matter and praying affirmative relief thereon. It was a purely defensive pleading. When the plaintiffs instituted this suit, the decree upon which it is predicated was before them and exhibited with their bill. That decree showed, by a recital therein, that Blair's claim of a lien for attorney's fees and expenses had already been asserted by motion in the original cause, based upon the record therein; and an attorney's charging lien is usually asserted in a summary and informal manner. *Schmertz v. Hammond*, 51 W. Va. 409, 41 S. E. 184; *Renick v. Ludington*, 16 W. Va. 378; 6 C. J. 794. Blair had his claim of a lien noted right in the decree and the cause was retained upon the docket for inquiry and adjudication respecting it. The bill in this cause made him a defendant, resisted his claim, and admitted that he had obtained the decree. His answer, therefore, introduced no new cause of action, nor any new matter, save the specification of the items of his demand. It denied allegations of the bill and particularly those relied upon to defeat his lien.

[4] The complaint of rejection of answers, petitions, and exhibits tendered by the appellants, is not sustained by any order of rejection, except in the instance of the special replication, and it is not here. As to the merits of the several claims and contentions, there was a full hearing before the commissioner, on the second reference. The decree does not rest upon any technical ground.

As has already been demonstrated, the decree in Blair's favor stands upon sufficient pleadings. The plaintiffs assailed his lien by allegations of their bill and he answered it. No further pleadings or parties were necessary.

[5] Barring something exceptional in the situation of the parties or the circumstances of the case, Blair's claim is clearly valid, even though not confessed by the lack of a general replication to his answer as suggested. If sufficiently denied, it has been proved. It falls exactly within the principles de-

clared and applied in *Fisher v. Mylius*, 62 W. Va. 19, 57 S. E. 276. In that case, as in this, the lien was acquired by the plaintiff, through the services of one attorney, and enforced against the real estate of the debtor by the aid of another. Nevertheless, the lien on the fund in favor of the original attorney was sustained.

[6, 7] The contention of nonliability of the fund to a lien for attorney's fees, on the ground of the infancy of the clients, at the date of the rendition of the services, is altogether untenable. In the institution and the prosecution of the suit, they acted by their next friend who, of course, incurred personal liability for expenses, attorney's fees, and costs, but he was entitled to reimbursement for all such amounts as against them. In a court of equity, he can stand in the shoes of the next friend. In this instance, he paid all of the expenses, including costs; wherefore he is entitled to be subrogated to the right of the next friend and charge the interests of the plaintiffs in the fund, as their next friend could have done. In such cases, a court of equity always places the liability where it ultimately belongs. That a next friend is entitled to reimbursement from his ward cannot be successfully controverted. *Voorhees v. Polhemus*, 36 N. J. Eq. 456; *Whitaker v. Marlair*, 1 Cox, Ch. 285; *Pearce v. Pearce*, 9 Ves. 548. Nor does unsuccessful determination of a suit brought by him preclude his right to reimbursement for costs and expenses, if he has acted in good faith and with reasonable caution, in an effort to protect the interests of the infant. *Voorhees v. Polhemus*, cited; *Taner v. Ivis*, 2 Ves. Sr. 466; *Cross v. Cross*, 8 Beav. 455.

[8] Failure of the attorney representing the plaintiffs in the original suit, to obtain the relief specifically prayed for, vacation of the sale and recovery of the title, constitutes no impediment to his assertion of a lien upon the fund recovered in lieu of the land. It stands in the place of the land. Moreover, recovery thereof was within the prayer of the bill for general relief. In their enforcement of the decree for money, his clients have accepted the benefit of his services and cannot be permitted to reject the burden that, on legal as well as equitable principles,

accompanies it. The answer admits contingency of the fee, owing to poverty of the clients and the hazard of expenses, but it does not admit nor show that the compensation was to be contingent upon recovery of the land. On the contrary, it sets up an agreement for compensation out of the property or proceeds thereof, and the decree was for its proceeds.

The statute of limitations, if sufficiently pleaded, and applicable, does not bar the lien. It was asserted, July 16, 1908, immediately on the termination of the service, and, with the exception of one item of \$9, within five years from the date of payment of the costs and expenses. A reasonable and fair inference from all the facts and circumstances is that payment of this item and others, before recovery of the money sued for, was not contemplated by the parties. It was to be paid primarily out of the recovery, if any.

For the reasons stated, the demurrer to the answer, treated as an exception, was properly overruled.

[9] Nor was there any error in the allowance of priority to Blair's lien. Chapman prosecuted the suit that brought the actual money into court, it is true, but he was not acting for Blair in the rendition of that service. Blair obtains incidental benefit of the service, but he takes it involuntarily. It was service he would have performed himself, if permitted to do so. He had laid the basis for this suit and evidently was ready to go on with it when Chapman interposed his services, in preclusion of further proceedings by Blair. In doing so, he assailed and endeavored to defeat Blair's lien. Therefore the case does not fall within the rule of apportionment, applied in *Fisher v. Mylius*, cited. Chapman claims from his clients whose effort, if any, to avoid Blair's claim, is inequitable. Claiming under them, he is in no better position than they are. Being a party to their conduct in the premises, he falls within the rule inhibiting collusive settlements and other indirect methods of avoidance of attorneys' charging liens, asserted in *Burkhart v. Scott*, 69 W. Va. 694, 72 S. E. 784.

Seeing no error in the decree complained of, we will affirm it.

(152 Ga. 161)

BROADWELL v. SMITH et al. (No. 2343.)

(Supreme Court of Georgia. Sept. 30, 1921.)

(Syllabus by the Court.)

1. Trusts \S 35(1)—Plaintiff in execution, purchasing in behalf of defendant, a trustee.

It has been held: "A plaintiff in execution, who, at the instance of the defendant in execution in possession of land under a deed, bids off the land at a sheriff's sale, under a parol agreement with the defendant that he will buy in the land and take the sheriff's conveyance to himself for the benefit of the defendant, and allow the defendant to redeem the land upon the payment of the judgment (the value of the land exceeding the amount of the judgment), and who, while the bidding is in progress, discourages bidding by others by stating that he is bidding in behalf of the defendant, holds as trustee for the latter such title as he derives from the sheriff, and, on being paid or tendered in due time the amount of the judgment, with interest, may be compelled by decree to convey the premises to the defendant in execution by release or quitclaim deed." Also: "Whether the contract be such as is provable by parol, or is required by the statute of frauds to be in writing, it must be certain and unequivocal in all its essential terms, either within itself or by reference to some other agreement or matter, or it cannot be specifically enforced. The certainty required must extend to all the particulars essential to the enforcement of the contract." *Dowling v. Doyle*, 149 Ga. 727, 102 S. E. 27.

2. Vendor and purchaser \S 18(2, 3)—Time of essence of option agreement and renewal to be supported by valuable consideration.

Where the owner of land upon a valuable consideration grants an option to another to buy the land within a stated time, time is of the essence of the contract; and in order to raise a binding promise on the part of the optionor to sell, the optionee must make an election and offer to perform within the time stipulated in the option contract. *Hughes v. Holliday*, 149 Ga. 147, 99 S. E. 301. A subsequent agreement by the optionor to extend the time, whether made before or after the time limited for exercise of the original option, must be supported by a valuable consideration, as such agreement is in effect a new option. 27 R. C. L. 843, § 40, and cases cited.

3. Vendor and purchaser \S 18(2)—Time of essence of option agreement, and extension requires new consideration.

The basis of the plaintiff's case as alleged in the petition was a parol agreement by the attorney at law of the plaintiff in *fi. fa.* with the defendant in *fi. fa.*, duly ratified by the plaintiff in *fi. fa.*, that the latter should buy in the property for the benefit of the former and should give 12 months from the date of the sale, in which the property might be redeemed by the payment of the amount of the debt due the plaintiff in *fi. fa.*, and that a few days before expiration of the term specified in the option agreement the plaintiff in *fi. fa.* verbally agreed with the defendant in *fi. fa.* to extend the time for exercise of the option

to a specified date. On the trial no evidence was introduced tending to show acceptance of the option and offer to perform its conditions by the defendant in *fi. fa.* within the 12 months as therein specified. An effort was made to show acceptance and offer to perform the conditions of the option within the time specified in the alleged extended option. There was no evidence of any new consideration for the extended option. Referring to extension of the option, there was evidence that the option stated "a certain time" in which the optionee might redeem, but the evidence relied on to show the particular time in which to redeem was too vague and indefinite to form a basis for holding that the tender and offer to redeem was within the time so stipulated. Accordingly the judge did not err, under application of the principles of law announced in the preceding notes to the pleadings and evidence, in granting a nonsuit.

Error from Superior Court, Cobb County; W. E. H. Searcy, Judge.

Action by R. G. Broadwell against R. I. Smith, administratrix, and others. From judgment of nonsuit, plaintiff brings error. Affirmed.

Geo. F. Gober, of Atlanta, and H. B. Moss and Mozley & Gann, all of Marietta, for plaintiff in error.

Clay & Blair, Anderson & Roberts, and J. Z. Foster, all of Marietta, for defendants in error.

ATKINSON, J. Judgment affirmed. All the Justices concur, except HILL, J., absent.

(152 Ga. 150)

GEORGIA PERUVIAN OCHRE CO. v. CHEROKEE OCHRE CO. et al.
(No. 2163.)

(Supreme Court of Georgia. Sept. 30, 1921.)

(Syllabus by the Court.)

1. Boundaries \S 26—Party held entitled to proceed in equity to settle boundary dispute.

The petition as amended set forth a cause of action, and the court erred in dismissing the same on general demurrer.

2. Petition—Special demurrers.

The petition was not subject to any of the special demurrers urged.

(Additional Syllabus by Editorial Staff.)

3. Pleading \S 204(2)—Demurrer overruled if any part is sustainable.

A demurrer to a whole bill should be overruled if any part thereof is sustainable.

4. Pleading \S 193(2)—Petition for equitable relief not demurrable on ground of adequate remedy at law.

Since the passage of the Uniform Procedure Act of 1887 (Civ. Code 1910, § 5406) a petition praying for only ordinary equitable re-

Relief is not demurrable on ground that plaintiff has a complete and adequate remedy at law.

5. Boundaries ¶26—Superinduced equity must exist to give equity jurisdiction of boundary dispute.

Generally a superinduced equity must exist between the plaintiff and the defendant to give equity jurisdiction of a boundary dispute, and an equity in favor of the plaintiff against other persons is not sufficient.

6. Boundaries ¶26—Prevention of multiplicity ground of equitable jurisdiction.

The prevention of a multiplicity of suits is a ground of equitable jurisdiction which will give court of equity jurisdiction in a boundary dispute, in view of Civ. Code 1910, § 4538.

7. Boundaries ¶26—Plaintiff held not to have adequate remedy at law in boundary dispute.

Where there was a boundary dispute between plaintiff and defendant owners of land, both tracts of which were leased to a mining company, which was paying plaintiff a royalty of \$1 a ton and defendant a royalty of 35 cents a ton, and \$1 for each ton of ore taken from the disputed territory was placed in bank to plaintiff's credit, but could not be withdrawn by him until the boundary dispute was settled, *held*, that plaintiff did not have an adequate remedy at law as against the mining company and defendant, and properly proceeded in equity to have the boundaries settled, and an accounting on the part of the mining company, and to recover the deposit in the bank.

8. Boundaries ¶30—All interested in event properly made parties to bill in equity.

All persons who are directly or consequentially interested in the event of the suit are properly made parties to a bill in equity so as to prevent a multiplicity of suits by or against parties, at once or successively affected by the original case, and where plaintiff and defendant landowners had a boundary dispute, and where a mining company, leasing both properties and paying plaintiff a royalty of \$1 per ton and defendant a royalty of 35 cents a ton, placed \$1 a ton in bank to credit of plaintiff for ore taken from disputed strip, but not withdrawable by plaintiff until the boundary dispute was settled, the mining company was properly made an adverse party defendant by plaintiff in an action in equity to settle the boundary dispute, recover judgment for the deposit in the bank, and to have an accounting from the mining company.

9. Action ¶50(10)—All of defendants need not be interested in all matters in suit.

A bill is not multifarious because all of defendants are not interested in all of the matters contained in the suit; it being sufficient if each party has an interest in some matter in the suit which is common to all, and that they be connected with the others.

10. Mines and minerals ¶47—Surface and mineral owners own separate estates.

Where the ownership of the surface is in one person and the ownership of the minerals in another person, they each own a separate and distinct estate from the other.

11. Boundaries ¶30—Surface owners of adjoining property not necessary parties in boundary controversy between mineral owners.

Surface owners of adjoining tracts of land are proper, but not indispensable, parties in a boundary dispute between owners of minerals in the respective tracts.

Error from Superior Court, Bartow County; M. C. Tarver, Judge.

Action by the Georgia Peruvian Ochre Company against the Cherokee Ochre Company and another. From a judgment dismissing its petition, plaintiff brings error. Reversed.

The Georgia Peruvian Ochre Company filed a petition in Bartow superior court, naming the Cherokee Ochre Company and Thompson, Weinman & Co. as defendants. The petition as amended set forth substantially the following allegations: The plaintiff is the owner of the minerals upon land lot No. 531, and the Cherokee Ochre Company is the owner of the minerals upon land lot No. 478, the latter lot being adjacent to and immediately north of lot 531, and both being in the fourth district and third section of Bartow county. Thompson, Weinman & Co. hold a lease from the plaintiff which gives to them the right to extract the barytes ores from lot 531 at a royalty of \$1 per ton. Thompson, Weinman & Co. also hold a lease from the other defendant, the Cherokee Ochre Company, which gives to them the right to extract the barytes ores from lot 478 (the adjoining lot immediately north of lot 531) at a royalty of 35 cents per ton. A dispute has arisen between the plaintiff and the Cherokee Ochre Company as to the location of the line which separates the two lots. The plaintiff and the Cherokee Ochre Company employed separate surveyors to run the true line, the plaintiff's surveyor locating the line north of the line located by the surveyor employed by the Cherokee Ochre Company, the two lines being 54 feet apart on the east and 76 feet apart on the west sides. The plaintiff contends for the northern and the Cherokee Ochre Company for the southern line as the true dividing boundary. The petition sets forth the bearings, monuments, and distances of the two lines, and these are also shown on the map made by plaintiff's surveyor, which is attached as an exhibit to the petition. Thompson, Weinman & Co. are extracting barytes from the disputed area. In the lease between plaintiff and Thompson, Weinman & Co. it is provided that in the event any barytes is mined by the lessee near a boundary line of the leased premises, and a dispute arises with any adjacent landowner as to the location of such a line, the lessee shall furnish to the lessor monthly reports of the barytes

taken and shipped by them from the disputed area, and deposit the royalties thereon to the credit of the lessor in a named bank, "there to remain on deposit until it is determined to whom such royalties belong." In pursuance of this provision of their lease from plaintiff, Thompson, Weinman & Co. have deposited in a bank in Cartersville, to the credit of the plaintiff, the sum of \$1,767, representing the royalties at the rate of \$1 per ton on ore mined by Thompson, Weinman & Co. in the contested area to the date of the filing of the suit. This deposit, under the terms of the contract, is not subject to check by the plaintiff, but is to remain in bank "until it is determined to whom the same belongs." The Cherokee Ochre Company claims this sum of money, and royalties on all barytes that may be mined by Thompson, Weinman & Co. in the tract in question. Plaintiff and the Cherokee Ochre Company have been unable to agree upon the ownership of this sum of money, because of their disagreement as to the location of the true dividing line between their respective lots. The interests of Thompson, Weinman & Co. are adverse to those of the plaintiff, in that, if it should be determined by the court that the line contended for by the Cherokee Ochre Company is the true line, Thompson, Weinman & Co. will be called upon to pay to the Cherokee Ochre Company a royalty of only 35 cents per ton of barytes mined from the contested strip of land, instead of \$1 per ton to the plaintiff as stipulated in the separate leases held by Thompson, Weinman & Co. from the respective owners of the minerals in the two lots. The amendment to the petition merely alleges that the case is a proper one for decision by an auditor, and asks that an auditor be appointed and the case submitted to him. The prayers of the petition are: (1) For a decree establishing the line as contended by the plaintiff; (2) that plaintiff recover the sum of money on deposit with the Cartersville bank, and all undeposited royalties that may have accrued on barytes mined by the lessees within the disputed area, and that plaintiff be declared to be entitled to the royalties on all barytes that may in the future be extracted from said area; (3) that an accounting be had from Thompson, Weinman & Co. as to all ores mined within the area up to the time of the trial; (4) that the court ascertain the true line, in the event it should be found that neither of those contended for is correct, and enter a decree accordingly; (5) in the event it should be ascertained that the true line is between the two disputed lines, that the court apportion the royalties between plaintiff and the Cherokee Ochre Company in accordance with the quantities of barytes mined above or below the true line and within the area in question; that to this

end Thompson, Weinman & Co. be ordered to account for the tonnage mined by them from the different parcels of the disputed tract; that plaintiff recover from its lessee, at the stipulated rate, any undeposited royalties that may have accrued on barytes extracted south of the said intermediate line and within the said tract; (6) for general relief, and for process.

The defendants filed separate, but identical, demurrers, which were renewed, to the petition as amended. The grounds of the demurrer in substance were: (1) No cause of action is alleged; (2) plaintiff has an adequate and complete remedy at law, by processioning or ejectment; (3) the petition is multifarious, and sets up separate and distinct causes of action against separate and distinct persons; (4) there is a misjoinder of parties defendant, and a nonjoinder of the owners of the surface interests in the two lots; (5) the determination of the boundary line between the two lots will not alter the rights or duties of Thompson, Weinman & Co.; (6) it does not appear from the petition that the Cherokee Ochre Company has made any demand on plaintiff for any portion or all the fund alleged to be deposited in the Cartersville bank to the credit of the plaintiff, and that plaintiff "is in possession, through deposit," of the royalties taken from the tract in dispute; (7) the petition is vague and indefinite (in the respects pointed out in the demurrers); (8) there is no allegation as to the location of any intermediate line, and defendants cannot properly prepare to give evidence to the jury as to the true line, or anticipate what evidence relative to such possible line the plaintiff will produce at the trial; (9) there is no allegation showing any act or omission on the part of either of the defendants constituting a violation of any right of the plaintiff. The court by separate orders sustained each of the demurrers filed, and dismissed the petition. The plaintiff excepted.

Neel & Neel, of Cartersville, for plaintiff in error.

G. H. Aubrey and J. T. Norris, both of Cartersville, for defendants in error.

GEORGE, J. [1-3] "A demurrer * * * to the whole bill should be overruled if any part thereof be sustainable." *Hudson v. Hudson*, 119 Ga. 637, 46 S. E. 874. But it is insisted that the petition does not allege any act or omission on the part of either of the defendants constituting a violation of any right of the plaintiff, and that no judgment is prayed against either of the defendants, in that a declaratory judgment only is prayed. It appears that the lessee has deposited in bank to the credit of the plaintiff the sum of \$1,767, representing the royalties at the rate of \$1 per ton on ore mined by the lessee

in the contested area to the date of the filing of the suit. The money thus deposited cannot be withdrawn by the plaintiff, is not subject to its check, and the plaintiff is losing the use of the money and the interest thereon. Under plaintiff's contract with its lessee the money on deposit is to remain in bank "until it is determined to whom the royalties belong." While the owner of lot No. 478 is not actively asserting any claim to the fund, it does assert that the ore was taken from its land, and that the money is its money. In the second prayer of the petition the plaintiff specifically prays for the recovery of the sum of money on deposit with the bank; and this must be construed as a prayer for judgment against the lessee, binding upon the Cherokee Ochre Company as the owner of the mineral interest in lot No. 478.

[4-7] Since the passage of the Uniform Procedure act of 1887 (Civil Code of 1910, § 5406) a petition praying for only ordinary equitable relief is not demurrable on the ground that the plaintiff has a complete and adequate remedy at law. *Teasley v. Bradley*, 110 Ga. 497 (4), 35 S. E. 782, 78 Am. St. Rep. 113. But we do not agree that the plaintiff has a complete and adequate remedy at law.

"Where the boundaries between two adjacent parcels of land, even when held by their respective owners under purely legal titles, have become confused or obscure, equity has, from an early period, exercised a jurisdiction to settle them. * * * Courts of equity will not interpose to ascertain boundaries, unless, in addition to a naked confusion of the controverted boundaries, there is suggested some peculiar equity which has arisen from the contract, situation, or relations of the parties." 4 *Pomeroy's Eq. Jur.* § 1384.

See, also, 9 C. J. 286 et seq., and numerous cases cited in notes.

While generally a superinduced equity must exist between the plaintiff and the defendant, and an equity in favor of the plaintiff against other persons will not give jurisdiction (*Steed v. Baker*, 13 Grat. 380), sufficient equitable grounds exist, in the peculiar circumstances of this case, to give jurisdiction to the court of equity. The prevention of a multiplicity of suits is recognized as a ground of equitable jurisdiction in cases of this character. 9 C. J. 268, and cases cited in note 87; 4 *Pomeroy's Eq. Jur.* § 1385, and cases cited in note 2. Our Civil Code (section 4538) provides:

"Equity will not take cognizance of a plain legal right, where an adequate and complete remedy is provided by law; but a mere privilege to a party to sue at law, or the existence of a common-law remedy not as complete or effectual as the equitable relief, shall not deprive equity of jurisdiction."

In *Scott v. Scott*, 33 Ga. 102, it was held:

"A demurrer to a bill on the ground that the complainant has a complete remedy at law ought not to be sustained, unless it appears that the complainant has a remedy at law that will secure his whole rights in a perfect manner, at the present time, and in the future."

[8, 9] In the circumstances of this case, as set up in the petition, the case is peculiarly one for equity. It does not follow that the settlement of the disputed boundary by an action at law—either by processioning or by ejectment—will secure the plaintiff's "whole rights in a perfect manner."

"All persons who are directly or consequentially interested in the event of the suit are properly made parties to a bill in equity, so as to prevent a multiplicity of suits by or against parties at once or successively affected by the original case." *Blaisdell v. Bohr*, 68 Ga. 56 (3).

The plaintiff prays not merely for the location of the true boundary line, for judgment for the money already deposited in bank, but for an accounting in the event an account should be necessary. Not only is the lessee a necessary party to the suit, if full, complete, and adequate relief is to be granted plaintiff, but the lessee is a proper party defendant. If the ore belongs to the plaintiff, the lessee is liable at the rate of \$1 per ton; if the ore belongs to the Cherokee Ochre Company, the lessee is liable at the rate of 35 cents per ton. The lessee is therefore interested adversely to the plaintiff in the result of the suit.

"A bill is not multifarious because all of the defendants are not interested in all of the matters contained in the suit. It is sufficient if each party has an interest in some matter in the suit which is common to all, and that they are connected with the others." *Brown v. Wilcox*, 147 Ga. 546 (4), 94 S. E. 993.

It follows from what has been said that the petition was not subject to demurrer on the grounds that it set forth no cause of action, that plaintiff had an adequate remedy at law, that there was a misjoinder of parties defendant, or that the petition was multifarious.

[10, 11] Only one other ground of the special demurrer requires consideration. So far as the allegations of the petition disclose, the surface interest in both lots may be owned by the same party or by the respective owners of the mineral interests in the lots. If the surface owner be a person other than the persons owning the mineral interests, he has no interest in the mineral estate. Where the ownership of the surface is in one person and the ownership of the minerals in another person on the same tract, they each own a separate and distinct estate from the other. 1 *Jones, Real Property*,

(192 S.E.)

§ 537. It is agreed that, if the surface interest in lot 581 is in one person and the surface interest in lot 478 is in another person, then and in that event the surface owners are proper parties to the action; but they are not indispensable parties. The surface owners are not directly interested in the minerals, and their interests would not be directly affected by a settlement of the dispute between the owners of the mineral interests. At least, so far as disclosed by the petition, the interest of the surface owners would not necessarily be affected by the granting of the relief sought in the action; and, considering the allegations of the petition, the surface owners are not necessary parties to the action. We conclude, therefore, that the court erred in dismissing the petition upon demurrer.

Judgment reversed.

All the Justices concur, except HILL, J., absent.

(152 Ga. 86)

ANDERSON v. AMERICAN NAT. BANK OF MACON et al. (No. 2176.)

(Supreme Court of Georgia. Sept. 24, 1921.)

(Syllabus by the Court.)

Work and labor — 30(2)—Whether there was an implied agreement by banks to pay plaintiff as member of liquidating committee held for jury.

Under the pleadings and evidence, the trial court erred in directing a verdict for the defendant.

Error from Superior Court, Bibb County; H. A. Mathews, Judge.

Action by W. T. Anderson against the American National Bank of Macon, Ga., and another. From a judgment for defendants, plaintiff brings error. Reversed.

Hall, Grice & Bloch, of Macon, for plaintiff in error.

Jones, Park & Johnston and R. C. Jordan, all of Macon, for defendants in error.

ATKINSON, J. This case was formerly before this court, when a judgment on demurrer to the original petition was reviewed. *Anderson v. American National Bank of Macon*, 149 Ga. 798, 102 S. E. 584. The petition contained two counts, and it was held that only the first count alleged a cause of action. Subsequently the case was tried on that count, and at the conclusion of evidence introduced by both sides the court directed a verdict for the defendants. The exception is to that judgment.

In so far as it related to count 1, the statement of the case made by this court was as follows:

"Commercial National Bank of Macon, being embarrassed financially, on August 1, 1914, decided to liquidate and wind up its banking business. To that end it entered into a contract with American National Bank of Macon, a copy of which is set forth in the opinion of the Court of Appeals, which opinion is brought here for review by a writ of certiorari, and it is unnecessary to set out this lengthy contract again. (For the sake of brevity the two banks will hereinafter be called the American Bank and the Commercial Bank.) Under that contract all the assets of the Commercial Bank were transferred and assigned to the American Bank, the transferee assuming the obligations of the other bank and agreeing to reduce the assets to cash. It was stipulated in the contract that the expense of realizing on the assets transferred and liquidating the business should be paid out of the proceeds of the assets transferred, that a sum equal to the liability assumed should be deducted from the proceeds, and that the American Bank should account to the stockholders of the Commercial Bank for any overplus that might remain. W. T. Anderson brought suit jointly against the American Bank and the Commercial Bank, for the recovery of an amount alleged to be due him for services rendered both banks as a member of the liquidating committee of the Commercial Bank in assisting the American Bank to reduce to cash assets which had been transferred and taken over by the American Bank under this contract. * * * In the first count, after stating the existence and execution of the contract between the two banks and making reference to a copy thereof attached, it is alleged that on the 1st day of August, 1914, all the assets of the Commercial Bank had been transferred to the American Bank, and that on the 11th day of August, 1914, contemporaneously with the agreement between the two banks, the stockholders of the Commercial National Bank, at the request of the American National Bank, adopted a resolution appointing plaintiff as one of the committee to assist the American National Bank in reducing to cash the assets which originally belonged to the Commercial National Bank, * * * but which had been transferred and taken over by the American National Bank; that petitioner did, from the 11th day of August, 1914, until the 27th day of September, 1917, in compliance with the provisions in said resolution, proceed to assist in liquidating the assets of the Commercial Bank; that he conferred from time to time with the American Bank as to notes, securities, and other choses in action which were transferred under the agreement, giving to this work his time and attention; that the reasonable value of plaintiff's services as set forth in the petition is \$5,000 per annum; that under the agreement between the two banks all the assets of the Commercial Bank were assigned to and taken over by the American Bank; that the other bank on that date ceased to do a banking business; that the value of the assets transferred is approximately \$1,000,000; that by reason of the facts set forth the American Bank is liable to the plaintiff as a creditor of the said Commercial Bank for the debt due to plaintiff as aforesaid by the Commer-

cial Bank. * * * The prayers were for a judgment for the amount sued for, and for process."

Relatively to this count, it was said in the opinion:

"Under the allegations of the petition, the plaintiff rendered valuable services in the necessary work of liquidating the assets of the Commercial Bank. In the performance of the duties undertaken by him he rendered services to the American Bank, conferring with them as to notes, securities, and other choses in action which had been transferred by the Commercial Bank. These services were accepted by the American Bank. He had been named in a resolution appointing him as one of a committee to assist the American Bank in reducing the assets to cash. Services like these can properly be regarded and treated as a part of the expense incurred in realizing on the assets, which they were authorized to deduct from the proceeds of the assets. The contract under which these assets were transferred by the Commercial Bank to the American Bank contains the express provision that the latter bank accepted the appointment as liquidating agent of the other bank, and should proceed with all due diligence in the course of liquidation to collect and reduce to cash all of the assets, and that the actual expenses incurred by the American Bank in realizing on said assets should be deducted from the proceeds produced by realizing on said assets. The allegation that these services were of value to the American Bank is to be taken as true in passing upon the demurrer. The question as to whether the plaintiff could have sued on a quantum meruit against the American Bank alone for the value of his services is not involved, as the plaintiff has seen fit to sue both of them and to rely upon the contract and upon the value of the services rendered. We are of the opinion that the suit as brought is maintainable. The obligation of the American Bank to the Commercial Bank rests upon the express terms of this contract, and under the provisions of that contract the services of the plaintiff in the case were rendered and were accepted by the liquidating agent.

"It is insisted by counsel for the American Bank that, even if there was an undertaking entered into by that bank to pay for such services as those claimed to have been rendered, it was a promise and undertaking to the Commercial Bank, and that a party for whose benefit the promise was made could not maintain a suit at law, that he would be compelled to bring a suit in equity to obtain the benefit of the promise, and that the present action is one at law. Authorities are cited to support that contention. The proper reply to that contention seems to us to be that the present suit has all the necessary elements of an equitable petition to entitle the plaintiff to the only judgment which could be rendered; that is, a judgment for the value of his services. It is true that the prayers are merely for judgment and for process. What else would have been asked in the most formal equitable petition? The petition shows clearly the relation of the defendants to one another in this transaction, and shows the facts that were the basis

of the plaintiff's right under the contract, treating it as one between the two banks. We think, therefore, that the general demurrer to the petition was properly overruled by the trial judge. And while his reason for doing so was placed upon the ground about which we differ, nevertheless the entire petition should not have been dismissed."

On the subsequent trial of the case the contract between the two banks was proved; and there was parol evidence tending to sustain the allegations of the petition, as to services rendered by the plaintiff to the banks, and as to the acceptance of such services by both banks and the value thereof. The plaintiff testified that his inducements to render the services sued for were two resolutions adopted by the Commercial Bank, August 11, 1914, and a proposal made to him by Mr. Taylor, the president of the American Bank. The minutes of the stockholders of the Commercial Bank were introduced, which showed that the proposal from Mr. Taylor was that the stockholders of the Commercial Bank should "appoint a committee to work with him, to actively handle with him the affairs of the Commercial National in liquidating its assets," and that, upon such proposal being reported at a stockholders' meeting by the plaintiff, the stockholders passed the following resolution:

"Whereas, the stockholders have passed a resolution appointing the American National Bank of Macon, Ga., liquidating agent of this bank as requested by the Comptroller of the United States:

"Now, therefore, be it resolved that this meeting appoint L. O. Benton, J. L. Lewis, Leon S. Dure, W. T. Anderson, and John J. McKay a special committee of five, who shall serve as a special stockholders' committee, representing the stockholders, whose duty it shall be to serve with the board of directors, and who shall be consulted before any final action is taken by the board of directors on all matters relating to the said liquidation by the said American National Bank. Compensation to be later determined by the board of directors."

The minutes of the directors of the Commercial Bank, dated August 12, 1914, were also introduced. A resolution showed:

"That the directors having heard the resolution of the stockholders, that they hereby instruct the committee of five, as follows: W. T. Anderson, Leon S. Dure, John F. Lewis, L. O. Benton, and John J. McKay—to proceed at once to conserve the interest of the stockholders in every way that they can."

The minutes of the stockholders of the Commercial Bank, dated September 30, 1914, were also introduced, which showed the following resolution:

"The committee of five stockholders of the Commercial National Bank of Macon, consisting of Leon S. Dure, W. T. Anderson, John F.

Lewis, John J. McKay, and L. O. Benton, be appointed to act with the directors of the said Commercial National Bank and with the American National Bank of Macon in liquidating the assets of said Commercial National Bank, and that the directors of said bank take no final action in the matter of liquidation, without consulting with said committee."

The further resolution at the same meeting provided:

"That a special committee of three stockholders be appointed by the chairman to investigate the duties of the stockholders' committee of five, and report at the January meeting to said stockholders their recommendations as to proper compensation."

The trial judge was of the opinion, that the resolutions above quoted did not sustain the allegations of the petition, and that the services rendered by him were rendered at the instance and request of the stockholders of the Commercial Bank, and, on the basis of such opinion, directed a verdict for the defendants. In rendering his decision the court stated:

"Upon a careful reading of the minutes of the stockholders of the Commercial National Bank and of the resolutions passed at the meetings of the stockholders, I have concluded that a fair and reasonable construction of these writings does not sustain the proposition that there ever was a contract between the two banks who are defendants in this case, authorizing the American National Bank to use the services of the plaintiff in reducing to cash the assets of the Commercial Bank. The resolution referred to in paragraph 8a of the declaration clearly does not so authorize, as the terms of the resolution, now in evidence, clearly does not, though this is the resolution upon which this suit as originally brought was predicated. The motion made and carried in the meeting of September 30th, taken and construed under all the circumstances, does not, upon a careful reading of all the minutes, justify, in my opinion, the inference that there was any intention to increase or add to the duties of the plaintiff as a member of the committee of five, or the committee itself, in regard to any of its duties material to this case, or contemplates any new or changed contract, or mutual relations of the two banks, with reference to this committee, or to each other. The Supreme Court places its opinion and ruling upon the allegation of paragraph 8a of the declaration. The relations of the two banks to one another in this transaction afforded the basis of the plaintiff's rights under the contract, treating it as one between the two banks. In the absence of an agreement or contract between the banks with reference to the position of this committee, it would seem to follow that the suit is not maintainable. The contract claimed in this case rests altogether on writings which are in evidence, and the court must construe these writings. I do not think they show such relations between the banks as afford a basis for this suit."

In reaching his decision the trial court unduly restricted the effect of the evidence. The action was upon a contract that was express as to the services to be rendered but implied so far as concerns the compensation. There was evidence tending to show a request for such services by both corporations, but no evidence of an agreement as to the amount of compensation to be paid. The resolutions by the corporation were material only in so far as they tended to show authority in plaintiff to render the services. They were sufficient for that purpose. There was evidence that both corporations accepted the services of the plaintiff in the collection of the assets of the Commercial Bank, and that such services were of some value. Giving effect to all such evidence, the jury would have been authorized to hold that either or both banks were bound, under the former decision of this court, to pay the reasonable value of plaintiff's services. The trial court erred in directing a verdict for the defendants.

Judgment reversed.

All the Justices concur.

(152 Ga. 143)

GEORGIA RY. & POWER CO. et al. v. TOWN OF DECATUR.

SAME v. MAYOR AND COUNCIL OF COLLEGE PARK.

(No. 2334, 2359.)

(Supreme Court of Georgia. Sept. 27, 1921.)

(Syllabus by the Court.)

Carriers \S 12(9)—Judgment \S 744—Former decision binding as to validity of contract as to rates; no change of rates except by Railroad Commission, and no power to change, where there is a valid and subsisting contract.

Upon request of counsel for plaintiff in error the decision of this court in the case of Georgia Railway & Power Co. v. Railroad Commission of Georgia, 149 Ga. 1, 98 S. E. 606, 5 A. L. R. 1, has been reviewed, and after consideration of the ruling there made, it appears that the requisite number of the judges now presiding are not in favor of reversing the decision so reviewed, and therefore the ruling there made stands unchanged. This ruling controls adversely to the plaintiff in error the issues presented here. But the court is further of the opinion that, independently of the ruling made in the case referred to, the Georgia Railway & Power Company was without authority to fix the rate which the plaintiffs in the court below sought to have enjoined, and that consequently the court did not err in granting the interlocutory injunction.

Error from Superior Court, Fulton County; J. T. Pendleton and John B. Hutcheson, Judges.

Actions by the Mayor, etc., of College Park and by the Town of Decatur, respectively, against the Georgia Railway & Power Company. From judgments, granting injunctions, defendant brings error. Affirmed.

J. Prince Webster, Rosser, Slaton, Phillips & Hopkins, and Colquitt & Conyers, all of Atlanta, for plaintiff in error.

A. C. Broom, of Atlanta, for defendant in error College Park.

L. J. Steele, of Decatur, and Frank Harwell and Green, Tilson & McKinney, all of Atlanta, for defendant in error town of Decatur.

WRIGHT, J. The differences arising between the parties in the case under consideration are based more upon legal contentions than upon disputed facts.

On April 1, 1903, the Georgia Railway & Electric Company, through its legally constituted officials, signed an agreement ratifying the terms of an ordinance passed by the town of Decatur on March 3, 1903, which ordinance provided, among other things, that the street railway company was—

"to never charge more than five cents for one fare upon its main Decatur line, referred to as the rapid transit line, for one passenger and one trip upon its regular cars from the terminus of said line in the city of Atlanta to the terminus of same in the town of Decatur, or from the terminus of same in the town of Decatur to the terminus of the same in the city of Atlanta."

This written agreement came about as the result of compromise between the parties, growing out of litigation, through which the town of Decatur sought to enjoin the Georgia Railway & Electric Company from tearing up and removing the line of the Atlanta Railroad Company in the town of Decatur. The written agreement embodied the consent of the municipality to the removal and discontinuance of the line of the Atlanta Railroad Company, with the stipulation as to fare just quoted. Under this written agreement both parties acted without differences until some time in the year 1918, when the Georgia Railway & Power Company (the lessee of the Georgia Railway & Electric Company) petitioned the Railroad Commission to grant an increase of fare over their main Decatur line. This application was rejected by the Railroad Commission, which held that it was without jurisdiction to grant the increase of fare, under the proviso of the act of August 23, 1907, which prohibited them from interfering with existing rates where there was a valid, subsisting contract. On August 23, 1918, the Georgia Railway & Power Company sought a

mandamus to compel the Railroad Commission to take jurisdiction and to act upon the application for an increased rate over the electric line in question. This application was based upon an attack on the validity of the contract between the town of Decatur and the Georgia Railway & Electric Company. This court upheld the judgment of the lower court denying the mandamus absolute, which was an adjudication that the Railroad Commission was without jurisdiction because of a valid, subsisting contract between the parties, to wit, the contract of April 1, 1903.

On October 5, 1920, the Georgia Railway & Power Company and the Georgia Railway & Electric Company notified the town of Decatur that on or after October 20, 1920, the fare on the main or north Decatur line would be seven cents and that they denied the legality and validity of the so-called contract provision limiting the fare to five cents (set out in the ordinance of the town of Decatur March 3, 1903, and an agreement of April 1, 1903, signed by the town of Decatur and the Georgia Railway & Electric Company). Just prior to the threatened raise in rates the town of Decatur brought the case now under review, denying the right of the power company and the electric company thus to abrogate the contract of April 1, 1903, setting forth in their petition in detail the facts above stated. The defendant companies in their answer and cross-bill denied the validity of the contract of April 1, 1903, upon numerous grounds, and prayed that it be declared null and void, and that all parties be enjoined and restrained from interfering with it in fixing the rate of seven cents, or any other just and nondiscriminatory rate, upon the Decatur line. After granting a temporary restraining order, the judge of the superior court, on December 4, 1920, continued the same of force, and granted the injunction as prayed in favor of plaintiffs and against the defendants. It is to this ruling of the court that exception is taken.

We are of the opinion that the presiding judge was right in granting the injunction as prayed. Under our law the rate of fare upon this and every electric railway company within the state must be fixed by the Railroad Commission, unless there is a valid, subsisting contract made prior to the act of August 23, 1907. The right to fix rates on electric railway companies' lines is contained in the amendatory act of August 23, 1907 (Acts 1907, p. 72), which carries into effect the provision of the Constitution (article 4, § 2, par. 1). Under the act of August 23, 1907, it is provided:

"The powers and duties heretofore conferred by law upon the Railroad Commission are hereby extended and enlarged, so that its authority and control shall extend to street railroads

(193 S.E.)

and street railroad corporations, companies or persons owning, leasing or operating street railroads in this state: Provided, however, that nothing herein shall be construed to impair any valid, subsisting contract now in existence between any municipality and any such company."

The effect of the constitutional provision and the legislative enactments carrying it into effect was clearly to cover the entire scheme of rate-fixing. If there existed on August 23, 1907, a valid, subsisting contract, which fixed the rate, it was conclusive, and neither the Railroad Commission nor either party to the contract can change or alter it. If there was a void contract for any of the numerous reasons urged by plaintiffs in error, then it was not a valid, subsisting contract, and the Railroad Commission only could and should fix a change in the rate.

In the instant case the power company is assuming to do what the Railroad Commission refused to do, and what this court has held they were right in not doing, to wit, declare the contract of April 1, 1903, void. Not only this, but the plaintiffs in error are asking this court to now declare the contract void and enjoin all parties from interfering with the power company in fixing a fare of seven cents, or any other just, reasonable, and nondiscriminatory rate over the line in question. If this is a void contract, the Railroad Commission alone has the right to change the fare; if it is a valid, subsisting contract, the power company is bound by it. Plaintiffs in error are met at the very threshold with the question of their right to declare void this contract of 1903; but, should we grant to them the right to do so, they are met with what appears to be an unanswerable objection, that the power company has no right to alter, change, or fix a rate differing from the existing rate under which it has been operating their line of railroad since 1903. This power is reserved alone by the Constitution to the state, and by legislative enactment is placed in the hands of the Railroad Commission.

It is insisted that where the governmental authority fails to exercise its power to control, and where no contract exists, the company has the right to fix its own fares, provided they are just, reasonable, and nondiscriminatory. Granting this to be true, it is plain that such condition does not exist. The state of Georgia, in the amendatory act of 1907 referred to, clearly exercised this authority to regulate; and it is no answer to say that an appeal has already been made to the Railroad Commission, and that it has refused for want of jurisdiction. The Railroad Commission disclaimed jurisdiction, not because they were without power to fix rates for electric railroad companies, but because in the case they had under review

they were deprived of that right by the existence of a valid, subsisting contract. Whatever conclusion might be reached as to the validity of the contract of April 1, 1903, it would not affect the conclusion that the power company is without authority to change or fix rates on its electric lines, and this is exactly what it attempts to do, and what the trial court has enjoined it from doing in the instant case.

But the ruling of this court in the case of *Georgia Railway & Power Company v. Railroad Commission*, 149 Ga. 1, 98 S. E. 696, 5 A. L. R. 1, if unreversed, is conclusive on the issue involved in the instant case. In that case Justice Beck, rendering the decision, said:

"Under the provisos contained in the fifth section of the act approved August 23, 1907, embodied in Civil Code, § 2662, the Railroad Commission of this state is without authority to exercise the powers conferred and extended by that act, so as to determine or fix fares upon lines of street railroads within the limits of any town or city between which and the street railroad company operating such lines there was a valid, subsisting contract at the time of the passing of the act. There was such a contract between the city of College Park and the Georgia Railway & Power Company, and between that company and the town of Decatur as to one line running from Decatur to Atlanta. * * * Those contracts were in existence on the 23d day of August, 1907, and are still subsisting contracts. As we decided in the first part of this opinion, these contracts are not invalid, but are valid and subsisting contracts, and were valid and subsisting contracts on the 23d day of August, 1907."

This decision clearly settles the question that at the time of the execution of this contract both the Georgia Railway & Electric Company and the town of Decatur had authority to execute the contract of April 1, 1903.

Mr. Justice White, in the case of *Southern Iowa Electric Co. v. City of Chariton*, 255 U. S. 539, 41 Sup. Ct. 400, 65 L. Ed. —, decided April 11, 1921, held:

"Where, however, the public service corporations and the governmental agencies dealing with them have power to contract as to rates, and exert that power by fixing by contract rates to govern during a particular time, the enforcement of such rates is controlled by the obligation resulting from the contract, and therefore the question of whether such rates are confiscatory becomes immaterial"—citing *Freeport Water Co. v. Freeport*, 180 U. S. 587, 593, 21 Sup. Ct. 493, 45 L. Ed. 679, 686; *Detroit v. Detroit City R. Co.*, 184 U. S. 368, 22 Sup. Ct. 410, 46 L. Ed. 592; *Knoxville Water Co. v. Knoxville*, 189 U. S. 434, 437, 23 Sup. Ct. 531, 47 L. Ed. 887; *Cleveland v. Cleveland City R. Co.*, 194 U. S. 519, 24 Sup. Ct. 756, 48 L. Ed. 1103; *Home Tel. & Tel. Co. v. Los Angeles*, 211 U. S. 265, 273, 29 Sup. Ct. 50, 53 L. Ed. 176, 182; *Minneapolis v. Minneapolis Street R. Co.*, 215 U. S. 417, 30 Sup. Ct. 118, 54 L. Ed.

259; Columbus R., etc., Co. v. Columbus, 249 U. S. 399, 39 Sup. Ct. 349, 63 L. Ed. 669, 6 A. L. R. 1648, P. U. R. 1919D, 239.

We have been asked to review and reverse the decision in the case of Georgia Railway & Power Company v. Railroad Commission of Georgia, 149 Ga. 1, 98 S. E. 696, 5 A. L. R. 1; but, upon review the requisite number of the judges now presiding are not in favor of reversing the decision so reviewed, and therefore the ruling there made stands unchanged. And the court is further of the opinion that, independently of this ruling as to the case which we are asked to review, the Georgia Railway & Power Company was without authority to fix the rate which the plaintiffs in the court below sought to enjoin, and consequently the court did not err in granting the interlocutory injunction.

What is said as to the case of Georgia Railway & Power Company v. Town of Decatur is also controlling in the case of Georgia Railway & Power Company v. College Park.

Judgments affirmed.

All the Justices concur.

GILBERT and GEORGE, JJ., concur in the judgment affirming the grant of the interlocutory injunction, and specially as to the ruling that the contracts between the municipalities and the street railway company as to fares are valid, because bound by the decision in Georgia Railway & Power Co. v. Railroad Commission of Georgia, 149 Ga. 1, 98 S. E. 696, 5 A. L. R. 1.

(152 Ga. 92)

CENTRAL OF GEORGIA RY. CO. v. JONES.
(No. 2250.)

(Supreme Court of Georgia. Sept. 24, 1921.)

(Syllabus by the Court.)

1. Pleading —248(12)—Amendment of pleading held to add new cause of action.

This was an action by an employee of a railway company as a common carrier by railroad to recover for personal injuries sustained by the plaintiff while in the defendant's service. The petition contained no allegation showing whether the plaintiff was entitled to recover under the state law or the federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665). Pending the action the plaintiff died. His widow, who was appointed administratrix upon his estate, was duly made a party plaintiff to the pending suit. *Held*, that an amendment by the personal representative of the deceased employee, alleging a cause of action under the federal Employers' Liability Act for damages for the pecuniary loss to the designated beneficiaries by the death of the employee, added

a new and distinct cause of action, a cause of action not in existence while the employee lived, and its allowance was therefore contrary to state practice, in view of the Civil Code of 1910, § 5683, which declares that "no amendment adding a new and distinct cause of action * * * shall be allowed, unless expressly provided for by law."

(Additional Syllabus by Editorial Staff.)

2. Pleading —248(12)—Personal representatives could amend petition for personal injuries.

Assuming that pending action by employee of railway company for personal injuries did not abate by the death of the employee, the declaration might have been amended by his personal representative by alleging that the employee at the time he received the injuries was engaged in interstate commerce, and damages could be claimed for the personal loss and suffering of the employee while he lived for the benefit of relatives, under the federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665).

3. States —4—States cannot take away substantive right given by Congress.

When an act of Congress in regard to a subject within its domain creates a right on condition, compliance with the condition is essential, and a state under the guise of procedure cannot take away or affect such right, but Congress has no power to regulate matters of procedure in state courts.

4. States —4—Congress adopts rules of procedure in state when creating right.

When Congress creates a right and confers jurisdiction on the courts of the state to enforce the right, it adopts the prevailing rules of procedure in the state.

Questions Certified by Court of Appeals.

Action by E. L. Jones, administratrix, against the Central of Georgia Railway Company. Judgment for plaintiff, and defendant brought error to the Court of Appeals, which certified questions. Questions answered.

See, also, 24 Ga. App. 582, 101 S. E. 710.

Jordan & Moore, of Macon, for plaintiff in error.

Emmett Houser, of Ft. Valley, and T. S. Felder, of Macon, for defendant in error.

GEORGE, J. The Court of Appeals certified to this court the following questions:

"(1) Where a suit brought against a railroad company by an employee to recover damages for personal injuries received by him while employed by the defendant, in which there is no allegation showing whether he was entitled to recover under the state statute or the federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665), has, under the state statute, by his death, survived to his administratrix, and where the administratrix, who is his widow, has been properly made a party plaintiff to

the suit, is the petition subject to amendment by the administratrix, as the personal representative of the deceased employee, where the amendment alleges a right of action under the federal Employers' Liability Act, surviving to the administratrix, as the personal representative of the deceased employee, for the benefit of the beneficiaries named in the act, and where it also alleges a right of action under the act in the administratrix, as the personal representative of the deceased employee, for the pecuniary loss resulting to the beneficiaries named in the act on account of his death?

"(2) Was such an amendment properly allowed over the following objections offered by the defendant (see page 23 of the record): (1) Because the suit brought by the deceased during his lifetime is not amendable by setting up therein or grafting thereon a suit for the right of action given by the statute (the federal Employers' Liability Act) for the pecuniary loss to the widow and children of the said deceased caused by his death; (2) because the amendment attempts to set up a new, separate, and independent cause of action; (3) because the cause of action attempted to be declared on by the said amendment did not exist at the time the original suit was brought by the deceased, and cannot be grafted on the original suit by amendment?"

[1, 2] We are advised by the Court of Appeals that this was an action by an employee of a railway company, as a common carrier, by railroad, to recover for personal injuries sustained by the plaintiff while in the defendant's service. The petition contained no allegation showing whether the plaintiff was entitled to recover under the state statute or the federal Employers' Liability Act. Pending the action the plaintiff died. His widow, who was appointed as administratrix on his estate, was "properly made a party plaintiff to the suit." The questions make no direct reference to the former decision of the Court of Appeals in this case, when the judgment overruling the demurrer to the plaintiff's petition as amended was reviewed and affirmed by that court. *Central of Georgia Railway Co. v. Jones*, 24 Ga. App. 532, 101 S. E. 710. Nevertheless it was there ruled that—

"Whether the instant case was an action under the state law or under the federal 'Employer's Liability Act,' it did not abate upon the death of the plaintiff, but survived to his personal representative. (a) Under the state law it did not abate. Civil Code 1910, §§ 4421, 5617. (b) Under the federal Employers' Liability Act, as amended April 5, 1910, it did not abate. 36 Stat. 291 (8 Fed. Stat. Ann. [2d Ed.] 1378; U. S. Comp. Stat. § 8665); U. S. Rev. Stat. § 955 (6 Fed. Stat. Ann. [2d Ed.] 111, and cases cited; U. S. Comp. Stat. § 1592)."

The decision of the Court of Appeals in this case is of course the law of the case. Conceding, as we must, that the "right of action" given by the federal Employers' Lia-

bility Act to the employee suffering the injury survived to his personal representative for the benefit of the relatives named in the act, under the amendment of April 5, 1910 (36 Stat. 291), and assuming also that the pending action itself did not abate by the death of the employee, as held by the Court of Appeals in this case, we are of the opinion that the declaration might have been amended by the personal representative after she had been made a party to the pending suit, by alleging that the employee at the time he received the injuries complained of was engaged in interstate commerce, and that his injuries were received by the negligence of the defendant's servants so engaged, and claiming damages for the personal loss and suffering of the employee while he lived, for the benefit of the relatives named in the act. Upon this point the question is in principle controlled by the decision of this court in *Gainesville Midland Railway v. Vandiver*, 141 Ga. 350 (2), 80 S. E. 997, where it was ruled:

"In an action for damages against a railroad company for personal injuries to an employee, where the petition sets forth the relation between the injured person and the railroad company, and describes the circumstances under which the injury occurs, making out a case of negligence upon the part of the defendant, but contains no allegation that the defendant was engaged in interstate commerce at the time of the injury, the petition is amendable by setting forth allegations to that effect."

See, also, *Missouri, etc., Ry. v. Wulf*, 226 U. S. 570, 576, 33 Sup. Ct. 135, 57 L. Ed. 355, Ann. Cas. 1914B, 134; *S. A. L. Ry. v. Koennecke*, 239 U. S. 352, 36 Sup. Ct. 126, 60 L. Ed. 324.

But the amendment also alleged a right of action, under the federal act, in the personal representative of the deceased employee, for the pecuniary loss resulting to the beneficiaries named in the act on account of the death of the employee. We must therefore determine whether the amendment as offered was subject to the objections urged. The first section of the original act (35 Stat. 65; 8 Fed. Stat. Ann. 1208) provides for—

"two distinct rights of action based upon altogether different principles, although primarily resting upon the same wrongful act or neglect. It invests the injured employee with a right to such damages as will compensate him for his personal loss and suffering—a right which arises only where his injuries are not immediately fatal. And where his injuries prove fatal, either immediately or subsequently (*Michigan Central R. Co. v. Vreeland*, 227 U. S. 68, 57 L. Ed. 421, 33 Sup. Ct. Rep. 192; *Louisville, etc., R. Co. v. Clarke*, 152 U. S. 230, 38 L. Ed. 422, 14 Sup. Ct. Rep. 579), it invests his personal representative, as a trustee for designated relatives, with a right to such damages as will compensate the latter for any

pecuniary loss which they sustained by the death." *St. Louis, etc., Ry. Co. v. Craft*, 237 U. S. 648, 35 Sup. Ct. 704, 59 L. Ed. 1160.

The original act made no provision for the survival of the right of action to the injured person, and under the operation of the rule of the common law the right of action died with him. On April 5, 1910, the act was amended by adding the following section, as section 9:

"That any right of action given by this act to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, but in such cases there shall be only one recovery for the same injury." 36 Stat. 291; 8 Fed. Stat. Ann. 1378.

In *Taylor v. Taylor*, 232 U. S. 363, 34 Sup. Ct. 350, 58 L. Ed. 638, it was held that the amendment of April 5, 1910, made no change in section one of the original act. In so far as the amendment alleged a right of action in the personal representative of the deceased for the pecuniary loss resulting to the beneficiaries named in the act, on account of his death, a new and distinct cause of action was added, under the decisions of the Supreme Court of this state. See *Spradlin v. Ga. Ry., etc., Co.*, 139 Ga. 575, 77 S. E. 799; *Dayhuff v. Brown*, 150 Ga. 291, 103 S. E. 458. Civil Code 1910, § 5683, declares that—

"No amendment adding a new and distinct cause of action * * * shall be allowed unless expressly provided for by law."

It is said, however, that the meaning of section 9 of the federal act (brought into the act by the amendment of April 5, 1910) is that damages for the deceased's personal loss and suffering and for the pecuniary loss to the designated beneficiaries by the death not only may be recovered by the personal representative of the deceased in one action, but must be recovered in one action only, if at all. The ninth section of the act is so interpreted and construed in *St. Louis, etc., Ry. Co. v. Craft*, 237 U. S. 648, 35 Sup. Ct. 704, 59 L. Ed. 1160. In *Mondou v. New York, etc., R. Co.*, 223 U. S. 1, 32 Sup. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44, it was held that Congress—

"may, in the execution of its power over interstate commerce, regulate the relations of common carriers by railroad and their employees while both are engaged in such commerce. * * * Those regulations [referring to the Employers' Liability Act] have superseded the laws of the several states in so far as the latter covered the same field. Rights arising under the regulations prescribed by the act may be enforced, as of right, in the courts

of the states, when their jurisdiction, as fixed by local laws, is adequate to the occasion."

It is suggested that the policy declared by Congress supersedes the declared policy of the state not only in matter of substance, but in manner of procedure also, where, as in this instance, the act of Congress granting the right prescribes the mode of procedure. The language of Mr. Justice Van Devanter in *Mondou v. New York, etc., R. Co.*, 223 U. S. 1, 32 Sup. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44 (construing section 6 of the federal act, also brought into original act by the amendment of April 5, 1910), is pertinent:

"We deem it well to observe that there is not here involved any attempt by Congress to enlarge or regulate the jurisdiction of state courts or to control or affect their modes of procedure, but only a question of the duty of such a court, when its ordinary jurisdiction as prescribed by local laws is appropriate to the occasion and is invoked in conformity with those laws, to take cognizance of an action to enforce a right of civil recovery arising under the act of Congress and susceptible of adjudication according to the prevailing rules of procedure."

[3] It is agreed that the federal act insures uniformity of substantive law in every court and in every state in which an action thereunder may be brought. *Reed v. Ill. Cent. R. Co.*, 182 Ky. 455, 206 S. W. 794; *Landrum v. W. & A. R. Co.*, 146 Ga. 88 (1), 90 S. E. 710. It is also agreed that, when an act of Congress in regard to a subject within the domain of Congress creates a right upon condition, compliance with the condition is essential, and that the state, under the guise of procedure, cannot take away or affect a substantive right created by Congress. The application of state rules of procedure and practice, under the peculiar facts of this case, will result in some inconvenience. Nevertheless we are of the opinion that no substantive right or defense under the federal act will be affected by a proper application of the rules of procedure prevailing in this state. We are clear, however, that Congress not only did not attempt to regulate matters of procedure in the state court, but that it had no power to do so. *Small v. Slocumb*, 112 Ga. 279, 37 S. E. 481, 53 L. R. A. 130, 81 Am. St. Rep. 50; and see, also, *Ga. So., etc., Ry. Co. v. Smiley*, 151 Ga. —, 108 S. E. 273.

[4] When Congress creates a right and confers jurisdiction on the courts of the state to enforce the right, it adopts the prevailing rules of procedure in the state. As was held in *Mondou v. New York, etc., H. R. Co.*, supra:

The "systems of jurisprudence of the state and of the United States together form one system which constitutes the law of the land for the state."

Nothing directly decided in Northern Pacific Railway Co. v. Maerkl, 198 Fed. 1, 117 C. C. A. 237, is contrary to the conclusion here reached.

All the Justices concur.

(27 Ga. App. 440)

BRYAN LAND & TIMBER CO. et al. v. SOUTHERN FERTILIZER & CHEMICAL CO. (No. 12152.)

(Court of Appeals of Georgia, Division No. 2. Oct. 7, 1921.)

(Syllabus by the Court.)

Appeal and error \S 1002 — Verdict on conflicting evidence not reviewable.

A careful examination of the record in this case discloses no error of law. The judge's charge, when considered as a whole, fully eliminates any apparent merit in any exception thereto, and while the evidence on the issues of fact is in conflict, there is ample evidence to support the verdict.

Error from City Court of Savannah; Davis Freeman, Judge.

Action by the Southern Fertilizer & Chemical Company against the Bryan Land & Timber Company and another. Judgment for plaintiff, and defendants bring error. Affirmed.

Bryan Land & Timber Company, as principal, and J. R. Paschall, as indorser, were sued on two promissory notes, a verdict was rendered against them for the full amount of the notes, and their motion for a new trial was overruled. On the trial the defendants assumed the burden of proof, admitting that the plaintiff was entitled to recover the amount sued for, unless certain affirmative defenses were sustained. One of these defenses was by the defendant corporation, the maker of the notes. It set up, through the president and treasurer of the corporation, that the notes were without consideration, that they were given for the payment of chemical fertilizer to be used upon the lands of the defendant corporation in Bryan county, and that the fertilizer was not merchantable and reasonably suited to the uses intended, in that it was worthless, being full of injurious and deleterious substances, to wit, rubber, shoe heels, shoe bottoms, twenty-penny nails, and similar substances, on account of which condition the fertilizer was not only worthless, but the defendant corporation was greatly damaged in attempting to use the fertilizer; the damage being set out fully in the plea.

Paschall, in his answer, adopts as his own the Bryan Land & Timber Company's plea of failure of consideration, and in his plea sets out fully and at great length the dam-

ages resulting from the deleterious character of the fertilizer and the attempt to use it on the land of the principal. He says, in addition to this plea and on account of the facts set out, which he did not know at the time when he signed the notes as indorser, that his risk as indorser was increased beyond that contemplated when he indorsed the notes, and therefore he was discharged and released from any liability. There was evidence to support both the plea of the principal defendant and that of the indorser.

Besides denying the truth of the defendants' evidence, the plaintiff by voluminous testimony sought to show that the condition of the chemicals was fully known to the defendant corporation at the time of making and delivering the notes, and contended that the giving of the notes, therefore, constituted a waiver of any condition complained of. The plaintiff further set up that this condition was brought to the minds of the defendant corporation's officers, or some of them, by the agent of the plaintiff, and, after full consultation and negotiations an accord and satisfaction was effected between the plaintiff and the defendant corporation by the allowance of a credit on the notes of an amount agreed upon to cover such condition, and the acceptance of this credit as in full accord and satisfaction of the condition of the chemical fertilizer and the resulting damages. The defendants denied these allegations, and there was much evidence in support and denial of them.

Travis & Travis, of Savannah, for plaintiffs in error.

Seabrook & Kennedy, of Savannah, for defendant in error.

HILL, J. (after stating the facts as above). The charge of the court has been carefully read and considered, and the writer of this opinion expresses the view, without reservation, that in his experience he has never considered a charge that more completely, fully, and correctly set out, and more clearly and distinctly covered all the rules of law applicable to the evidence in the case, than that delivered by the learned judge in the present instance. Many objections to excerpts from the charge are made in the motion for a new trial, but a careful examination of these exceptions, when they are considered in connection with the entire charge, shows beyond doubt, not only that they are entirely without merit, but that the charge as a whole fully conformed to the law claimed to be applicable to the facts by the plaintiff in error. It would answer no profitable purpose to take up and discuss each of these exceptions. We therefore conclude that no error of law was committed, the evidence was in conflict on the issues of fact involved, and this court is without ju-

isdiction to set aside the verdict, which is approved by the trial judge.
Judgment affirmed.

JENKINS, P. J., and STEPHENS, J., concur.

(27 Ga. App. 411)

HEARN v. ROBERTS. (No. 12415.)

(Court of Appeals of Georgia, Division No. 1.
Oct. 6, 1921.)

(Syllabus by the Court.)

1. New trial \S 108(1)—Not granted for newly discovered evidence not likely to change the result.

The ground of the motion for new trial based upon what is alleged to be newly discovered evidence consisting of the contents of certain papers is without merit. This ground shows that the evidence is not "newly discovered," for it appears therefrom that for some time before the trial the movant's counsel knew of the existence of these papers. Besides, this evidence is both cumulative and impeaching, and not such as would likely cause a different verdict should the case be tried over.

2. Appeal and error \S 1005(2)—Verdict approved by trial judge not reviewable.

There is evidence to authorize the verdict; and, the verdict having been approved by the trial judge, under the repeated and uniform rulings of this court and of the Supreme Court a reviewing court is powerless to interfere.

Error from Superior Court, Bibb County; Malcolm D. Jones, Judge.

Action between Paul Hearn and O. A. Roberts. Judgment for Roberts, and Hearn brings error. Affirmed.

R. D. Feagin, of Macon, for plaintiff in error.

BLOODWORTH, J. Judgment affirmed.

BROYLES, C. J., and LUKE, J., concur.

(27 Ga. App. 452)

O'CONNELL v. STODDARD.

AMERICAN SURETY CO. OF N. Y. v.
SAME.

(Nos. 12366, 12367.)

(Court of Appeals of Georgia, Division No. 2.
Oct. 7, 1921.)

(Syllabus by the Court.)

1. Demurrers properly overruled.

The judgment overruling the demurrers to the petition, general and special, was correct.

(Additional Syllabus by Editorial Staff.)

2. Action \S 38(1)—Petition held not demurrable for misjoinder.

In action against building contractor and surety on his bond for breaches of building contract, the petition, although alleging repeated fraudulent acts on the part of the contractor in obtaining money from the plaintiff by false affidavits, and its appropriation otherwise than according to the terms of the contract, was not demurrable for misjoinder of causes of action, as the petition as a whole showed that it was for breach of contract, and the fact that some of the transactions complained of partook of the nature of both a tort and contract was immaterial, in view of Civ. Code 1910, \S 4407, as to election to waive tort.

3. Principal and surety \S 152—Surety may be sued with principal.

In view of Civ. Code 1910, \S 5529, where building contractor's bond was joint and several, the principal and the surety could both have been sued in the same suit, or could have been sued separately.

4. Parties \S 95(2)—Plaintiff's amendment, to join party entitled to proceeds of suit, held proper.

In suit against building contractor and surety on his bond, it was proper for plaintiff owner to amend by adding as plaintiff the name of a third party, on the ground that the surety bond had been assigned to her by the owner as security for money borrowed from her to make payments on the building contract, and for an order to be passed allowing the case to proceed in the name of both the owner individually and of the owner for the use of such third party, to the extent of her interest in the bond as represented by her advances.

Error from Superior Court, Chatham County; P. W. Meldrim, Judge.

Action by A. H. Stoddard against C. S. O'Connell and the American Surety Company of New York. Judgment for plaintiff, and defendants bring separate writs of error. Affirmed.

Stoddard sued O'Connell, as principal, and the American Surety Company of New York, as surety, on a building contract, and specifically alleged many breaches of it. The petition, in only one count, contains specifications of breaches of the building contract, and the whole scheme of the suit is to recover damages from O'Connell and the surety company for these various breaches on the part of O'Connell, in connection with the construction of the building described in the contract. The petition alleges repeated fraudulent acts on the part of O'Connell in obtaining money from the plaintiff by false affidavits, and its appropriation otherwise than according to the terms of the contract. The petition was originally in the name of Stoddard alone as plaintiff. Pending the hearing the petition was amended by add-

ing as plaintiff the name of Mrs. Mabel Leigh, on the ground that the surety bond in question had been assigned to her by Stoddard as security for a large amount of money which he had borrowed from her to make payments on the erection of the building as described in the building contract made with O'Connell, and an order was passed allowing the case to proceed in the name of both Stoddard individually and Stoddard for the use of Mrs. Leigh to the extent of her interest in the bond as represented by her advances. The defendants both filed demurrers, general and special. The trial court overruled these demurrers, and the case is here for review on that judgment. Separate writs of error were sued out, and both present for the consideration of this court two questions arising on the judgment overruling the demurrers: First, it is insisted that there was a misjoinder of parties and causes of action, there being joined an action ex delicto against O'Connell and ex contractu against the surety company, O'Connell being directly charged in the petition with misappropriation of the funds intrusted to him in connection with the building contract, and the surety company being charged with the violation of its contract as surety on O'Connell's bond in connection with said building; second, it is insisted that the amendment making Mrs. Leigh a party plaintiff was improperly allowed.

Seabrook & Kennedy and Stephens, Barrow & Heyward, all of Savannah, for plaintiffs in error.

Wm. W. Gordon, of Savannah, for defendant in error.

HILL, J. [1,2] 1. There was no misjoinder of causes of action. The allegations of the petition showed that it was clearly an action for damages for the breach of the contract. It may be that the transactions complained of partake, some of them, of both a tort and contract; but this is immaterial. Civil Code (1910), § 4407. The allegations in the petition charging the wrongful conversion of the money which had been intrusted to the defendant by the plaintiff do not necessarily make the cause of action one arising ex delicto. True, the wrongful conversion alleged was tortious in the general sense that all torts are wrong; but it does not follow that an action ex contractu is joined to an action in tort because the money intrusted under the covenants of the contract has been wrongfully converted by the principal defendant to his own use. These are simply means by which the contract was violated. But an action setting out these violations is, nevertheless, properly construed as an ac-

tion ex contractu arising from the breach of the covenants of the contract.

[3] 2. Neither was there any misjoinder of parties. The bond in question, made by the surety company, is, by its terms, joint and several. The obligation of the surety company was to make good the derelictions and defaults arising from the building contract; and the plaintiff in this case could have sued, in the same suit, both the principal and surety, or he could have sued them separately. Civil Code (1910), § 5529.

[4] 3. The amendment making Mrs. Mabel Leigh a party plaintiff, or allowing the suit to proceed in the name of Stoddard for the use of Mrs. Leigh, was proper under the allegations. The surety bond, according to the allegations of the petition, had been assigned to Mrs. Leigh by Stoddard to protect her for advances she had made to him in completing the building. What concern is it to the debtor, O'Connell, whether the bond has been assigned, or whether the assignee is made a party? Stoddard not only had the right to sue in his own name, but also had the right, under the allegations, to designate another person to take the proceeds of the suit. *Gilmore v. Bangs*, 55 Ga. 403; *Richmond & D. R. Co. v. Bedell*, 88 Ga. 591, 15 S. E. 676; *Fidelity Co. v. Nisbet*, 119 Ga. 316, 46 S. E. 444; *Gate City Cotton Mills v. Cherokee Mills*, 128 Ga. 170, 57 S. E. 320. It is therefore the opinion of this court that the judgment of the lower court, overruling the general and special demurrers, should be affirmed.

Judgment affirmed.

JENKINS, P. J., and STEPHENS, J., concur.

(27 Ga. App. 436)

CITY OF EAST POINT v. HENDRIX.
(No. 12545.)

(Court of Appeals of Georgia, Division No. 2.
Oct. 7, 1921.)

(Syllabus by the Court.)

1. Municipal corporations ~~§~~819(8)—Evidence held to show notice before suit.

The petition contains the allegation that "before filing this suit he [petitioner] filed a petition with the mayor and council of the city of East Point, asking them to compensate him for his said injury as before alleged, but they failed and refused to do so." The evidence in support of the allegation is as follows: "Before filing this suit I filed a written petition with the mayor and council of East Point. I was down there when this was read to the mayor and council. My recollection is that it was about three months before I filed this suit. * * * Col. Clarke [petitioner's attorney] handed that notice to them. I saw him hand it to them." *Held*, this was sufficient to show a substantial compliance with section 910 of the Civil Code of 1910.

2. Bridges \Rightarrow 35—Bridge held part of public street.

The evidence was amply sufficient to show that the bridge, the defective condition of which caused the plaintiff's injury, was a part of a public street of the defendant municipality. It had been used by the public for years as a sidewalk, and had been repeatedly worked, and the bridge repaired by the municipal authorities. Mayor, etc., of Americus v. Johnson, 2 Ga. App. 378, 58 S. E. 518.

3. Appeal and error \Rightarrow 1004(3)—Verdict cannot be set aside as excessive unless inference of gross mistake or undue bias is justified.

The amount of the verdict is large and generous, but this court cannot hold, in view of the evidence and its approval by the trial court, that it is "so excessive as to justify the inference of gross mistake or undue bias." Civ. Code 1910, § 4899.

Error from Superior Court, Fulton County; George L. Bell, Judge.

Action by W. B. Hendrix against the City of East Point. Judgment for plaintiff, and defendant brings error. Affirmed.

Guy Parker, of Atlanta, for plaintiff in error.

J. Caleb Clarke, of Atlanta, for defendant in error.

HILL, J. Judgment affirmed.

JENKINS, P. J., and STEPHENS, J., concur.

(27 Ga. App. 463)

W. S. BRADLEY & CO. v. COCHRAN. (No. 12476.)

(Court of Appeals of Georgia, Division No. 2
Oct. 7, 1921.)

(Syllabus by the Court.)

Attachment \Rightarrow 180—Attachment lien held prior to unrecorded conditional sale contract.

An unrecorded contract retaining title in the vendor of personal property until full payment of the purchase money is not good as against "the interests of third parties acting in good faith and without notice." Civ. Code 1910, § 3320. It therefore follows that in a contest between the holder of an unrecorded retention of title note and a creditor of its maker under a lien created by the levy of an attachment, judgment in favor of the latter was properly rendered; and the judge of the superior court did not err in refusing to sanction a petition for a writ of certiorari. Civ. Code 1910, § 3318 et seq.; Southern Iron & Equipment Co. v. Voyles, 138 Ga. 258 (4), 75 S. E. 248, 41 L. R. A. (N. S.) 375, Ann. Cas. 1916D, 369; North v. Goebel, 138 Ga. 739 (5) 76 S. E. 46.

Error from Superior Court, Murray County; M. C. Tarver, Judge.

Action between W. S. Bradley & Co. and A. T. Cochran. Judgment for Cochran, and Bradley & Co. bring error. Affirmed.

J. Roy McGinty, of Chatsworth, Jesse M. Sellers, of Cairo, for plaintiff in error.

HILL, J. Judgment affirmed.

JENKINS, P. J., and STEPHENS, J., concur.

(27 Ga. App. 415)

SOUTHERN COTTON OIL CO. v. WALLACE. (No. 12431.)

(Court of Appeals of Georgia, Division No. 1
Oct. 6, 1921.)

(Syllabus by the Court.)

1. Highways \Rightarrow 192—Petition alleging injury in a collision due to discharge of steam on highway held to state cause of action.

The petition in this case set out a cause of action, and the court properly overruled the demurrer thereto.

2. Evidence held sufficient.

The evidence authorized the verdict.

Error from City Court of Waynesboro; Wm. H. Davis, Judge.

Action by A. B. Wallace, Jr., against the Southern Cotton Oil Company and another. Judgment for plaintiff, and the named defendant brings error. Affirmed.

H. C. Hatcher, of Waynesboro, for plaintiff in error.

E. V. Heath, of Waynesboro, for defendant in error.

BLOODWORTH, J. Wallace sued Marchman and the Southern Cotton Oil Company for damage to his automobile, alleging, in part:

That the plant of the Southern Cotton Oil Company, at Waynesboro, was situated some distance from the public highway; that the corporation had "a pipe run from the trappers of its press and extending a distance of some 100 yards to the public road, the outlet for said pipe being in the ditch right on the side of the road"; that while he was driving his automobile along the public road he was forced to stop his car "just before he reached the outlet of said pipe, on account of an outburst of steam from said pipe; that the steam from said pipe formed a dense fog, so dense that petitioner could not see ahead of him at all; that petitioner, being unable to see, stopped his car completely as an extraordinary precaution; that plaintiff's car was in the middle of the road;" that while petitioner's car "was at a standstill, waiting for the outburst of steam to get out of the way, a two-ton truck owned by H. B. Marchman and driven by his employee, Johnson, who was using the same in the business of said March-

man, came along said road from Waynesboro; that the said Johnson did not stop the truck, but came right on through the fog, although it was impossible for him to see or be seen, and his truck struck the car of petitioner directly in the front; that by said collision all of the front part of petitioner's car was completely ruined;" that "the use of said pipe seriously interfered with travel on said road, endangered the safety of all parties using said road, and amounted to gross negligence on the part of said defendant company in operating its plant;" that "the failure of Johnson, the driver of H. B. Marchman's truck, to stop his said truck when he saw the outburst of steam so dense he could not see what was ahead of him, amounted to gross negligence on the part of said Johnson as employee of H. D. Marchman."

Petitioner prayed for judgment for the amount of his damages.

The defendant demurred to the petition, and among the grounds of demurrer were the following:

"(1) Because the said petition sets forth no cause of action against this defendant; (2) because the defendant is sued jointly with H. D. Marchman in said cause, when the facts alleged show there was no concert of action between defendant and said Marchman and his servants, but, on the contrary, shows that the acts of negligence charged against defendant were totally disconnected and in no way related to each other; (3) because the act of negligence charged against this defendant neither naturally produced the injury to plaintiff, nor did it tend naturally to produce the act or damage charged against his codefendant."

The demurrer was overruled, the case proceeded to trial, and the trial resulted in a verdict for the plaintiff.

[1] 1. Under the ruling in *Bonner v. Standard Oil Co.*, 22 Ga. App. 532, 96 S. E. 573, the petition set out a cause of action, and the court properly overruled the demurrer thereto.

[2] 2. The motion for a new trial contains no allegation that in the trial of the case any error of law was committed; there is sufficient evidence to support the verdict, the judge who tried the case approved their finding, and this court will not interfere.

Judgment affirmed.

BROYLES, C. J., and LUKE, J., concur.

(27 Ga. App. 444)

HOGAN v. GILBERT. (No. 12164.)

(Court of Appeals of Georgia, Division No. 2.
Oct. 7, 1921.)

(Syllabus by the Court.)

1. Appeal and error \S 1061(3)—Overruling motion for nonsuit is harmless, where error later cured.

Whether or not an exception to the overruling of a motion for nonsuit, based upon

the ground that there was a fatal variance between the allegata and probata, in that the evidence showed that the contract sued upon was made with a partnership rather than with the individual plaintiff, is such an exception as can be considered after testimony for the defendant was introduced, a verdict rendered against the defendant, and a motion for new trial made which presented the complaint that the verdict was contrary to the evidence and without evidence to support it (as to which see cases cited in *Gunn v. Wilson Co.*, 20 Ga. App. 14, 16, 17, 92 S. E. 721, and see *Citizens' Bank v. Shaw*, 132 Ga. 771 (1), 773, 65 S. E. 81, *Glausier v. Boston Naval Stores Co.*, 132 Ga. 549, 552, 64 S. E. 547, *Findley v. Central of Ga. R. Co.*, 7 Ga. App. 180, 66 S. E. 485, and cases cited), it is nevertheless true that, where a motion for nonsuit is overruled, and the defendant thereafter introduces evidence by which the deficiency in the plaintiff's testimony is cured, the error, if any, in overruling the motion for nonsuit, is also cured. *Ga. Ry. & Electric Co. v. Reeves*, 123 Ga. 697 (7), 703, 51 S. E. 610; *Southern R. Co. v. Morrison*, 8 Ga. App. 647 (2), 648, 70 S. E. 91; *Ala. Construction Co. v. Continental Car Co.*, 131 Ga. 365, 369, 62 S. E. 180. In the instant case, whatever uncertainty might have existed under the plaintiff's evidence upon the question as to whether the contract with the defendant was made with the plaintiff alone, as alleged in the petition, or with himself and his brother, was clarified by the defendant's own testimony that the contract was made and remained solely with the plaintiff.

2. Brokers \S 54, 63(1, 5)—Entitled to commission on procuring willing purchaser; owner's refusal to consummate deal leaves him liable for commissions; tender of price not generally necessary to entitle broker to commission when owner refuses to sell to purchaser procured.

It is the general rule that a real estate broker earns his commissions when, "during the agency, he finds a purchaser, ready, able, and willing to buy, and who actually offers to buy on the terms stipulated by the owner." *Civ. Code* 1910, \S 3587; *Smith v. Tatum*, 140 Ga. 719, 79 S. E. 775; *McMath Plantation Co. v. Allison*, 107 S. E. 420. Still the owner may, by the express terms of his agreement with the broker, limit his liability by specifically providing that the commissions shall become earned, due, and payable only as the purchase price shall be actually paid. Such a provision would not, however, affect the broker's rights to commissions in a case where, during the agency, he finds a purchaser, ready, able, and willing to buy, and who actually offers to buy, on the terms stipulated, but where the owner himself refuses to consummate the trade. *Fenn v. Ware*, 100 Ga. 563(1), 28 S. E. 238; *Girardeau v. Gibson*, 122 Ga. 313, 314, 50 S. E. 91. In such a case, where the owner, without legal excuse, refuses to effectuate the sale, he becomes liable for the commissions; and after such a refusal it is generally not necessary that the proposed purchaser shall have made to the owner an actual tender of the purchase price. *Smith v. Tatum*, supra; *Winer v. Flournoy Realty Co.*, 107 S. E. 398(1).

3. Evidence —589—Party's evidence construed against him.

"The testimony of a party who offers himself as a witness in his own behalf is to be construed most strongly against him, when it is self-contradictory, vague, or equivocal." And unless there be other evidence tending to establish his right to recover, he "is not entitled to a finding in his favor, if that version of his testimony the most unfavorable to him shows that the verdict should be against him." *Steele v. Central of Ga. R. Co.*, 123 Ga. 237 (1), 51 S. E. 438; *Southern Ry. Co. v. Hobbs*, 121 Ga. 428(1), 49 S. E. 294; *City of Thomasville v. Crowell*, 22 Ga. App. 383, 384 (1, b), 96 S. E. 335. While the first portion of the defendant's testimony might be taken as indicating that he had a right to refuse to consummate the contract of sale with the vendee, for the reason that the vendee failed to comply with the agreed terms by making the cash payment required by the agreement procured by the broker and accepted in writing by the owner, yet in another part of his testimony he clearly admits that such was not the case, but states that the vendee offered to make full compliance with such obligation within the time contemplated. Testing the defendant's evidence by the rule stated, he failed to sustain his defense in justification of his refusal to sell, and the court did not err in directing a verdict for the plaintiff.

Error from Superior Court, Laurens County; J. L. Kent, Judge.

Action by J. W. Gilbert against J. A. Hogan. Judgment for plaintiff, and defendant brings error. Affirmed.

J. S. Adams & R. Earl Camp, of Dublin, and Hines, Hardwick & Jordan, of Atlanta, for plaintiff in error.

W. C. Davis, of Dublin, for defendant in error.

JENKINS, P. J. The plaintiff, a real estate broker, sued the owner of certain land for commissions on account of having produced a purchaser ready, able, and willing to buy the property listed, on the terms offered by the owner. The petition alleged that the contract for commissions was with the plaintiff. The defendant moved for a nonsuit, on the ground of a variance between plaintiff's testimony and his petition, because the plaintiff testified that, after the original employment of himself, he stated to the defendant that he would need his brother to assist in making a sale and wanted the brother to share in the commission, and that the defendant was to pay them 5 per cent. After the court had overruled the motion the defendant testified that he had the trade with the plaintiff, and the plaintiff "was to pay him 5 per cent. commission on the sale," that he made the contract with plaintiff to sell this land, that all the plaintiff did was afterwards to come to him and ask him "something

about his brother helping him" (plaintiff, that defendant replied that "as far as he [defendant] was concerned," he "didn't care who" the plaintiff "got to help him sell the land," and that this was all that was said.

[1-3] The evidence was undisputed that the defendant refused to execute the contract of sale. The sole issue was whether or not he was justified in such refusal on account of any noncompliance by the purchaser with the terms of the contract. The preliminary written agreement for a purchase and sale, as signed by the owner and the purchaser procured by the broker, fails to state specifically when the actual contract of sale should be entered upon, the bond and purchase-money notes should be delivered, and the full first payment should be made. The written contract executed August 18, 1919, simply provided that the purchaser should pay \$15,000 cash, give a note of \$2,500 principal, due January 1, 1921, and 14 notes of \$5,000 each, payable from January 1, 1922, to January 1, 1935, with 8 per cent. interest to be paid yearly, acknowledged the receipt of \$2,000 earnest money, and provided that possession should change January 1, 1920. The defendant in his plea set up that the purchaser having failed to make the \$15,000 cash payment and deliver the notes stated, he on October 20, 1919, notified the purchaser by letter that such terms must be performed by October 29, 1919, giving him 7 days to meet such conditions, which was a reasonable time, 60 days having previously passed since the contract, and that the purchaser wholly failed to perform within that period. The defendant introduced this letter, and testified:

"I agreed to accept the \$2,000, and give Jobson 30 days in which to examine the title to the land, and the matter went on, and he never did say whether he approved of the title or not. I never did agree for him to pay \$2,000, and give him until January 1st on the \$13,000. I just merely extended him the 30 days in which to examine the titles to the place, and he was to let me know if he approved the title to the land, and he never did let me know. In this contract it is stipulated that \$15,000 was to be paid cash; he did not pay me that much cash in accordance with the contract."

As already stated, the preliminary written agreement between the defendant and the purchaser procured by the broker did not provide as to the time when the terms of purchase should be performed by the purchaser. However, the defendant, immediately following his evidence just quoted, and in his own direct examination, admitted:

"This contract that was signed does not speak the truth; \$15,000 was not to be paid cash; only \$2,000 was to be paid cash, and \$13,000 was to be paid on January 1st thereafter."

There was no contradiction of the testimony of the purchaser that he had tendered to the defendant the full cash amount due, and the agreed bond and notes before January 1, 1920. And the defendant further admitted that the purchaser "tendered me some money and notes and bond for title; I don't know how much money he had; this was on December 8th."

It is not necessary to add anything further to the headnotes.

Judgment affirmed.

STEPHENS and HILL, JJ., concur.

(27 Ga. App. 435)

FOLDS v. NEW YORK LIFE INS. CO.
(No. 12130.)

(Court of Appeals of Georgia, Division No. 2. Oct. 7, 1921.)

(Syllabus by the Court.)

1. Insurance \S 136(1, 2, 4), 141(3)—Requirements as to delivery of policy and waiver of delivery stated; recitals held not to create presumption first premium had been paid.

While actual delivery of the policy is not essential to the validity of a consummated contract of life insurance, unless by the terms of the agreement it be expressly so required, and while it is true that, even where the agreement requires delivery of the policy as a condition precedent to liability, still, if the contract has been otherwise fully consummated, the receiving of the policy from the company by its agent, for unconditional delivery to the applicant, will be taken as equivalent to delivery to the latter, and while it is true that, even though the agreement may require that the delivery of the policy shall be made while the applicant is in good health, it still remains the rule that, where the contract has been otherwise fully consummated and the agent thus receives the policy from the company for unconditional delivery while the applicant remains in good health, the contract, in that event and under such circumstances, will be treated as delivered and as binding (*New York Life Insurance Co. v. Babcock*, 104 Ga. 67, 30 S. E. 273, 42 L. R. A. 88, 69 Am. St. Rep. 134), and even though it might seem that, where the agent has received from his company an otherwise consummated contract for unconditional delivery, save only that the occupation and condition of health of the applicant should have remained the same since examination, and the agent negligently fails and refuses to comply with such positive instructions, although at the time of its receipt by him the health and occupation of the applicant had not changed, the policy should be held to have been delivered and the contract held binding under the principle which treats as done that which ought to have been done, yet, where the application for a policy of life insurance and the policy itself both provide that the insurance shall not take ef-

fect unless the first premium is paid and the policy is delivered to and received by the applicant during his lifetime and while in good health, and that only certain named officers of the company can make, modify, or discharge contracts or waive any of the company's rights or requirements, and that none of these acts can be done by the agent taking the application, and where the policy is forwarded by the company to the agent, not for unconditional delivery to the applicant, but, under its written instruction to its agent, "for delivery and collection of premium, provided there has been no change in the occupation or condition of health since examination," and "under no circumstances are you to mail or deliver any policies on which requirements are called for until all such requirements have been fully complied with," such transmission of the policy to the agent, with such conditional and limited authority for delivery to the applicant, is not tantamount to a delivery to the latter, where it also appears that the applicant was not in good health when the policy was so received by the agent or at any subsequent time; nor do recitals contained in such an undelivered policy create a presumption that the first premium has been paid. *Reese v. Fidelity Mutual Life Ass'n*, 111 Ga. 482, 36 S. E. 637; *Clark v. Mutual Life Ins. Co.*, 129 Ga. 571, 59 S. E. 283; *Brown v. Mutual Benefit Life Ins. Co.*, 131 Ga. 38, 61 S. E. 1123; *Williams v. Empire Life Ins. Co.*, 146 Ga. 246, 91 S. E. 44; *Reliance Life Ins. Co. v. Hightower*, 148 Ga. 843, 98 S. E. 469; *McKenzie v. Northwestern Mutual Life Ins. Co.*, 26 Ga. App. 225, 105 S. E. 720.

2. Evidence \S 244(13), 317(1)—Insurance \S 668(3)—Hearsay conversation inadmissible; insurance company not bound by agent's declarations while not acting on behalf of his principal; applicant's good health at time of policy delivery held for the court.

The evidence in this case cannot be held to establish the fact that the policy was in any wise delivered by the agent to the applicant. The excluded letter from the agent to his company, even had it been otherwise admissible, was without probative value. The court properly excluded as hearsay the testimony of the plaintiff, whereby it was sought to put in evidence certain conversations with the agent. Nor could such declarations of the agent be held to bind the company, since they were made after the death of the applicant and not while acting on behalf of his principal nor within the scope of his agency. Moreover, under the undisputed facts and circumstances disclosed, it is immaterial whether there had been a delivery of the policy by the agent to the applicant. While it is ordinarily true that any question as to whether or not the plaintiff was in good health at the time a policy was delivered should be left for determination by the jury (*Few v. Supreme Lodge Knights of Pythias*, 136 Ga. 181 [8], 71 S. E. 130), yet, where all the testimony relating thereto excludes every reasonable hypothesis but one, the question becomes one of law for adjudication by the court (*Empire Life Ins. Co. v. Jones*, 14 Ga. App. 647 [3], 82 S. E.

62; Life Ins. Co. of Va. v. Pate, 23 Ga. App. 232 [3], 235, 97 S. E. 874; Mutual Life Ins. Co. v. Bolton, 22 Ga. App. 566 [2], 570, 96 S. E. 442).

Error from Superior Court, Jasper County; Jas. B. Park, Judge.

Action by Annie Folds, administratrix, against the New York Life Insurance Company. Judgment for defendant and plaintiff brings error. Affirmed.

Mrs. Annie Folds, as administratrix, sued the New York Life Insurance Company on an insurance policy upon the life of her deceased husband. The application for insurance, which was made a part of the policy, provided:

"That the insurance hereby applied for shall not take effect unless the first premium is paid and the policy is delivered to and received by me during my lifetime and good health," and "that only the president, a vice president, a second vice president, a secretary, or the treasurer of the company can make, modify, or discharge contracts, or waive any of the company's rights or requirements, and that none of these acts can be done by the agent taking this application."

The policy contained also the following provisions:

"The policy and the application therefor, copy of which is attached hereto, constitute the entire contract. * * * No agent is authorized to waive forfeitures or to make, modify, or discharge contracts, or to extend the time for paying a premium."

From the plaintiff's evidence it appears that the policy was written up and dated December 23, 1918, and, after being forwarded from the home office in New York to the Atlanta office of the company it was mailed on January 2, 1919, to the company's agent who had solicited the policy, H. G. Smith, Newborn, Ga. The policy as forwarded to this agent was accompanied by a letter to him, stating that it was sent "for delivery and collection of premium, provided there has been no change in the occupation or condition of health since examination," and that "under no circumstances are you to mail or deliver any policies on which requirements are called for until all such requirements have been fully complied with." On the trial the plaintiff testified:

"He was taken sick on Sunday, the 29th day of December. He took his bed that day—stayed in bed some. His physical symptoms were that he had a cold. I don't know about fever; I didn't have any thermometer to tell; he wasn't any too hot. He went to bed on Sunday and I called Dr. Wilson. He prescribed for him. The prescription was quinine and soda. That is all. He said he thought he had influenza. He passed a very good night Sunday night. Not any opiates or anesthetics at all were given him. Dr. Wilson came on Monday; he made one visit Monday. He was in

bed part of the time Tuesday. He made one visit Tuesday. He didn't leave any more medicine Tuesday. He came Wednesday. Mr. Folds was sitting up by the fire when he came. He did not prescribe anything for him Wednesday. He came Thursday night. Mr. Folds had gotten a little worse Thursday night. I don't remember whether he was in bed when the doctor got there Thursday night. The doctor called Friday also, and he continued to get worse. He died Saturday, the 4th of January. He was buried on Sunday. From the 29th of December, 1918, until the 4th day of January, 1919, he was confined to his house, didn't attend to any business—he stayed around home. I said he died of pneumonia. I don't know whether the influenza went into pneumonia or not. I have nursed pneumonia. My husband's case was similar to this—similar symptoms."

It appears that the policy remained in the hands of the company's agent, who afterwards became temporary administrator of the applicant's estate; that after the death of the applicant the agent, while temporary administrator, exhibited to the plaintiff at her home certain papers that the deceased had in the bank of which the agent was cashier, among which was the policy in question. The plaintiff testified that after looking at the papers she requested Smith to keep them for her, and that the policy remained in his possession until afterwards returned by him to the company.

On the trial the policy was produced by the company under a notice given to it by the plaintiff. Other than the recital in the policy there was no evidence that the first premium had ever been paid. The plaintiff offered in evidence a letter from the agent Smith to the defendant, addressed to its office in Atlanta, and dated February 4, 1919, stating that on account of his having been appointed temporary administrator of Folds' estate, his (Smith's) attorney would not consent to his return of the policy sued on. The letter was offered for the purpose of showing that Smith had received and delivered the policy to the applicant. This letter, on objection, was excluded by the court. The court excluded also certain testimony of J. O. Stanton, a witness for plaintiff, as follows:

"I asked him whether the policy had come, and he said he had it—the policy on Will Folds' life—he told me it had come. He didn't say how much. He said he had it and hadn't delivered it. He said Mr. Folds had a box at the bank. He didn't state anything else. He said he had the policy, and Mr. Folds had a box in his bank. I had not seen Mr. Folds—I just heard he was sick."

The following testimony of the plaintiff was also excluded:

"Mr. Smith said he wanted to see me about being administrator. I told him I would like to get him to help me for a while—I wasn't able to see after anything myself. Nothing

was said about its being necessary to look after the matter promptly and right away. He said he had been told by several to get the place as temporary administrator if he could. He came to see me again. I asked him to carry these papers back and put them in the bank. He said this policy had been there several days. He did not say whether W. J. Folds had ever seen it. He said W. J. Folds told him just to keep this policy up there with his other papers as he had always done. Mr. Smith said when he received it he put it with his other papers in the bank. When he came to my house, he had it all together in one bundle."

At the conclusion of the evidence introduced by the plaintiff the court granted a motion for nonsuit.

It is not necessary to add anything further to what is said in the headnotes.

Doyle Campbell, of Monticello, and Hall, Grice & Bloch, of Macon, for plaintiff in error.

Bryan & Middlebrooks, of Atlanta, and Greene F. Johnson, of Monticello, for defendant in error.

JENKINS, P. J. Judgment affirmed.

STEPHENS and HILL, JJ., concur.

(27 Ga. App. 491)

TENNESSEE, A. & G. R. Co. v. NEELY.
(No. 12563.)

(Court of Appeals of Georgia, Division No. 2.
Oct. 7, 1921.)

(Syllabus by the Court.)

1. Appeal and error \S 1097(1)—Previous decision of Supreme Court on practically same record controlling.

This case is fully controlled by the decision of the Supreme Court when it was before that court on substantially the same record, and no error appears in the last trial.

(Additional Syllabus by the Editorial Staff.)

2. Railroads \S 327(1)—Failure to stop, look, and listen does not establish negligence.

It is not the rule that it constitutes negligence in one approaching a railroad crossing to fail to stop, look, and listen before crossing.

3. Trial \S 194(17)—Generally court cannot instruct as to what constitutes negligence at crossing.

The question of negligence of one injured crossing a railroad track is for the jury, and, unless his acts constitute negligence per se, the court cannot instruct as to what facts would constitute negligence.

4. Trial \S 253(4)—Instruction omitting element of comparative negligence held properly refused.

Even if decedent was negligent in approaching the railroad crossing at which he was killed, yet, there being also evidence that those in charge of the train were also negligent in approaching the crossing, from which evidence the jury might well have found that defendant's negligence exceeded that of decedent, an instruction omitting the question of comparative negligence was properly refused.

Error from Superior Court, Walker County; Moses Wright, Judge.

Action by Nancy Neely against the Tennessee, Alabama & Georgia Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

See, also, 108 S. E. 177.

S. B. Smith, of Chattanooga, Tenn., and Shattuck & Shattuck, of La Fayette, for plaintiff in error.

Rosser & Shaw, of La Fayette, for defendant in error.

HILL, J. [1] This case was before the Supreme Court on substantially the same record as in the present case. The only two points involved in the case then are the only two points involved now. Those two points are, first, whether the plaintiff was the lawful wife of the decedent, and was therefore entitled to bring the suit for his homicide by the defendant railroad company, and, secondly, whether the decedent, at the time he was killed by the railroad company, was himself guilty of such negligence as would prevent his widow from recovering damages for his death. The Supreme Court, in *Neely v. Tennessee, Georgia & Alabama Railroad Company*, 145 Ga. 363, 89 S. E. 325, L. R. A. 1916F, 819, decided the two points in question as follows:

First. "Upon the whole, the evidence on behalf of the plaintiff made out a prima facie case that she was married to the decedent and remained his wife until his death, although under a misapprehension and under advice of counsel, she had married a second time before that event. As against this, the mere bald proof of a marriage in Alabama to another woman and of living with her in Georgia at the time when his death occurred would not be sufficiently conclusive to show that the first marriage had been dissolved, and that the plaintiff was not the widow of the decedent, or to authorize the judge to direct a verdict in favor of the defendant railway company on that ground."

On the present trial, as disclosed by the record, there was no difference in the evidence on the subject of the plaintiff being the lawful widow of the decedent, and the trial judge substantially charged the law decided

in the case by the Supreme Court on that point.

On the second point the Supreme Court held:

"If the plaintiff made out a prima facie case showing she was the widow of the decedent, there was sufficient evidence on the subject of negligence and liability to authorize the submission of the case to the jury. It follows that the direction of a verdict in favor of the defendant was error."

In the present trial, as disclosed in the record, the evidence on the question of negligence and liability was substantially, if not identically, the same, and in the absence of any error of the trial judge in the conduct of the trial, if, in the opinion of the Supreme Court, the evidence was sufficient on the subject of negligence and liability to authorize the submission of the case to the jury, it follows that a verdict on practically the same evidence would be supported.

We have examined the grounds of the motion for a new trial as amended, and we find none of them are meritorious. The law as specifically decided by the Supreme Court in this case, on the subject of the plaintiff being the lawful widow of the decedent, was given in charge, and the principles of law that have been well settled by repeated decisions of this court and the Supreme Court on the subject of negligence and liability, applicable to the facts, were also submitted to the jury. The failure to give the following instructions requested was not erroneous according to repeated rulings of this court and of the Supreme Court:

"It is the duty of one approaching a railroad crossing to exercise ordinary care to ascertain whether a train is approaching. I charge you that it is ordinary care to look and listen. It may not be negligence which will bar a recovery to fail to use one's senses—to fail to look and listen. If the evidence shows that the deceased could have seen or heard the train in time to avoid danger had he looked or listened, and he drove upon the track in front of the moving train, then this was such negligence on his part as would prevent a recovery in this case, and if you find such to be the fact, then your verdict should be for the defendant."

[2] Such instructions would have been fatally afflicted with two infirmities, and if it had been given as requested would have been reversible error. First, it has never been held in this state that it constituted negligence in one approaching a crossing over a railroad track to fail to stop, look, and listen before crossing. *Bryson v. Southern Ry. Co.*, 3 Ga. App. 407, 59 S. E. 1124; *Columbus R. Co. v. Peddy*, 120 Ga. 589, 48 S. E. 149; *Seaboard Air Line Ry. v. Blackwell*, 16 Ga. App. 504, 85 S. E. 686. There are many other decisions both of the Supreme Court and of this court to the same effect.

[3] Second, the question of negligence in such circumstances is always one for the jury, and, unless the act complained of as negligence is negligence per se, the trial judge cannot instruct the jury as to what facts would constitute negligence. This is an issue to be determined by the jury according to the facts of each particular case, without any assistance from the trial judge.

[4] Even if the decedent was negligent in approaching the railroad crossing, there was also evidence that those in charge of the train of the defendant company were also negligent in approaching the crossing, and the jury might well have found from the evidence that the defendant's negligence exceeded that of the decedent, and that therefore, under the well-established doctrine of comparative negligence, the verdict for \$1,500 was authorized.

Judgment affirmed.

JENKINS, P. J., and STEPHENS, J., concur.

(182 N. C. 200)

YOUNG v. DAVIS. (No. 107.)

(Supreme Court of North Carolina. Oct. 19, 1921.)

1. Statutes \S 162—Procedure act as to specified money demands held not repealed by act relating to procedure generally.

Pub. Laws Sp. Sess. 1920, c. 96, relating to procedure in civil cases, held not to repeal Pub. Laws 1919, c. 156, relating to procedure in actions to enforce money demands of a specified kind.

2. Statutes \S 225—Several acts on same subject to be harmonized, if possible.

In the construction of statutory law there is a presumption against inconsistency, and when there are two or more statutes on the same subject in the same or successive Legislatures, in the absence of an express repealing clause, they are to be harmonized, and every part allowed significance, if it can be done by fair and reasonable interpretation.

3. Statutes \S 225½—Special act construed as exception to general act.

Where there are two acts or provisions, one of which is special and certainly includes the matter in question, and the other general, which, if standing alone, would include the same matter, the special act must be construed to constitute an exception to the general act.

4. Pleading \S 77—General procedure statute as to time for pleading and special act held not repugnant.

Pub. Laws 1919, c. 304, relating to the time for pleading in civil actions generally, held not repugnant to Pub. Laws 1919, c. 156, affording an additional and more speedy re-

lief in moneyed demands, where no defense is offered within the required time; one act being an exception to the other.

Appeal from Superior Court, Harnett County; Lyon, Judge.

Action by E. F. Young, receiver, against Z. R. Davis. From a judgment setting aside a default and granting leave to answer, plaintiff appeals. Reversed.

The facts more directly relevant to the inquiry and his honor's judgment thereon are set forth in the record as follows:

"It appears to the court, and the court finds, from the record of the cause and affidavits submitted, the following facts:

"(1) The summons in this cause was issued by the clerk of the superior court of Harnett county, April 13, 1921, returnable May 2, 1921; the last-named date being the first Monday of May.

"(2) The summons was, by the sheriff of Wilson county, together with a copy of the complaint, duly served on the defendant April 20, 1921.

"(3) The complaint, duly verified, declared on a promissory note, and demanded judgment to the amount of the note, alleging that the plaintiff was the holder in due course of said note.

"(4) On the 10th day of May, 1921, eight days after the return date of the summons, and on the second Monday of May, 1921, judgment by default final was entered by the clerk of the superior court against the defendant for the amount demanded by the plaintiff.

"(5) The defendant, on the 18th day of May, 1921, for good cause, requested an extension of time in which to answer the complaint. The defendant was informed by the clerk of the superior court of Harnett county that the time to answer would be extended as requested, and for the cause assigned, but for the fact that judgment had already been entered in the cause. The court finds further that the defendant could have and would have answered prior to the 22d day of May, 1921, had judgment not already been entered, and had the clerk of the superior court of Harnett county refused the application of the defendant for an extension of time in which to answer.

"(6) The court finds that the defendant has a meritorious defense; that the defense set up in the further defense of the answer sought by the defendant to be filed in this cause, and used in his motion as an affidavit, is a good and meritorious defense to the plaintiff's alleged cause of action.

"The court is of the opinion that chapter 156 of the Laws of 1919, was repealed by chapter 96, Pub. Laws Sp. Sess. 1920, and is further of the opinion that the judgment entered by the clerk of the superior court in this case was premature, and for that cause irregular, and that the defendant is entitled to have his motion that the judgment be set aside and that he be granted leave to answer sustained.

"It is now, by the court, on motion of the defendant, ordered and decreed that the judgment heretofore entered in this cause by the clerk of the superior court of Harnett coun-

ty be and the same is hereby set aside and declared of no effect. The defendant is permitted to file answer within 10 days from this date."

From this judgment plaintiff appealed, assigning as error the ruling of his honor that chapter 156, Laws of 1919, was repealed by chapter 96, Pub. Laws Sp. Sess. 1920, and that, the judgment of the clerk being therefore premature and irregular, defendant is entitled to have same set aside.

Ross & Salmon, of Lillington, and James Best, of Dunn, for appellant.

W. A. Lucas, of Wilson, and Pou, Bailey & Pou, of Raleigh, for appellee.

HOKE, J. Chapter 156, Laws 1919, entitled "An act to provide a more speedy determination of uncontested rights and actions upon bills, notes, bonds, and other forms of indebtedness," and duly ratified March 7, 1919, makes provision in effect that, in all such actions, summons may be returnable before the clerk on the first Monday in the month, and judgment by default rendered on the second Monday, provided such summons is issued more than 10 days before any first Monday, a duly verified complaint is filed at time of issue, setting forth a cause of action of the kind specified, a copy of same being "served on defendant at time of service," and the defendant shall neglect or fail to file a verified answer, raising material issues before said second Monday.

In chapter 304 of the same session, ratified March 11, 1919, the Legislature made provision as to the procedure in civil actions generally, the first three sections of which are as follows:

"Section 1. The summons in all civil actions in the superior court shall be made returnable before the clerk at a date named therein, not less than ten days nor more than twenty days from the issuance of said writ, and shall be served as now provided by law.

"Sec. 2. The complaint shall be filed on or before the return day of the summons: Provided, for good cause shown the clerk may extend the time to a day certain.

"Sec. 3. The answer or demurrer shall be filed within twenty days after the return day, or, if the time is extended for filing the complaint, then the defendant shall have twenty days after the date fixed for such extension: Provided, for good cause shown the clerk may extend the time for filing the answer or demurrer."

The statute contained extended and further provisions affecting procedure not specially relevant to the questions presented. At the Special Session of 1920 (chapter 96) the same Legislature enacted a statute which, in section 1, purports in express terms to amend "chapter 304 of the Laws of 1919," and which makes extended provision affecting procedure in civil causes, providing,

among other things, that the "summons in all civil actions in the superior court shall be made returnable before the clerk at a date named therein not less than ten days nor more than twenty days from the issuance of said writ," that "the complaint shall be filed on or before the return day of the summons," unless the time is extended, and that "the answer or demurrer shall be filed within twenty days after the return day," unless time is extended, etc.

After making, as stated, additional regulations affecting procedure in the civil causes to which it may refer, this statute closes with the following repealing clause:

"All of that part of chapter 304, Public Laws of North Carolina, Session 1919, not included and rewritten in this act, and all other laws and clauses of laws in conflict with this act, are hereby repealed."

[1,2] Upon this, a sufficient statement to a proper apprehension of the questions presented, we are of opinion that this chapter 96 of the special session of 1920 did not have the effect of repealing chapter 156 of the regular session of 1919, which in terms applied only to actions to enforce moneyed demands of specified kind, but the same is still in force as a permissive and selective method of procedure in the class of actions to which it refers. Speaking generally, it is recognized that in the construction of statutory law there is a presumption against inconsistency, and when there are two or more statutes on the same subject in the same or successive Legislatures, in the absence of an express repealing clause, they are to be harmonized, and each and every part allowed significance, if this can be done by fair and reasonable interpretation. In further elucidation of the position it is said in *Black on Interpretation of Laws*, pp. 328, 329:

"Where a statute contains both a general enactment and also specific or particular provisions, the effort must be, in the first instance, to harmonize all the provisions of the statute by construing all the parts together; and it is only when, on such a construction, the repugnancy of the specific provisions to the general language is plainly manifested, that the intent of the Legislature as declared in the general enacting part is made to give way. * * *

"A substantially similar rule prevails in cases where the two conflicting provisions are found in different statutes relating to the same subject. It is an established rule in the construction of statutes that a subsequent act, treating a subject in general terms, and not expressly contradicting the provisions of a prior special statute, is not to be considered as intended to affect the more particular and specific provisions of the earlier act, unless it is absolutely necessary so to construe it in order to give its words any meaning at all. Hence, where there are two acts or provi-

sions, one of which is special and particular, and certainly includes the matter in question, and the other general, which, if standing alone, would include the same matter, and thus conflict with the special act or provision, the special act must be taken as intended to constitute an exception to the general act, as the Legislature is not presumed to have intended a conflict."

[3] The principle so stated has been approved and applied in authoritative cases on the subject in this and other courts. *A. C. L. R. R. v. Brunswick Co.*, 178 N. C. 254, 100 S. E. 428; *Rankin v. Gaston Co.*, 173 N. C. 683, 92 S. E. 719; *Hannon v. Power Co.*, 173 N. C. 520, 92 S. E. 353; *Bramham v. Durham*, 171 N. C. 196, 88 S. E. 347; *Cecil v. High Point*, 165 N. C. 431, 81 S. E. 616; *Rodgers v. U. S.*, 185 U. S. 83, 22 Sup. Ct. 582, 46 L. Ed. 816; *Dahnke v. People*, 168 Ill. 102, 48 N. E. 137, 89 L. R. A. 197; *Stockett v. Bird*, 18 Md. 484. As more directly opposite to the facts presented, in *Bramham v. Durham*, it was held that—

"Where there are two acts of the Legislature applicable to the same subject, passed at different times at the same session, their provisions are to be reconciled in their interpretation, if this can be done by fair and reasonable intendment, but to the extent they are necessarily repugnant the latter shall prevail."

And in the *Cecil Case*, supra:

"Statutes on the same subject-matter should be construed together, so as to harmonize different portions apparently in conflict, and to give to each and every part some significance, if this can be done by fair and reasonable interpretation."

Recurring to the facts, it appears at the regular session the Legislature of 1919 enacted chapter 156, providing that an action could be instituted in a certain class of moneyed demands returnable in 10 days to the first Monday in any month, and judgment could be entered on the second Monday thereafter on proper proof made, and in case no verified answer raising material issues should be filed, ratified March 7th. Four days later, on March 11th, another statute (chapter 304) by the same Legislature was duly ratified, making provision as to return of summons within 20 days and answer within 20 days, etc., making extended provisions affecting procedure; this latter statute purporting to apply to "all civil actions in the superior court," and containing a repealing clause in general terms as follows:

"That all laws and parts of laws in conflict with this act are hereby repealed."

[4] Under the decisions cited, and others of like kind, and the principles they approve, we must hold that chapter 304, purporting to deal with civil actions generally, is not

necessarily repugnant to chapter 156, which affords an additional and more speedy relief in the class of actions therein specified, to wit, the moneyed demands, wherein no defense should be offered within the required time. The two acts are not, therefore, necessarily repugnant, but, on the contrary, it is clear, we think, that the one is an exception to the other, or rather the first affords an additional and more speedy method of relief in the stated class of suits. This, in our view, being the correct construction of the two acts of the regular session, the same Legislature at the special session enacted this chapter 96, making provision for the institution and mode of the procedure in civil actions generally. It begins by stating expressly that it purports to deal with this chapter 304 of the Regular Session. The general act provides for the issue of summons in 20 days, etc., in all civil actions, etc., and closes with the repealing clause as stated:

"All of that part of chapter 304 * * * not included and rewritten in this act, and all other laws and clauses of laws in conflict with this act, are hereby repealed."

If the special chapter 156 of the regular session was not in conflict with 304 of the same session, no more is it in conflict with this chapter 96, which on the question presented here is in exact accord with the corresponding section of 304 with the exception that the later act contains provision for "service by publication"; a position that is emphasized by the fact, as shown, that in express term it purports to deal only with chapter 304.

We are confirmed, also, in this view by the fact that the capable codifiers of Consolidated Statutes and their learned assistants have incorporated the two statutes of the regular session, chapters 156 and 304, in their valuable work, where they appear in separate sections, 476 and 593, not as inconsistent, but as affording two recognized methods of procedure in civil causes and in the cases specified. The legislators, at the time they passed the statute of the special session, were no doubt fully aware that both these laws of the regular session were generally recognized as existent, and had been so brought forward in the work referred to, and in restricting the effect of the act of the special session in terms to chapter 304 they thereby manifested a clear intent that the special act on moneyed demands, in the cases and to the extent specified therein, should be undisturbed.

For the reasons stated, we are constrained to differ with the learned judge in his ruling, and must hold that the judgment is in all respects regular, and the order by which same was set aside is disapproved.

Reversed.

TRIPP et al. v. SOMERSETT. (No. 293.)

(Supreme Court of North Carolina. Oct. 19, 1921.)

1. Appeal and error \S 567(2)—Agreements to extend time for settlement of cases not favored.

Agreements to extend time for the settlement of cases on appeal are not favored by the courts.

2. Appeal and error \S 567(2)—Statutory time for settling cases controlling in absence of agreement in writing or admitted.

The statute has fixed the time for the settlement of cases on appeal, and this should be strictly observed, unless there is a mutual agreement which is either in writing or admitted.

3. Appeal and error \S 567(1)—Illness of counsel no excuse for failure to settle case in time.

Illness of counsel is no excuse for failing to settle the case on appeal in time, where such counsel is not the only counsel for appellant, and, even if he is, it is the duty of the party to obtain other counsel.

4. Appeal and error \S 659(5)—Where case not settled in time, appellant should docket transcript and move for certiorari.

When for any sufficient cause the case on appeal is not settled in time to have the case docketed at the term of the Supreme Court to which the appeal should be brought, the appellant should in apt time docket a transcript of the record proper and move for a certiorari.

Appeal from Superior Court, Brunswick County; Kerr, Judge.

Action by J. F. Tripp and others against John Somerset. Judgment for plaintiffs, and defendant appeals, but on failure to docket the transcript the appeal was dismissed. On motion to reinstate. Motion denied.

Verdict and judgment against defendants who appealed, and were allowed by consent 60 days in which to serve case on appeal and plaintiff 60 days thereafter to serve counter case. The transcript on appeal not being docketed at this term at the beginning of the call of the docket of the district to which it belonged, the motion to docket and dismiss under Rule 17 (81 S. E. ix) was allowed. Immediately thereafter the appellants moved to reinstate.

Herbert McClammy, of Wilmington, for plaintiff.

Robert Ruark, of Wilmington, for defendant.

PER CURIAM. This was a motion for leave to reinstate an appeal from June term, 1921, of Brunswick, which had been dismissed for failure to docket the transcript on

appeal at this term. It appears from the affidavits filed that, just before the expiration of the 60 days allowed appellants by agreement to serve case on appeal, one of their counsel asked one of the counsel for the appellee for an extension of the time. The appellants' counsel insist that there was a verbal agreement that the time would be indefinitely extended, to which the appellee replies that the agreement for extension was upon the express agreement that the time would be extended 10 days and upon condition only that the appeal should be settled in time for the case on appeal to be docketed at this term.

[1, 2] We have often given notice that the time for the settlement of the case on appeal can be extended only by agreement of counsel and when the alleged agreement is oral it cannot be considered, if denied. This court will not pass upon the relative accuracy of memory of counsel, when they do not put their agreements in writing. Agreements to extend time for the settlement of cases on appeal are not favored by the courts. The statute has fixed the time, and this should be observed, and must be observed strictly, unless there is a mutual agreement which is either in writing or admitted.

[3] One of the counsel for the appellants also contends that the failure to settle the case on appeal was due to his illness. This, however, is not sufficient ground seeing that he was not the only counsel for the appellants, and besides, if he had been, it was the duty of the parties to employ other counsel to represent them.

[4] It is also elementary that when for any sufficient cause the "case on appeal" is not settled in time to have the case docketed at the term of this court to which the appeal should be brought, the appellant should in apt time docket a transcript of the record proper and move for a certiorari. This not having been done, the motion to docket and dismiss was properly allowed, and this motion by the appellants to reinstate and continue the cause must be denied. The appellant does not even docket a transcript of the record proper with his motion to reinstate.

These requirements for the orderly settlement of cases on appeal and for docketing the same in this court are clearly marked out by the statute and the rules of this court, and it admits of more than a mild surprise that counsel should not observe them and should take the time of the court, which is intended for the discussion and decision of cases, by motions to excuse themselves from a failure to observe the well-settled and orderly procedure which is necessary in bringing appeals to this court when a party deems that there has been error in the proceedings below. This is the second time at this term that we have been called upon to

consider the failure to observe the well-known requirements in bringing up the case on appeal, to which the appellee has a statutory right. *Kerr v. Drake*, 108 S. E. 393.

The motion to reinstate the appeal is denied.

(182 N. C. 223)

WARD v. LIDDELL CO. (No. 255.)

(Supreme Court of North Carolina. Oct. 19, 1921.)

1. Sales \S 285(2) — Notice of defects within certain time held essential to recovery for breach of warranty.

Under a contract for the sale of a cotton gin, requiring the buyer to give notice in writing within 10 days from the time the machine was set up of any original defect, and providing that continued possession or use of the gin should be conclusive evidence of fulfillment of a warranty as to the quality and capacity of the machine, the buyer could not recover for breach of such warranty, where he made no complaint of any defects until 3 months after the gin was set up.

2. Sales \S 267 — Implied warranty held excluded by express warranty.

By an express warranty of a cotton gin that it was "of good material, well made, and with proper management capable of working well for the purposes intended," any warranty that the gin would turn out as much as 22 or 25 bales per day, which might be implied from the fact that the seller's agent so assured the buyer after seeing the buyer's plant and machinery, was excluded.

3. Evidence \S 442(6) — Evidence of representations of agent as to capacity of cotton gin held incompetent.

In an action for breach of a warranty that a cotton gin was of "good material, well made, and with proper management capable of working well for the purposes intended," evidence of assurances of the seller's agent of an output of 22 to 25 bales a day was incompetent, in the absence of fraud, in view of an express provision of the contract that it contained the entire contract, and that none other, written or verbal, should form any part of it.

Appeal from Superior Court, Wake County; G. W. Connor, Judge.

Action by A. Ward against the Liddell Company. From a judgment of nonsuit, plaintiff excepts and appeals. Affirmed.

Robert C. Strong, of Raleigh, for appellant. Cansler & Cansler, of Charlotte, and Murray Allen, of Raleigh, for appellee.

HOKE, J. The written contract of sale executed between the parties contained a warranty as follows:

"The machinery specified in the within contract is warranted by Liddell Company to be of good material, well made, and with proper

management capable of working well for the purposes intended. In case of original defects in any machine, or part of machine, Liddell Company agree to make good the defect, by supplying a new machine, or a new part, provided notice of such defect shall be given, in writing, within 10 days from the time said machinery is set up and ready for operation; but continued possession or use of said machinery, after expiration of said 10 days, without such written notice, shall be conclusive evidence that the above warranty is fulfilled to the satisfaction of the undersigned, who agrees not to thereafter make other claim upon Liddell Company on account of said warranty: Provided, that in case any casting shall be replaced by Liddell Company without charge, except express charges, upon like written notice of 10 days; but on any claim for replacement of defective casting, the defective pieces shall be presented to Liddell Company, or the agent through whom the machinery was ordered, and shall clearly show the defects. Defects or failure in one part shall not condemn or be ground for claiming renewal, or for the return of any other part."

This contract also contains stipulation:

"That when this order is accepted, it is understood that the same shall be held to be the entire contract between us, and no agreement, verbal or otherwise, other than set forth herein, forms any part of this contract."

[1, 2] The evidence of plaintiff tends to show that it was 3 months after the gin was set up and in operation before plaintiff made complaint of any defects in the gin, written or otherwise, and, this being true, we are of opinion that the cause has been properly nonsuited. It is contended for the appellant that these gins, if properly constructed and with the machinery and power there operated by plaintiff, should have ginned 22 to 25 bales of cotton per day; whereas, they could never turn out more than 12 bales per day, and to plaintiff's great loss. And appellant offered to introduce testimony (excluded on objection of defendant) to the effect that defendant's agent, who was there at plaintiff's place and saw the plant and machinery at the time of the contract, and as an inducement thereto, gave express assurance that the gins would turn out as much as 22 or 25 per day. As to any implied contract or warranty embodied in this position of appellant, in *Armour Fertilizer Works v. Aiken*, 175 N. C. 398, 95 S. E. 657, it was stated to be the general rule that, subject to a few recognized exceptions (not presented on this record):

"An express warranty in an executed contract of sale will exclude one that is ordinarily implied, where the two are of the same general nature, or refer to the same or closely related subjects or qualities in the things sold."

[3] And as to the evidence offered tending to show express assurances of an output of

22 to 25 bales a day, that is incompetent further by reason of the express provision:

"That the written instrument contains the entire contract between the parties, and none other, written or verbal, shall form any part of the contract." *Bland v. Harvester Co.*, 169 N. C. 418, 86 S. E. 350; *Machine Co. v. McClamrock*, 152 N. C. 405, 67 S. E. 991.

Unless, indeed, the verbal assurances relied upon, offered in avoidance of the contract, and available to a claimant on that issue, are such as to permit the inference of fraud, and there is no allegation or claim of fraud presented. See *Machine Co. v. Feezer*, 152 N. C. 516, 67 S. E. 1004. On the record, our decisions pertinent to the precise questions involved are clearly in affirmance of his honor's ruling, and the judgment of nonsuit must be affirmed. *Farquhar v. Hardware Co.*, 174 N. C. p. 369, 93 S. E. 922; *Manufacturing Co. v. Lumber Co.*, 159 N. C. 507, 75 S. E. 718; *Allen v. Tompkins*, 136 N. C. 208, 48 S. E. 655.

Affirmed.

(182 N. C. 171)

BUCHAM et al. v. KING et al. (No. 217.)

(Supreme Court of North Carolina. Oct. 19, 1921.)

1. Fraud ¶54—Evidence held admissible to show good faith in representations as to animal's age.

In an action for fraudulent representation as to the age of a race horse sold to plaintiffs by defendant, evidence that defendant, when he purchased the horse, was handed a registry by his vendor showing the age of the horse as represented by defendant, was competent as showing defendant's good faith.

2. Evidence ¶351—Not competent to prove entries in a book giving ages of racing horses where it was not authentically compiled.

In an action for fraudulent representations as to age of race horse sold to plaintiffs, it was error to permit proof of entries in a book entitled the Year Book purporting to give the age of race horses, where it did not appear that the book was published by authority of a recognized trotting association acted upon by persons conversant with such matters as authentic and official, but which the evidence tended to show was compiled from mere statements not under oath made by persons interested.

Appeal from Superior Court, Lenoir County; Bond, Judge.

Action by A. A. Bucham and another against John L. King and another to recover damages for a false and fraudulent representation as to the age of a race horse, which induced the plaintiffs to purchase the same. The jury returned a verdict for the plaintiffs and assessed their damages at \$250, and

defendants appealed from the judgment. New trial.

Thos. C. Hoyle, of Greensboro, for appellants.

WALKER, J. [1] There was evidence for the plaintiff tending to show that the horse, which was represented to be seven years old, was actually nine years of age, and contrary evidence for the defendant. There was also proof by the defendant that, if the representation was made and was not true, the defendant acted upon the reasonable belief that it was true, having been handed a registry, at the time of his purchase, by the man who sold him the horse, wherein it appeared that the animal was but seven years old. The jury, notwithstanding this proof (which was competent as showing defendant's good faith in making his statement as to the horse's age), found against the defendant upon the issue of fraud. The court, over defendant's objection, permitted plaintiffs' witness S. B. Harper to testify that there was a book, entitled the Year Book, which purported to give the ages of race horses, that he had seen this book, and it listed the horse in question by his name, "Ned P., Jr.," and stated that the horse was foaled in 1909, from which it therefore appeared that he was nine years old at the time of the sale by the defendant J. R. Thomas to the plaintiff. This witness did not say with assured accuracy how the book was compiled, or whether it was accepted and relied on by any official body of horsemen for the information it professed to contain. His testimony in this respect was not full or satisfactory, as will appear further on, and does not show the book to be an authentic record, and it will further appear therefrom that the sources from which its author, or authors, gathered the information, to say the least of it, were very questionable. Defendants objected to this testimony because the witness could not speak of what he had seen in the book, but that the book itself was the only competent evidence of its contents and should be produced. His honor, in the beginning, when plaintiffs' first witness, Joseph Stricklin, who also referred to this book, was being examined, excluded all reference to this book, but admitted it when plaintiffs' witness S. B. Harper was testifying in rebuttal of defendants' evidence.

[2] We hold that the book would be competent and relevant evidence, under certain conditions and circumstances, which do not exist here as will appear by the following authority:

"Records published by authority of a recognized trotting association, if accepted and acted upon by persons conversant with racing matters as authentic and official, have been held admissible for the purpose of showing the speed of a horse or of others to whom he is related.

So under statute in Iowa a printed copy of a herd book in which cattle are registered has been held admissible if it be shown to be a standard authority recognized by cattle breeders; it being regarded as an historical work on a particular subject. The admissibility of books kept to register cattle and other animals as coming within the exception to the hearsay rule relating to proof of pedigree is discussed elsewhere." 17 Cyc. at p. 425(e).

And see, further, *Railway v. Sheppard*, 56 Ohio St. 68, 46 N. E. 61, 60 Am. St. Rep. 732; *Kuhns v. Chicago, etc., Ry. Co.*, 65 Iowa, 528, 22 N. W. 661; *Crawford v. Williams*, 48 Iowa, 247.

All the requisites noted in these authorities to the competency of the book are not found to be present in this case, and not even the majority of them, if any of them do, clearly appear, and those said to be lacking in the case last cited (*Crawford v. Williams*) have not been shown here. But we are of the opinion that parol evidence of an entry in the book was not competent, and should not have been received, for the reason that it does not appear that the book was made up and published in compliance with the essential requirements of the rule above stated. It was not shown that it was published by a recognized trotting association, and accepted and acted upon by persons conversant with racing matters as authentic and official. This very question was decided in *Railway Co. v. Sheppard*, supra, where it was held:

"(1) In an action to recover the value of a trotting horse, evidence of his pedigree, and that some of his blood relations have a record for speed, is competent as affecting his value, and when such record is published by authority of a recognized trotting association, and the publication is accepted and acted upon by those interested in and conversant with such matters as authentic and official, it is not error to admit evidence of the horse's speed as shown by that record."

There are other authorities to the same effect.

The cases of *Morrison v. Hartley*, 178 N. C. 618, 101 S. E. 375 (opinion by Allen, J.), and *Miles v. Walker*, 179 N. C. 479, 102 S. E. 884, do not militate at all against this view. In the *Morrison Case* the document was a letter, and in the *Miles Case* it was a written sublease. They were not records or registers of important facts or events, such as that in this case, and were not the co-operative act of a body of men or association, and were not required to be published, accepted, and acted upon by persons conversant with matters to which they relate as authentic and official, and as reliable for reference in trade transactions or in racing. Those cases held:

"Where the contents of a letter are not directly in issue and it is not the purpose of the action to enforce any obligation created by it,

its contents may be shown by parol when relevant to the inquiry." *Morrison's Case*, supra.

The principle underlying the two cases just cited is elementary that, where the writing relates to a matter collateral to the issue, but is or becomes relevant to it at any stage of the trial, its contents may be shown by parol. The party against whom it is produced may attack the testimony upon the ground that no such paperwriting ever existed, or that, if it did, its contents was not truly stated by the witness, or he may deny its relevancy to the issue, and rely upon its being collateral and immaterial. But that does not exclude the oral evidence in cases like those we have cited or which come within the rule they lay down.

It appears by the testimony of the plaintiffs' witness S. B. Harper that the alleged register or record was borrowed by him at the request of Stricklin, and that he brought it to Stricklin, one of the plaintiffs, and, so far as appears, the latter has possession of it. If the parol evidence had been competent, the defendant could have answered it by requiring the production of the book by Stricklin, if he had taken proper proceedings to that end, or, if a third party had the register, by a subpoena duces tecum issued to him or other appropriate procedure. But the parol evidence was incompetent because the book itself was not competent, and if plaintiffs wish to avail themselves of the book's contents, or any part thereof, they must in some way show the facts in regard to it which we have stated above, or something substantially to the same effect. S. B. Harper, plaintiffs' witness, testified:

"I saw the Year Book. Said book listed the horse, age of which was in controversy, as 'Ned P., Jr.,' and stated that he was foaled in 1909. I borrowed the book and brought it to Stricklin. There were no sworn statements in the book, but it claimed to give the record of race horses and their age. I do not know where the information is secured from. I saw the horse driven around the track, and he was a nice horse and moved nicely."

Defendants' witness N. M. Reaves testified:

"The book referred to by Harper was what is known as the Year Book, and is just about on a par with a newspaper report. It is made up by men who go around and see the races and get their information as best they can from statements given them. They do not mean to misrepresent, but the information thus gathered is not always correct. They often make mistakes. The statements are not sworn to."

While under this and other similar testimony the reliability of the "Year Book" may be seriously questioned, as ably argued by Mr. Hoyle, it was not evidence under the present facts, and could not be referred to for information as to pedigree and age by the witness.

If the book itself would not be competent, if introduced, without further evidence as to its nature, make-up, and reliability, oral evidence of its contents cannot be introduced.

We were not favored with a brief from the plaintiff, which, if filed, would, we have no doubt, have aided us very much in and greatly facilitated our investigation of the case, which has been prolonged for the lack of it. It was necessary for us to ascertain if there was any legal ground upon which this oral evidence could be held as competent, and by an exhaustive and patient search among the best authorities on the subject we have not been able to find any, but, as appears above, the authorities are the other way. We are greatly helped in our work here by the unusually well prepared briefs of counsel, which are the results of their deliberate thought upon and consideration of the questions involved, and we express the hope that they will give us the benefit of them, whether compelled by our rule to do so or not, and as a voluntary contribution to the correct decision of the case. We have been the more careful in the study of the plaintiffs' side of the case because of the absence of a brief, and have formed our conclusion definitely after a full investigation of the same.

This is an important case for the defendant Thomas at least, as there is more involved for him than mere dollars and cents, his character having been gravely impeached by the verdict, finding that he was guilty of a fraud in a horse trade, and, if he is unable finally to acquit himself of the charge, it will be a permanent record against him and a serious handicap to him in his future life. It is also important to the plaintiffs, so far as mere money can make it so, as they have recovered \$500, the original price of the horse. The plaintiffs' note which they gave for the purchase price has been transferred to a purchaser in due course for value and without notice, and they are entitled, therefore, to recover for the fraud, if any was practiced upon them.

The verdict will be set aside and a new trial ordered because of the error in admitting the evidence as to the contents of the book.

New trial.

(131 Va. 305)

RUDOLPH v. FARMERS' SUPPLY CO., Inc., et al.

(Supreme Court of Appeals of Virginia. Sept. 22, 1921.)

1. Corporations §428(3)—Knowledge gained by salesman and acting secretary of corporation in casual conversation held not notice to corporation.

Knowledge gained by a salesman and acting secretary of a corporation in a casual conversation with dealer in secondhand cars that such dealer had a certain car for sale which had been sold under a conditional contract by the corporation to the person who had sold it to the secondhand dealer was not notice to or knowledge on the part of the corporation; such salesman and acting secretary not then acting within the sphere of his duty or attending to the business of the corporation.

2. Sales §473(2)—Sale by vendee to dealer with shifting stock does not deprive original vendor of lien.

Where plaintiff sold automobile, reserving title and docketing a memorandum of the contract in the clerk's office of the circuit court under Code 1919, § 5189, it could not be deprived of the benefit of the lien by the supervening act of the vendee in selling the same to a dealer, without the knowledge of the vendor, and thereby allowing the automobile to become a part of a shifting stock and to be sold to a bona fide purchaser for value.

3. Sales §480(1)—On recovering automobile in hands of innocent purchaser vendor should assign notes to such purchaser.

Where vendee of automobile under conditional contract sold the same to a dealer in secondhand automobiles, who had a shifting stock, and it was purchased by defendant without knowledge of the lien, original vendor, in obtaining possession of the car to enforce its lien, should assign to defendant unpaid notes of the original purchaser, if defendant should pay the balance due the original vendor, or if the car should be sold for an amount sufficient to satisfy the lien.

Appeal from Law and Chancery Court of City of Roanoke.

Bill by the Farmers' Supply Company, Incorporated, against L. S. Rudolph and another. From a decree for complainant, the named defendant appeals. Affirmed, with directions.

Willis, Adams & Hunter, of Roanoke, for appellant.

Hall, Wingfield & Apperson, of Roanoke, for appellees.

SAUNDERS, J. On December 17, 1919, the Farmers' Supply Company, a corporation doing business in the city of Roanoke, sold to L. W., W. M., and J. O. Garman, citizens of Roanoke county, a Maxwell touring car for the sum of \$1,125.

By a written agreement between the parties, \$300 of the purchase money was to be paid in cash, and the balance to be paid in eleven installments of \$75 each, all of these deferred installments to be evidenced by notes of the buyers. It was further agreed that the Farmers' Supply Company was to retain title to the said car until the whole of the purchase price was paid. A memorandum of this contract was duly docketed in the clerk's office of the circuit court of Roanoke county on December 19, 1919. Thereafter this automobile was sold by the Garmans to one Walter L. Davis, a resident and dealer in secondhand automobiles in the city of Roanoke. L. S. Rudolph, the appellant in this proceeding, bought said automobile from Davis without knowledge of any reservation of title thereon. Later Davis failed in business and absconded. Thereupon the Farmers' Supply Company filed its bill in chancery against the Garmans, and L. S. Rudolph, alleging, among other things, that a balance was due from the said Garmans on the purchase price of said automobile, and that it held a lien on same which it was entitled to enforce. To this end, as well as in other respects, the aid of the court was asked.

Rudolph answered this bill, setting up that he was a purchaser for value of said automobile without knowledge or notice of the contract of sale relied upon by the plaintiff; that Davis was a dealer in automobiles in the city of Roanoke, and the automobile in question was a part of a shifting stock of merchandise; that complainant was aware "during the time that Davis had possession of the automobile, and at the time of its purchase by respondent, that said Davis was conducting a business of buying and selling automobiles," and that with this knowledge "complainant suffered and permitted Davis to retain said automobile as a part of a shifting stock of merchandise, and thereby lost its right to subject said automobile to sale under its contract, as against a bona fide purchaser for value and without notice or knowledge of said contract."

The answer asked that same be treated as a cross-bill, and that a decree be entered relieving respondent of any liability under and by virtue of complainant's contract; and, in the event the lien was held to be valid, asking that the Garmans be "ordered to reimburse said respondent in whatever sum he might be compelled to pay complainant to satisfy said lien."

No process appears to have been issued against the Garmans to answer the cross-bill, and the same was not taken for confessed as to them.

Upon the hearing of the bill, answer, depositions, and exhibits, the courts established the complainant's lien, and directed

the automobile to be sold in satisfaction of same, but refused to give a decree of reimbursement in favor of Rudolph against the Garmans, as prayed in said Rudolph's cross-bill.

An appeal from this decree was allowed by one of the judges of this court, thereby bringing the whole controversy before us for consideration and review.

The contentions of the appellant are:

I. That the automobile in the possession of Davis as a dealer was an article of shifting merchandise, and that, as against an innocent purchaser, the lien of the initial vendor was not enforceable. The case of *Boice v. Finance Corporation*, 127 Va. 563, 102 S. E. 591, 10 A. L. R. 654, is relied upon to support this contention. Further, it is contended that the officers of the Supply Company not only knew that Davis was conducting a retail automobile sales business, and acting as agent for them, but knew that Davis had this particular car in his place of business for sale.

II. That the court, after establishing complainant's lien should have given judgment over in favor of Rudolph against the Garmans, or in lieu thereof should have required that the notes for the unpaid deferred instalments on the car, if paid by Rudolph, should be "assigned to him by the Farmers' Supply Company, without being marked paid."

The evidence relied upon to show that the Farmers' Supply Company (appellee) was aware that the car sold the Garmans was in the hands of Davis for resale as one of a stock of second hand cars is not impressive. W. E. McGuire, Sr., is the President of the Farmers' Supply Company. He was examined for the plaintiff, and stated that Davis sold cars for his company on commission, but did not think he represented them at the time he bought the Garman car. Witness had been told that "Davis had been selling cars at a secondhand automobile place," but "knew nothing about his business." Witness' son, W. E. McGuire, Jr., "was a salesman for the Farmers' Supply Company," and also "secretary-treasurer. He was acting secretary." Further, this witness stated that he did not think that Davis was selling for the Supply Company up to June 1, 1920.

Davis states that he bought the Garman car some time in 1920, about May 20th, but adds that when he made this purchase "he was not agent for the Farmers' Supply Company," thereby positively confirming McGuire's impression in this respect. The following extracts from the testimony of this witness relate to the alleged imputed knowledge of the Supply Company that the Garman car was in Davis' hands for sale, and constituted a part of his stock in trade:

"Q. State whether or not any officer or agent of the Farmers' Supply Company knew that you had this car.

"A. The young Mr. McGuire knew that I had this car, for he had a talk with me. He is acting secretary. I told him that I had the car there.

"Q. Did you tell him that you had the car for the purpose of disposing of it?

"A. Yes; I could not say that we were talking about having the car there; I would not say that.

"Q. He knew that you had bought it?

"A. Yes.

"Q. Did young Mr. McGuire see this car when he was there?

"A. I would not be sure whether he did or not. * * *

"Q. Were you selling the car for the Farmers' Supply Company to the Garmans?

"A. Yes.

"Q. Were you agent at that time for the Supply Company?

"A. Yes.

"Q. At the same time you were running this business?

"A. No.

"Q. But I understood that you were acting as agent for the Farmers' Supply Company?

"A. Not when I bought this car from Garman."

From the foregoing testimony it will be perceived that Davis bought the Garman car after he ceased to represent the Supply Company.

This testimony also shows that it was in an apparently casual conversation with young McGuire some time in 1920, and not in the course of business (for he did not represent the company at the time) that he told the latter that he had this car for sale.

[1] Would this conversation be sufficient to impute to the Supply Company knowledge that the car in question was in the hands of Davis for sale, and a part of his stock? The answer to this query must be in the negative.

"While a corporation knows a fact only as its officers and agents know it, it does not know all that its agents know, but only what comes to them while acting for the corporation within the scope of their agency, when it is their duty to report their knowledge to the general officers, or agents of the company, and it may be presumed that they have told their principal what they know." *Corrigan v. Bobbs-Merrill Co.*, 228 N. Y. 68, 69, 126 N. E. 260, 10 A. L. R. 662.

"The prevailing rule upon this subject in the federal courts is that notice to an officer of a corporation is not such notice to the corporation as to affect its rights, unless such notice or knowledge of the officer is in regard to a matter coming within the sphere of his duty while attending to the business of the company, and acquired while acting in regard to the same." *McDermott v. Hayes*, 197 F. 129-135, 116 C. C. A. 553, 559.

"The rule that notice to an officer or agent is notice to the corporation applies as a general rule only where the matter with reference

to which notice is given or acquired is within the scope of the officer's or agent's authority, and has some direct connection with his agency, and the notice or knowledge comes to or is possessed by him in his official or representative capacity, and where the officer or agent in the line of his duty ought and could reasonably be expected to act upon or communicate the knowledge to the corporation; and hence the corporation is not affected with knowledge which the officer, or agent, acquires while not acting within his authority, or which relates to matters not within the scope of his authority, or which is acquired by a person who is not an officer or agent of the corporation." 14A Corpus Juris, p. 487.

In the case of *Taylor v. Sutherland-Meade Tobacco Co.*, 107 Va. 787, 790, 60 S. E. 132, it appears that an affidavit in attachment which the Code required to be made by the plaintiff, his agent, or attorney, was signed by the secretary and treasurer of the corporation.

The court held that this affidavit did not show on its face that it was made by an agent of the corporation, the court not taking judicial knowledge of the fact that such officer was, *virtute officii*, the agent of the corporation.

In the instant case it appears that a salesman of the Supply Company and its acting secretary, in a conversation with Davis after the latter had ceased to be an agent for the Supply Company, was apprised that Davis had the Garman car for sale. It is not established nor sought to be established that this knowledge was secured by McGuire while acting within the sphere of his duty and attending to the business of his company. Nor does it in any wise appear that it was McGuire's duty to report the information thus secured to the general officers or agents of his company.

Hence, under the circumstances revealed, McGuire's knowledge was not the knowledge of the Supply Company, and, if this casual communication of information by Davis is to be regarded as notice to McGuire, it was not notice to the Farmers' Supply Company.

[2] The elimination of this feature of the instant case leaves remaining for determination the inquiry whether the holder of a lien such as was reserved in this case, valid in all respects in its inception and recordation, shall be deprived of the benefit of same by the supervening act of his vendee who sells the same to a dealer without the knowledge of his vendor, thereby allowing the mortgage chattel to become a part of a shifting stock, and in the result to be sold to a bona fide purchaser for value, and without knowledge or notice of the contract.

The facts upon which the decision rests in the case of *Boice v. Finance & Guaranty Company* are widely different from the facts in the case in judgment.

Gordon, a licensed dealer in automobiles, with a salesroom and storeroom on Broad street in the city of Richmond, purchased certain automobiles from the National Company. He borrowed the money with which he paid for these automobiles from a Guaranty Company in Baltimore, Md. To secure the notes given for this borrowed money, he executed a chattel mortgage which was duly recorded in the city of Richmond. Thereafter the automobiles in question passed into and became a part of his stock in trade in his salesroom. C. Boice, the plaintiff in error, purchased and paid for one of these cars, on which a balance of purchase money, secured as aforesaid, was still due. Thereupon the guaranty company brought an action of detinue to recover possession of the automobile. The evidence showed that the guaranty company was aware that Gordon was exposing and offering for sale to the general public the automobiles in his showroom or salesroom, and that the automobiles upon which the chattel mortgages were given were bought for sale and placed in said salesroom for that purpose. The question presented was, Who had the superior claim to the automobile, Boice or the guaranty company? Boice was a subsequent purchaser for value from Gordon, without actual notice of the existence of the mortgage. The court held that—

"If the owner stands by, and permits a seller who is a licensed dealer in such goods to hold himself out to the world as owner to treat the goods as his own, to place them with other similar goods of his own in a public showroom, and offer the same indiscriminately with his own to the public, he will be estopped by his conduct from asserting his ownership against a purchaser for value without notice of his title.

"The constructive notice furnished by a recorded mortgage or deed of trust in such cases is not sufficient. The act of knowingly permitting the goods to be so handled and used by the seller in the ordinary and usual conduct of his business is just as destructive of the rights of the creditor as if such permission had been expressly granted in the mortgage, or deed of trust." *Boice v. Finance & Guaranty Co.*, 127 Va. 563, 102 S. E. 591, 10 A. L. R. 654.

It will be noted in this case that the owner loses his lien because his conduct estops him from enforcing it. No such situation is presented in the instant case. The Supply Company sold a car to the Garmans, not to become part of a shifting stock on exhibit for sale, but for their personal use. A lien for the deferred balance of purchase money on this car was reserved in a written contract, pursuant to the statute, and a memorandum thereof duly recorded in the clerk's office of the county of the vendee's residence.

[3] The vendor was not aware of the subsequent sale to Davis, and did not "stand by and permit" Davis to place the car in his

salesroom, and offer the same for sale to the public. Hence there is no estoppel by conduct. The sole ground upon which the Supply Company could be deprived of its lien in the instant case would be upon the theory that, after a lien is reserved under section 5189, it is the duty of the vendor to keep track of the chattel, and, if it is sold to a dealer, and becomes part of a shifting stock, to take prompt and appropriate steps to preserve his lien, and prevent a sale to an innocent purchaser. There is nothing in section 5189 to indicate that the General Assembly, when it gave the lien which that section affords, intended to place upon the vendor the duty of following the subsequent course of the chattel sold by him, and, failing in this duty, incur the penalty of losing his lien in the event that in the ultimate such chattel without his knowledge became a part of a shifting stock, and was sold to an innocent purchaser. It would be unreasonable to place such an interpretation upon the statute. The controlling principle asserted and established in *Boice v. Finance & Guaranty Corporation*, supra, is that the company's conduct was as destructive of its right to assert its lien as if it had expressly included in the mortgage provisions adequate to defeat its purposes. It is not perceived that the Law and chancery court of the city of Roanoke erred in upholding the lien in question, and its action in that respect is sustained. It is considered, however, that to the extent of the balance due to the Supply Company upon the car in question, should the appellant pay the same, or said balance be recovered by the said company by means of sale of the automobile under the decree under review, the Supply Company should and is hereby required to assign the notes of said Garmans, above mentioned, together with the lien upon the automobile, to the said Rudolph, without recourse as to said company.

Affirmed.

BURKS, J., absent.

(131 Va. 202)

LYNCH et al. v. CLINCH MOTOR CO.

(Supreme Court of Appeals of Virginia.
Sept. 22, 1921.)

1. Appeal and error \S 71(3)—Order refusing to dissolve injunction appealable.

An appeal will lie from an order refusing to dissolve an injunction.

2. Appeal and error \S 447—Appeal from order refusing to dissolve injunction does not forestall order at final hearing.

The granting of an appeal from an order refusing to dissolve an injunction does not forestall the order to be made at final hearing.

3. Appeal and error \S 863—Matters not finally decided on appeal from order refusing to dissolve injunction.

On an appeal from an order refusing to dissolve an injunction restraining defendants from entering the automobile business, made before final hearing, conflicting affidavits leave the matter in too much doubt for final decision, so that the cause should be remanded for proofs necessary to final determination.

Appeal from Circuit Court, Washington County.

Bill by R. T. Sutton and another, copartners as the Clinch Motor Company, against T. B. Lynch and another, to enjoin defendants from entering the automobile business. From an order refusing to dissolve the injunction, granted in accordance with the prayer of the bill, the defendants appeal. Appeal dismissed without prejudice.

Burns & Kidd and Bird & Lively, all of Lebanon, for appellants.

Finney & Wilson and S. B. Quillen, all of Lebanon, for appellees.

BURKS, J. R. T. Sutton and C. B. Sutton, partners as Clinch Motor Company, filed their bill in equity to enjoin T. B. Lynch and Joe Monk from going into the automobile and garage business at Lebanon, in Russell county, Va., in violation of their alleged contract not to do so within a given time. Lynch and Monk had been engaged in that business as partners, under the firm name of Lebanon Garage & Machine Company, for some time prior to January 13, 1919, and both partnerships were so engaged on that date, when the following contract was entered into:

"This contract, made this the 13th day of January, 1919, by and between Lebanon Garage & Machine Company, hereinafter known as the party of the first part, and Clinch Motor Company, hereinafter known as party of the second part, witnesseth:

"That party of the first part this day sell to party of the second part their garage and shop equipment and accessories, which includes Ford and Maxwell parts; party of the first part agrees to sell party of the second part their parts, accessories, shop equipment, and building at cost, plus expense of placing same in stock; party of the first part agrees to not go into garage or automobile business within 3 years from the above-mentioned date, within a radius of twenty miles on either side of Lebanon, Russell county, Va. [Signed] L. C. Mch. Co., by Joe Monk, Party of the First Part. Clinch Motor Co., by R. T. Sutton, Mgr., Party of the Second Part."

Soon after this contract was entered into a corporation was organized and chartered to do a rival business in the town of Lebanon, in which both Lynch and Monk became officers and active participants in

the business. The original bill was a pure bill of injunction, but soon after it was filed an amended bill was filed, making some changes in and additions to the original bill, and the prayer of the bill was enlarged, so as to ask that the defendants be required to compensate the complainants for the damages already done, and for the ascertainment of such damages by proper accounts to be ordered and taken. The application for the injunction, of which notice had been duly given, was to have been heard on January 13, 1920, but owing to causes for which the complainants were not responsible was not heard till March 10, 1920. In the meantime the bill had been amended, and the motion was heard on the original and amended bills, the demurrers and answers to each, and upon affidavits filed by the complainants and the defendants. Written briefs were also filed by counsel on both sides. Upon this hearing the demurrers were overruled, and the injunction was awarded as prayed for on March 10, 1920. On April 20, 1920, the defendants gave notice that they would move to dissolve the injunction on April 29, 1920. On the latter date the motion to dissolve was heard upon the pleadings and affidavits heard at the original hearing, and on the affidavits of the parties thereafter made, and on certain written motions filed by the defendants which need not now be considered. The court took time to consider of its judgment, and by an order entered June 18, 1920, refused to dissolve the injunction. From this order the present appeal was taken.

[1] The right to appeal from an order refusing to dissolve an injunction seems to be settled in this state, and is placed on the ground that it adjudicates the principles of the case. It is said that—

"The refusal to dissolve the injunction adjudicated the principle to this extent: That the injunction had not been improvidently awarded, and that as the cause then stood it ought to still be continued. It is therefore such an order as may be appealed from." *Baltimore & O. R. Co. v. City of Wheeling*, 13 Gratt. (54 Va.) 40, 59.

See, also, *Kahn v. Kerngood*, 80 Va. 342; *Bristow v. Home Building Co.*, 91 Va. 18, 23, 20 S. E. 946, 947; *Norfolk & W. Ry. Co. v. Old Dominion B. Co.*, 97 Va. 89, 90, 33 S. E. 385.

[2] But the granting of the appeal does not in any way forestall the order to be made at the hearing. It simply operates to put the case on the docket of this court for such order to be made therein at the hearing as appears to be right and proper.

A number of questions of great interest and importance were raised, and they have been discussed before us in briefs of more than ordinary ability, and with a very full

citation of authority. Some of them are pure questions of law, that might be disposed of on the present record; others are dependent on the facts. On the former, we do not wish to be understood as expressing any opinion, but will reserve our opinion until the case can be heard on the facts also.

[3] It will be observed that no testimony was taken in the cause, but that it was heard on purely ex parte affidavits. Among the questions discussed in the briefs were the power of Monk to make the contract; whether the same embraced the "good will" of the sellers' business; whether the contract was of such nature as to be void because in restraint of trade; whether or not the contract had been ratified by Lynch, if not originally authorized by him; and whether or not the complainants were barred of relief by reason of their laches in the enforcement of their rights. It is readily observed that most, or all of these questions, will be seriously affected by the facts of the case, and these have not been fully or sufficiently presented. The facts are to be gathered chiefly from the parties themselves, two on each side. None of them has been sworn to tell the whole truth, and each has apparently presented his side of the case, and has left unsaid facts material to a correct determination of the case. On some of the most material points the affidavits are in direct conflict. Both cannot be true. The transaction was of such nature that the parties thereto must have known facts which are not stated in their affidavits. These facts would most probably have been developed on cross-examination, and the accuracy of the witnesses' statements would have been tested by details not contained in the affidavits, but neither party has had the opportunity of cross-examining the other's witnesses. The conflicting affidavits leave the facts of the case in too much doubt and uncertainty to form a safe basis for the determination of the rights of the parties. The practice of receiving affidavits on an application for an injunction, or on a motion to dissolve, is too well established in this state to require the citation of authority, but they are not entitled to the same weight as depositions taken after notice to the opposite party and an opportunity for cross-examination. It is true that on a pure bill of injunction very summary proceedings are allowed, and are sometimes necessary, but they must be compatible with the correct decision of the case in question. As well said by Moncure, J., in *Baltimore & O. R. Co. v. Wheeling*, *ubi supra*:

"Irreparable mischief may be done, not only by denying, but also by granting and refusing to dissolve an injunction."

The case in judgment is of that nature. Very serious, if not irreparable, damage

may be done to one or the other of the parties if the case is decided on the present record. The case should be remanded for proof in the usual form, and then heard on its merits.

The appeal will therefore be dismissed as prematurely awarded, at the costs of the appellants, but without prejudice in any way to their rights.

KELLY, P., absent.

(191 Va. 253)

O'QUINN v. HAZEL LAND CORPORATION
et al.

(Supreme Court of Appeals of Virginia. Sept. 22, 1921.)

1. Judicial sales \S 27(2)—Purchaser, cast in judgment for failure to complete purchase, held not entitled to reimbursement from proceeds of further sales.

Purchaser at sale of land at suits of holders of several liens, failing to complete his purchase and compelled to pay loss incurred by resale for lesser amount, was not entitled to reimbursement from surplus from proceeds of sales of other lands of the debtor in the same proceedings, or entitled to subject other lands sold by the debtor to his claim for reimbursement by virtue of an agreement between him and the debtor, unknown to the subsequent purchasers, that he should be saved harmless by reason of his purchase; his remedy, if any, being against the debtor on such agreement.

2. Lis pendens \S 26(1) — Lands subject to owner's debts in inverse order of alienation.

If a purchaser at judicial sale, compelled to pay loss sustained by his failure to complete the purchase, was entitled to reimbursement for such loss out of lands sold by the debtor pending the proceedings, the lands first aliened would be last subject to such claim.

Appeal from Circuit Court, Dickenson County.

Petition of W. O'Quinn in numerous creditors' suits against J. P. Laforce, which were heard together for enforcing liens. Sale was ordered, at which W. O'Quinn purchased six tracts of land. Failing to pay purchase money, the land was resold, resulting in a deficit, for which judgment was taken against O'Quinn, which he paid in full, and between the time of sale and resale the Hazel Land Corporation purchased of the debtor certain other tracts, which were subsequently sold, resulting in a surplus, and O'Quinn petitioned to be reimbursed therefrom for the judgment he had paid, and from a decree sustaining a demurrer by the Hazel Land Corporation and others to the petition, and dismissing the petition, O'Quinn appeals. Affirmed.

W. B. Phipps, and S. H. & G. C. Sutherland, all of Clintwood, for appellant.

Chase & McCoy, of Clintwood, Harman & Probst, of Tazewell, for appellees.

KELLY, P. This is an appeal from a decree sustaining a demurrer to a petition interposed by W. O'Quinn in several lien creditors' suits against one J. P. Laforce and others.

Laforce owned a number of tracts of land, some of which were incumbered by deeds of trust, and all of which were subject to the liens of sundry judgments against him. Numerous suits were brought from time to time, all of which were finally heard together, for the purpose of enforcing the liens aforesaid against the Laforce lands. There was a report of the liens by a commissioner, and a judicial sale ordered, at which six certain tracts of land owned by Laforce (being only a portion of his real estate) were purchased by W. O'Quinn at the aggregate price of \$3,160, for which he gave his notes, with personal surety, payable in one, two, and three years. This sale was confirmed on condition that the costs and commissions should be paid within 30 days; otherwise, a new sale was to be made on the same terms as in the previous decree. It does not affirmatively appear from that portion of the record in the aforesaid chancery causes accompanying the petition now before us that this condition was ever complied with, but the clear inference is that it was, for the record in hand does disclose that the sale thereafter was dealt with by the court, the commissioner, and the parties, including O'Quinn, as having been duly confirmed.

O'Quinn failed to pay his purchase-money notes, and after due service of a rule against him and his sureties to show cause why the lands should not be resold at their risk, a resale was ordered and made, which resulted in a loss or deficit of \$1,584.54 in the fund belonging to the creditors, for which a judgment was duly rendered against O'Quinn and his sureties, and afterwards paid in full by O'Quinn.

While the aforesaid suits were pending, but before there had been any decree of sale therein, J. P. Laforce sold and conveyed to Harrison Austin 59 acres of land, and Austin thereafter conveyed a part thereof to W. J. Leftwich. This 59 acres was affected by some of the judgments against Laforce, but having been among the first aliened by him was, of course, to be among the last subjected to his debts. It was not one of the six tracts sold to O'Quinn.

Subsequently, but before the sale was made to O'Quinn, by decree of October 14, 1914, J. P. Laforce was permitted to convey to W. M. Ritter Lumber Company 139 acres of land involved in the litigation for \$1,700, which sum was paid into court, and the liens as to

the land thus sold and conveyed were transferred therefrom to the fund thus arising.

And between the date of the original sale to O'Quinn and the resale at his risk, J. N. Harman, trustee, acting on behalf of the Hazel Land Corporation, purchased from J. P. Laforce four tracts of land and 1,000 standing trees, all of which were subject to some or all of the liens sought to be enforced in the aforesaid chancery suit, but none of which had been sold therein. It therefore appeared that at the time of the purchase by Harman for the Hazel Land Corporation there was a fund in court represented by the notes of O'Quinn and his surety for \$3,160 available to owners of the liens sought to be enforced.

The proceeds of the lands sold to the W. M. Ritter Lumber Company and of the six tracts sold first to O'Quinn (and afterwards to another purchaser, with a judgment over against O'Quinn for the deficit), and of certain other lands sold in the cause, but not necessary to be further referred to herein, not being sufficient to pay all of the liens against the real estate owned by Laforce, the several causes were again referred to a commissioner to ascertain the other lands of Laforce not theretofore sold which were liable to the judgments and liens remaining unsatisfied. The commissioner reported among other things that a certain 5-acre tract should be first sold; that the Hazel Land Corporation property should be next sold; that a certain 1-acre tract should come next; that the Harrison Austin and W. J. Leftwich land should be sold as fourth in order of priority, and so on as to other tracts in the inverse order of their alienation by Laforce. This report was confirmed, and a sale ordered and made accordingly, but it was unnecessary to go beyond the Hazel Land Corporation tract to satisfy the liens. As a matter of fact it developed that the Hazel Land Corporation property (exclusive of the standing trees), which was bought by H. Claude Pobst at the price of \$2,245, was more than sufficient to pay off all the liens, and there remained in the hands of the court a surplus fund of about \$1,000 realized from the sale of the latter property. Thereupon O'Quinn filed his petition, in which he prayed that he be awarded the \$1,000 surplus, and that the unsold lands of J. P. Laforce and the Austin and Leftwich land and the 1,000 trees aforesaid, owned by the Hazel Land Corporation, be sold "to reimburse petitioner."

This very remarkable claim on the part of appellant seeks a foundation in the following extract from the petition setting up the claim:

"Your petitioner would further state that before he bid at the sale by Special Commissioner Geo. C. Sutherland, he was surety on the \$475 judgment owing to T. G. Kiser (a joint judgment against Laforce and O'Quinn), and, as

the lands of J. P. Laforce were being sold to satisfy that as well as other liens, your petitioner was anxious to see all of the said J. P. Laforce debts paid in order to save petitioner harmless, and that before the sale of said tracts by Commissioner Sutherland in which petitioner became the purchaser, J. P. Laforce told petitioner to bid the land off for said amount, and if petitioner would do so, he, J. P. Laforce, assured him that he, the said J. P. Laforce, would sell the other tracts of land owned by him, said J. P. Laforce, or execute deeds of trust, as well as on other property, and, if necessary, the tracts which were sold by Special Commissioner Sutherland and bid in by this petitioner, and from the money thus realized by deeds of trust or other sales, the said J. P. Laforce would pay off all the debts and the notes executed by this petitioner to said Commissioner Sutherland. This petitioner would also state that he knew, and was fully aware, the said J. P. Laforce owned other lands, and petitioner was willing that the said J. P. Laforce should take all of his lands (that which was unsold as well as the portion being sold by Commissioner Sutherland) and sell the same, or obtain the money by deeds of trust or otherwise, and pay off and discharge all of the judgments, including the one to T. G. Kiser, for which petitioner was surety, and also pay and satisfy the notes which petitioner executed to Commissioner Sutherland for the lands bid in by him. Petitioner also knew that the lands were of sufficient value to enable the said J. P. Laforce to sell the same and discharge all the judgments and liens against the same, including the notes executed by petitioner to Commissioner Sutherland, and, relying upon the representations and statements of said J. P. Laforce that he would sell all or such amount of his lands as would discharge all liens against the same, and the notes executed by this petitioner to Commissioner Sutherland, your petitioner made the said bids at the sale by the said Commissioner Sutherland; and that he would not have made said bids and executed said notes had it not been for the representations made by the said J. P. Laforce; for this was the inducing cause and motive. And petitioner would further state that after said notes were executed to Commissioner Sutherland, and after the rule was served upon him and his sureties, the said J. P. Laforce still assured this petitioner that he would, in the manner he had represented, pay off and discharge the liens as well as the notes executed by petitioner to Commissioner Sutherland, and assured this petitioner that he need not give the matter any notice or concern, and thereby lulled this petitioner into a sense of security, which caused him not to attend the other sales of the lands afterwards made in these causes."

To the foregoing petition the Hazel Land Corporation, Harrison Austin, and W. J. Leftwich demurred upon several grounds, among which were the following:

"(2) That the alleged agreement between O'Quinn and Laforce was a private matter in which the demurrants were not interested.

"(3) That the purchase by W. O'Quinn of the six tracts of land at the judicial sale for \$3,160 was a new and independent obligation on his part to the court, and any loss suffered by

him thereunder is his individual loss, and cannot be asserted against the lands of demurrants; that O'Quinn simply had the verbal promise of J. P. Laforce to make sale of his lands, or borrow the money thereon, and pay off his own indebtedness, and also pay the notes which O'Quinn executed to the court for the six tracts purchased at the judicial sale for \$3,160, and that such agreement would not give a lien on any lands of J. P. Laforce, or give him the right of subrogation to the lien of any lienholder, or prevent J. P. Laforce from selling his lands.

"(4) * * * That even if such an agreement should place an obligation on Laforce to reimburse O'Quinn for the \$3,160 bid by O'Quinn at the judicial sale of the six tracts of land, it would be an open account of O'Quinn against Laforce, without lien or equity of any kind; and that in no event would such an agreement affect the lands of demurrants."

The court sustained the demurrers, dismissed the petition as to the Hazel Land Corporation and Austin and Leftwich, directed that the \$1,000 surplus realized from the sale of the Hazel Land Corporation's land be paid over to it, and provided that process should issue upon the petition against J. P. Laforce if the petitioner should so request. It is from this decree that the present appeal was allowed.

[1] The foregoing statement of the case is greatly abridged from the account thereof contained in the petition upon which the decree complained of was rendered. The outline we have given, however, embraces all the facts appearing in the petition which are essential to a proper decision of the controversy; and from that outline it is manifest that there is no error in the decree to the prejudice of the appellant. To state the case is to decide it.

The relief sought by O'Quinn was based upon his alleged relationship as surety for Laforce. If this relationship existed, except as to the \$475 judgment against him and Laforce, it arose from the verbal agreement set out in the petition and quoted above. Neither as to the judgment nor as to the agreement did the Hazel Land Corporation have any notice of the alleged relationship of surety on O'Quinn's part. He became a purchaser just as any other stranger might have done, and raised none of the questions which he is now raising until after his own default had been in large measure the cause of the situation of which he here complains. He gave his obligations in a new and independent contract with the court, failed to meet these obligations or to show any reason why he should not do so, and permitted the lands to be resold at his risk, with a resulting loss. If he has any recourse, it is against Laforce, and this recourse was expressly offered him by the decree complained of.

[2] As to the Austin and Leftwich lands, it is sufficient to say that there is no possible

view of the case in which O'Quinn can justly ask that they be sold for his benefit. They were among the first of the lands to be aliened by Laforce, and the proceeds of other lands liable in advance of the former fully satisfied the liens sought to be enforced.

The decree complained of is affirmed.

Affirmed.

PRENTIS and BURKS, JJ., absent.

(131 Va. 640)

ALLS et al. v. COMMONWEALTH.

(Supreme Court of Appeals of Virginia. Sept. 22, 1921.)

1. Ball ¶82—Need not show that recognizance sought to be forfeited was in legal form.

The purpose of a writ of scire facias to forfeit a recognizance is merely to give notice to defendant of application for award of execution to enable him to show cause why the recognizance should not be forfeited, and it need not show on its face that the recognizance was in legal form, and need not recite all conditions of the recognizance, being sufficient if it identifies the recognizance.

2. Ball ¶58, 59—Recognizance held valid.

A recognizance was not invalid because it did not require the defendant to appear before the court, or any court, but only before the judge, or because language therein, "to answer said indictment," was not sufficiently definite to identify the indictment, and hence not equivalent to statutory requirement that condition of recognizance should be that the defendant shall appear "to answer for the offense with which such person is charged," it appearing in the caption in which the form of the recognizance appeared that the indictment was for violation of the Prohibition Law, in view of Code 1919, §§ 4973, 4981.

3. Ball ¶58—Recognizance need only point out offense.

If the language used in a recognizance is sufficiently definite to point out the offense with which the person who is let to bail is charged, there is a compliance with Code 1919, § 4973.

Appeal from Circuit Court, Montgomery County.

Proceeding by the Commonwealth against Leslie Alls and another to forfeit a recognizance. Judgment for the State, and defendants appeal. Affirmed.

On October 6, 1920, the following order was entered in this case, to wit:

"Commonwealth of Virginia v. Leslie Alls.

"Violation of the Prohibition Law.

"This day came the attorney for the commonwealth, and the defendant, Leslie Alls, who stands indicted for a misdemeanor returned by the grand jury at this term of court, on being

solemnly called came not, whereupon the attorney for the commonwealth moved for a forfeiture of the defendant's recognizance, executed and given for his appearance on this day, which motion is docketed; and it is ordered that a scire facias be issued by the clerk, directed to the sheriff of the county, against the surety, H. J. Alls, returnable on the first day of the next term of this court, to show cause, if any he can, why said recognizance should not be forfeited and a judgment entered against said surety for the amount thereof."

Accordingly, on October 8, 1920, the following scire facias issued:

"Whereas, on the 2d day of October, 1920, Leslie Alls and H. J. Alls personally appeared before the judge of the circuit court of Montgomery county, Va., and acknowledged themselves indebted to the commonwealth of Virginia, the said Leslie Alls in the sum of \$500, and the said H. J. Alls in the like sum of \$500, of their respective goods and chattels, lands and tenements to be levied, and to the said commonwealth rendered, yet upon condition that if the said Leslie Alls should personally appear before the judge of our circuit court for said county, on the 1st day of October, 1920, for violation of the Prohibition Laws of this state (Laws 1918, c. 388), and should not depart thence without the leave of the said court, then the said recognizance was to be void; and,

"Whereas, the said Leslie Alls has failed to make his personal appearance before the judge of our said court, at the time and place aforesaid, according to the condition of said recognizance as appears of record:

"Therefore we command you that you make known to the said Leslie Alls and H. J. Alls that they do be before the judge of our said circuit court, on the first day of the December term, 1920, to show cause, if any they can, why said commonwealth, execution against them, the said Leslie Alls and H. J. Alls, of the several sums of money aforesaid, ought not to have, if to us it shall seem expedient: and further to do and receive what our said judge then and there of them in this part shall consider.

"And have then and there this writ.

"Witness, Archer P. Johnson, clerk of our said court, at the courthouse, on the 8th day of October, 1920, and in the 145 year of the commonwealth.

"Archer P. Johnson, Clerk."

The defendants, the appellants, demurred to the scire facias on the grounds that it shows on its face that the recognizance taken in the case did not require the defendant Leslie Alls (a) to appear before the court or any court, or (b) "to answer for the offense with which such person is charged," as required by section 4973 of the Code; and also on the ground that the recognizance imposed no legal liability upon the defendants because it is not sufficiently definite so as to point to and designate the offense for which the defendant Leslie Alls was required thereby to answer.

The recognizance appears from the order

of court entered October 2, 1920, which, together with its caption, is in the record before us as follows:

"Commonwealth of Virginia v. Leslie Alls.

"Violation of the Prohibition Law.

"This day came the attorney for the commonwealth, and the defendant, Leslie Alls, was led to the bar in the custody of the sheriff. And this case is continued until the 6th day of October, 1920. Whereupon the said Leslie Alls and H. J. Alls, his surety, entered into a recognizance in the penalty of \$500, to be levied of their respective lands and tenements, goods and chattels, and unto the commonwealth to be rendered; yet upon the condition that if the said Leslie Alls shall make his appearance before the judge of this court on the 6th day of October, 1920, to answer said indictment, and not depart thence without leave of our said judge, and be of good behavior towards all citizens of this commonwealth, and not violate any of the provisions of chapter 388 of the Acts of 1918, then this recognizance to be null and void, otherwise to remain in full force and effect."

On the return day of the scire facias, December 1, 1920, the court overruled the demurrer aforesaid to the scire facias, and, on motion of the attorney for the commonwealth, entered judgment upon the recognizance against the defendants. It is of this action of the trial court that the defendants complain.

V. M. Sowder, of Christiansburg, and R. L. Jordan, of Radford, for appellants.

John R. Saunders, Atty. Gen., J. D. Hank, Jr., Asst. Atty. Gen., and Leon M. Bazile, Second Asst. Atty. Gen., for the Commonwealth.

SIMS, J. (after stating the facts as above).

[1] 1. Was the scire facias invalid on demurrer thereto, because it failed to show on its face that the recognizance was in legal form?

This question must be answered in the negative.

As held in *Bolanz et al. v. Commonwealth*, 24 Grat. (65 Va.) 31, the purpose of the writ of scire facias is merely to give notice to the defendant of an application for award of execution upon the recognizance, to enable him to show cause, if any he can, why the recognizance should not be forfeited. If the terms of the scire facias are definite enough to so designate the recognizance as to unmistakably identify it as the recognizance upon which execution will be asked, the scire facias is sufficient. In such case a variance between the language of the scire facias and that of the recognizance is immaterial, and the validity of the judgment and execution will depend upon the validity of the recognizance itself. *Allen's Case*, 90 Va. 356, 18 S. E. 437; *Fulks' Case*, 94 Va. 585, 27 S. E. 498; *Bolanz v. Commonwealth*, supra.

In the instant case the scire facias gave the defendants unmistakable notice of the particular recognizance upon which execution would be asked, namely, the recognizance which the defendants had entered into on October 2, 1920, in the case of Commonwealth v. Leslie Alls, in which the latter had been indicted on October 1, 1920, in the circuit court of Montgomery county, Va., for violating the prohibition laws of the state, which recognizance was in the penalty of \$500 as to each of the defendants, and upon condition that the said Leslie Alls should personally appear before the judge of said court on the 6th of October, 1920, etc.

It is true that the scire facias does not correctly recite all of the conditions of the recognizance. But that, as aforesaid, is immaterial, since it otherwise identifies the recognizance, which speaks for itself. Indeed, in the second "whereas" clause of the scire facias, "the condition of the recognizance as appears of record" is expressly referred to.

[2] 2. Was the recognizance itself invalid (a) because it did not require the defendant Leslie Alls to appear before the court or any court, but only before the judge of the court, or (b) because the language therein, "to answer said indictment," was not sufficiently definite to point to and identify the indictment, and, hence is not equivalent to the statutory requirement that the condition of the recognizance shall be that the defendant who is let to bail shall appear "to answer for the offense with which such person is charged."

The whole question must be answered in the negative.

(a) As to the appearance of the defendant who is let to bail, which a recognizance should require, this should be said:

Section 4973 of the Code of 1919 provides as follows:

"The condition when it is taken of a person charged with a criminal offense shall be that he appear before the court, judge, or justice before whom the proceedings on such charge will be at such time as may be prescribed by the court or officer taking it to answer for the offense with which such person is charged."

Further:

Section 4981 of the Code of 1919 provides as follows:

"Defects in form of recognizance not to defeat action or judgment. No action or judgment on a recognizance shall be defeated or arrested by reason of any defect in the form of the recognizance, if it appear to have been taken by a court or officer authorized to take it, and be substantially sufficient."

It will be observed that the statute, section 4973 of the Code, does not require the place of the appearance to be stated in the

recognizance, and the language of the statute is such that it is immaterial whether the recognizance requires the appearance to be before "the court [or] judge * * * before whom the proceedings on [the] charge will be." And, it appearing in the case before us that the recognizance was "taken by a court, or officer, authorized to take it," the recognizance was certainly "substantially sufficient" in the particular now under consideration, namely, in its condition that the defendant Leslie Alls "shall make his personal appearance before the judge of this court," etc., and hence the recognizance is valid under the statute in so far as such particular is concerned.

(b) As to whether the language of the recognizance "to answer said indictment" is equivalent to the statutory requirement that the condition of the recognizance shall be that the defendant who is let to bail shall appear "to answer for the offense with which such person is charged," this should be said:

[3] It is well settled that by the statute (section 4973 of the Code) no particular form of language is prescribed for a recognizance in the particular now under consideration. If the language used in the recognizance is sufficiently definite to point out the offense with which the defendant who is let to bail is charged, it is a compliance with the statute. *Allen's Case*, 90 Va. 356, 18 S. E. 437; *Bolanz v. Commonwealth*, supra.

In *Allen's Case* the condition of the recognizance, as it appeared in the order of the court, was for the appearance of the defendant let to bail "to answer the charge against him." The court held that—

" * * * The language * * * is sufficiently definite, as it points out the only offense with which the prisoner stood charged."

See 90 Va. at page 358, 18 S. E. at page 438.

In the case before us the caption of the order of court, in which the form of the recognizance appears, while not a part of the order itself, is a part of the record of the court below and before us. *Robinson v. Commonwealth*, 88 Va. 900, 14 S. E. 627. Hence they must be read along with each other. When the order of court is read along with its caption, it plainly appears that the condition of the recognizance was for the appearance of the defendant Leslie Alls to answer the indictment against him in the case of the commonwealth against him for violation of the Prohibition Law. This identifies the indictment referred to, and fixes it as a single indictment in that particular case. Hence it points out, identifies and designates unmistakably, the offense for which such defendant was required to answer.

The judgment under review will be affirmed.

BURKS, J., absent.

(131 Va. 664)

HARLEY v. COMMONWEALTH.

(Supreme Court of Appeals of Virginia. Sept. 28, 1921.)

1. Criminal law \S 1092(8)—Bills of exception, not filed within 60 days after final judgment, not considered, though execution on judgment was suspended.

Bills of exception, not being applied for or obtained within 60 days after final judgment, as required by Code 1919, \S 6252, they are not part of the record, and assignment of error based thereon cannot be considered, though execution of the judgment was suspended under section 6338.

2. Criminal law \S 951(4)—Motion to set aside verdict for after-discovered evidence must be made at trial term.

The trial court's jurisdiction ends with the term, and it has no power thereafter to set aside a verdict for after-discovered evidence.

3. Criminal law \S 1031(1)—Objection to sufficiency of warrant cannot be raised for first time on appeal.

Where no objection was made in the trial court to the sufficiency of the warrant to state the disorderly conduct complained of the objection cannot be raised for the first time on appeal.

4. Criminal law \S 1031(1)—Venue in warrant in prosecutions for petty misdemeanors not essential.

In prosecution for disorderly conduct, under Code, \S 4533, that venue was not laid in the warrant, no objection being made at the trial court, and no motion made to correct it, under Code 1919, \S 4989, is not ground for reversal, especially in view of section 4992, providing for trial without warrant, and section 4990, for trial on appeal without formal pleadings.

Error to Hustings Court of Richmond.

One Harley was convicted of disorderly conduct, and she brings error. Affirmed.

A. O. Boschen and M. J. Fulton, both of Richmond, for plaintiff in error.

John R. Saunders, Atty. Gen., J. D. Hank, Jr., Asst. Atty. Gen., and Leon M. Bazile, Second Asst. Atty. Gen., for the Commonwealth.

BURKS, J. The plaintiff in error, herein-after called the defendant, was convicted by a justice for disorderly conduct on a street car, and sentenced to pay a fine of \$10. She appealed to the hustings court, part II, of the city of Richmond, where the case was heard de novo and the trial was by jury. The jury found her guilty and imposed a fine of \$10, which the trial court refused to set aside, and upon which it entered up judgment. To that judgment a writ of error was awarded by one of the judges of this court, pursuant to the statute providing that—

"In all criminal cases where petition for a writ of error is presented the same shall be granted as a matter of right." Acts 1920, c. 300.

It is assigned as error: (1) That the venue is not laid in the warrant of arrest; (2) that the warrant does not specify any act of disorderly conduct; (3) that the court erred in giving an instruction for the commonwealth; (4) that the court erred in permitting certain questions to be asked and answered; and (5) that the court erred in overruling defendant's motion to set aside the verdict as contrary to the law and the evidence. The last three assignments are dependent upon the bills of exception taken to support them. If the bills of exception are not parts of the record, these assignments cannot be considered.

[1] Final judgment was entered against the defendant on February 10, 1920, and the court adjourned before the first Monday in March. The bills of exception were not applied for or obtained until May 8, 1920, which was not within the 60 days after final judgment, as required by section 6252 of the Code. The bills of exception are not parts of the record, and hence the assignments of error based thereon cannot be considered. *Bragg v. Justus*, 129 Va. —, 106 S. E. 335. The fact that execution of the judgment was suspended under the provisions of section 6338 of the Code did not affect the finality of the judgment in that court.

[2] A motion was also made to set aside the verdict for after-discovered evidence, but the motion was not made until after the adjournment of the term at which the final judgment was entered. The jurisdiction of the trial court over the case ended with the adjournment of the term, and it had no power to grant the motion. *Allen v. Commonwealth*, 114 Va. 826, 77 S. E. 66.

[3] No objection was made in the trial court to the sufficiency of the warrant in any respect, and no demurrer thereto was interposed, and the defendant cannot raise the objection for the first time in this court that the warrant does not specify the acts of disorderly conduct complained of. If the specification was necessary, it could, and doubtless would, have been readily supplied. It is too late now to raise the objection.

[4] In case of indictments, especially for serious offenses, venue must be alleged and proved. *Early's Case*, 93 Va. 765, 24 S. E. 936; *Fitch's Case*, 92 Va. 824, 24 S. E. 272; *Anderson's Case*, 100 Va. 860, 42 S. E. 965; *West v. Commonwealth*, 125 Va. 747, 99 S. E. 654. But in prosecutions for petty misdemeanors the same particularity is not expected or required in the charge made in the warrant, and where no objection to the warrant is made in the trial court, and no motion is made to correct it, under the comprehensive provisions of section 4989 of the

Code, this court will not reverse the judgment of the trial court for formal imperfections of the warrant, unless the ends of justice require it.

In *Flint v. Commonwealth*, 114 Va. 820, 822, 76 S. E. 308, 309, it is said:

"As has been said by this court frequently, the same exactness and precision is not required in the statement of an offense where it is to be heard upon a warrant as in more formal proceedings by information or indictment. In this case it appears, further, that the defendant made no objection whatever to the form of the warrant in the corporation court. Had he then objected, whatever formal defects may have appeared in the warrant could have been cured.

"As was said in *Robinson v. Commonwealth*, 111 Va. 844, 69 S. E. 518: 'Under the broad powers conferred upon the trial court, by section 4107 of the Code, it was entirely competent for the court, of its own motion, pending the trial of an appeal from the justice of the peace, to direct the attorney for the commonwealth to change the warrant from an attempt to commit larceny of oats to an attempt to obtain money by false pretenses. While it would have been more regular, perhaps, to have directed the change to have been made before the trial began, yet where the prisoner did not ask for a continuance, and there is nothing to indicate that he was prejudiced by the amendment during the trial, the irregularity is harmless.'

"We think, therefore, that if there were formal objections to the warrant, the court had ample power, under the statute, to amend it, and that the accused cannot be permitted to go to trial upon a warrant which the court had full power to amend, and after verdict and judgment, for the first time, to make known his objection."

If the defendant had been arrested by a police officer without a warrant she might have been tried and convicted without any warrant, unless she demanded that the charge against her be reduced to writing in the form of a warrant (Code, § 4992), and it is expressly provided that if the defendant appeals to the court he shall be entitled to a jury trial, but that "the appeal shall be tried without formal pleadings in writing." Code, § 4990. If the accused may be tried without a warrant in the first instance, unless demanded, if abundant opportunity is afforded to correct the warrant where one has been issued (Code, § 4989), and in either event the appeal is to be tried "without formal pleadings in writing," it would seem to be very plain that this court ought not to reverse the judgment of the trial court simply because the warrant failed to allege the venue of the offense.

It is said in the reply brief that the warrant did not charge the commission of any crime under the laws of this state. It is sufficient answer to quote section 4533 of the Code, which is as follows:

"If any person, whether a passenger or not, shall, while in any car or caboose, or on any part of a train carrying passengers or employees of any railroad or street passenger railway, behave in a riotous or disorderly manner, he shall be guilty of a misdemeanor. The agent or employees in charge of the train, car, or caboose, may require such person to discontinue his riotous or disorderly conduct, and if he refuses to do so may eject him, with the aid, if necessary, of any other persons who may be called upon for the purpose."

The judgment of the trial court will be affirmed.

Affirmed.

(130 Va. 633)

BLANCHARD v. DOMINION NAT. BANK
et al.

(Supreme Court of Appeals of Virginia. Sept. 22, 1921.)

1. Usury §47—Note providing for semiannual payments of interest not usurious.

Provision for semiannual payments of interest does not render note usurious, in view of Code 1919, § 5551, relating to legal rate of interest.

2. Interest §60—Creditor entitled merely to simple interest, notwithstanding debtor's continuing default in payment of interest at specified periods.

Where the principal of debt is ascertained, and there has been a continuing default in payment of interest, though contract provides for its payment on recurring and for specified periods, the court in settling the account, in the absence of a specific agreement to pay lawful interest on the installments in default, will only allow simple interest on the principal sum due.

Appeal from Circuit Court, Washington County.

Suit by F. T. Blanchard against the Dominion National Bank and others. Decree for the named defendant, and complainant appeals, and the named defendant cross-appeals. Affirmed, as amended.

A. H. Blanchard, of Bristol, Hutton & Hutton, of Abingdon, for plaintiff.

Peters & Lavinder, of Bristol, for defendants.

PRENTIS, J. This is the sequel to the case of *Blanchard v. Dominion National Bank*, 125 Va. 586, 100 S. E. 463. There the appellant, who was the indorser of certain notes, claimed that they had been paid. That question having been decided against him, the case was remanded for further proceedings. One of the objections then urged is thus stated in that opinion:

"Objection is made to the decree appealed from on the ground that it is uncertain, because it fails to state from what time the

amounts due the [plaintiff] should bear interest."

This point is thus decided:

"The decree did not finally dispose of the case, but referred it to a commissioner to take certain accounts, which would of necessity disclose, not only the amount of the bank's claim, but the time from which it bore interest. This decree properly ordered accounts of liens and their priority before directing a sale under the trust deed."

After the former appeal was determined and the case remanded, the commissioner stated the account and compounded the interest on the debt semiannually. The appellant excepted to this, claiming that the amount of the debt was irrevocably fixed by the former decree at \$4,584, and that, as no other time was thereby fixed, the interest thereon could only be computed from the date of the decree, October 10, 1918, and also upon the ground that, in case his first exception should be overruled, the commissioner erred in compounding the interest.

At the hearing the court entered a decree in favor of the creditor, Dominion National Bank, for the sum of \$4,866.18, with simple interest thereon from June 6, 1914, that being the aggregate of the balance due by the debtor as of that date.

[1] The chief contention of the appellant upon this appeal is that, because the notes provide for semiannual payments of interest thereon, therefore the debt was usurious. No authority is cited supporting this proposition, and so far as we are informed it has never been sustained by any court anywhere.

This is said by the learned annotator in a note to 46 Am. St. Rep. 189:

"The interest specified in these statutes [referring to usury] is usually designated as a certain rate per annum. This has never, so far as we are aware, been considered either as forbidding loans for a short period of time, or as requiring that interest shall be computed at yearly intervals only. On the contrary, it is well settled that interest may be made payable semiannually, or quarterly, or at such recurring periods as may receive the assent of the parties."

And he cites numerous cases to support the text.

In *Myer v. Muscatine*, 1 Wall. 391, 17 L. Ed. 566, this is said on the subject:

"This objection has no foundation. When a statute fixes the rate of interest per annum, it has always been held that parties may lawfully contract for the payment of that rate, before the principal debt becomes due, at periods shorter than a year"—citing *Mowry v. Bishop*, 5 Paige (N. Y.) 98.

In *Brown v. Vandyke*, 8 N. J. Eq. 795, 55 Am. Dec. 250, it was held that an agreement between commission merchants and their customers that rests shall be made in their

accounts quarterly, and that interest should be calculated upon the balance thus found to be due quarterly, was not usurious, saying in this connection:

"Business men must be allowed to make their own bargains; and when they do so understandingly, and are not entrapped or deceived, their bargains must be enforced. If the parties dealing with commission merchants agree that rests shall be made quarterly, it has long been settled that such a mode of stating accounts and calculating interest is perfectly legal."

In *Goodrich v. Reynolds, Wilder & Co.*, 31 Ill. 490, 83 Am. Dec. 243, it is held that a reservation in a note that the interest thereon shall be paid semiannually is not usurious. In *Gooddale v. Wallace*, 19 S. D. 405, 103 N. W. 651, 117 Am. St. Rep. 969, 9 Ann. Cas. 545, it is held that the fact that upon the face of the notes the interest was payable monthly, instead of annually, does not make them usurious.

In *Cook v. Courtright*, 40 Ohio St. 248, 48 Am. Rep. 681, under a statute which allowed interest at a specified rate "upon the amount of such note payable annually," it was held that the reservation of the prescribed legal rate of interest on the face of the note, but making it payable semiannually, is not usurious.

It is observed in this connection that the Virginia statute provides (Code 1919, § 5551) that—

"Legal interest shall continue to be at the rate of six dollars upon one hundred dollars for a year, and proportionately for a greater or less sum or for a longer or shorter time."

In *Brown v. Johnson*, 43 Utah, 1, 134 Pac. 590, 46 L. R. A. (N. S.) 1157, Ann. Cas. 1916C, 321, it is also held that, under a statute permitting any rate of interest not exceeding 12 per cent. per annum, a note calling for interest at the rate of 1 per cent. per month is not usurious. 27 R. O. L. 229.

To hold that such a contract violates the usury statute of Virginia would be to condemn contracts and business transactions which are of everyday occurrence in this state as well as elsewhere. The statute forbids the taking of a greater rate of interest than 6 per cent., and where the time is 12 months, or more, there is no violation of either the letter or spirit of the statute to contract that the legal rate due shall be payable in installments during the specified period. The point made is without merit.

[2] The court eliminated the compound interest which the commissioner allowed, and this is assigned as cross-error by the bank. While it is true that a debtor may enter into a contract under some circumstances to capitalize overdue interest, and to pay interest thereon, no such contract is shown to exist in this case. Where the principal of the

debt is ascertained, and there has been a continuing default in the payment of interest although the contract provides for its payment upon recurring and for specified periods, a court in settling the account, in the absence of a specific agreement to pay lawful interest upon the installments thus in default, will only allow simple interest upon the principal sum due. 46 Am. St. Rep. 190. The decree is without error in this respect.

The notes provide for the payment of 10 per cent. attorney's fees in case the notes should be placed in the hands of an attorney for collection, and by authority of this provision the court allowed an attorney's fee of \$500. This sum is less than the amount authorized by the contract of the debtor. If he had not appealed from that decree, it is not probable that we would have adjudged the fee insufficient. Inasmuch, however, as the debtor appealed from the decree as a whole, has thus delayed his creditor in the collection of the debt justly due, and is responsible for the expense caused by the litigation thus prolonged, we think that this fee should be increased to compensate for the additional labor thereby imposed. We therefore sustain the cross-error assigned by the appellee, and will provide in our decree for an additional fee of \$100, this being within the 10 per cent. limitation specified in the notes.

As thus amended, the decree will be affirmed.

Affirmed.

KELLY, P., and BURKS, J., absent.

(131 Va. 649)

CORVIN v. COMMONWEALTH.

(Supreme Court of Appeals of Virginia.
Sept. 22, 1921.)

1. Divorce \S 328—When divorce decree will be given full faith and credit in other states.

Divorce decree of court in state in which the parties were married, rendered in conformity to the laws of such state, against constructively served defendant who has left the state, will be given full faith and credit in other states under the federal Constitution, but decree granted in state other than that of the matrimonial domicile, in suit by party who has acquired, or who claims to have acquired, a bona fide residence in such other state, without personal service or appearance of other party, is not binding in state of matrimonial domicile under the full faith and credit clause, and its force will depend upon the respect given it by the courts of the state of matrimonial domicile as a matter of comity.

2. Judgment \S 509—Fraud vitiates judicial proceedings, though they appear to be legal in form.

Fraud vitiates judicial proceedings, even where they appear to be legal in form.

3. Divorce \S 329—Decree fraudulently procured held not entitled to full faith and credit in other state in bigamy prosecution.

Where husband, who had forced wife to leave him, obtained a divorce in other state on constructive service by fraud, in that he gave false testimony that wife had abandoned him, and that separation had taken place one year prior to actual date, the decree was not entitled to full faith and credit, under the federal Constitution, in state in which they had lived prior to separation, in prosecution of husband for bigamy following his marriage to and cohabitation with second wife, even though husband acquired a bona fide residence in state in which decree had been rendered.

4. Bigamy \S 2—Fraudulent divorce decree rendered in other state held no defense.

Divorce decree obtained by husband against constructively served wife, in state other than that in which they had lived prior to separation, by means of fraud, held no defense under Code 1919, \S 4538, in prosecution of husband for bigamy in state in which they had lived following his marriage to and cohabitation with second wife; the courts of such state not being bound by the fraudulently obtained decree in other state.

5. Indictment and Information \S 11(3)—Indictment need not negative exceptions in statute not constituting part of the description of the offense.

Indictment charging bigamy in violation of Code 1919, \S 4538, need not negative exceptions contained in section 4539, since such section does not constitute a part of the description of the defense but merely affords the accused certain grounds of defense.

6. Witnesses \S 271(3)—Exclusion of divorce decree offered by defendant during cross-examination of state's witness held proper.

In bigamy prosecution in which defendant claimed to have been divorced from first wife, court's refusal to admit copy of divorce decree during defendant's cross-examination of state's witness as to conversation during which defendant had shown witness copy of divorce decree, on defendant's refusal to adopt the witness as his own, held proper; the admission of the decree being a matter of defense.

7. Criminal law \S 1170(3)—Exclusion of evidence subsequently introduced harmless.

In bigamy prosecution exclusion of copy of divorce decree offered by defendant during cross-examination of state's witness held harmless, where it was subsequently introduced.

8. Criminal law \S 759(1)—Refusal to charge that failure of second wife to testify created no presumption held proper in bigamy prosecution.

In bigamy prosecution involving validity of defendant's divorce from first wife, refusal to charge that second wife's failure to testify created no presumption against defendant under Code 1919, \S 6211, held proper in view of issue as to validity of marriage to second wife, since such charge would have been on the facts.

Error to Circuit Court, Wythe County.

L. G. Corvin was convicted of bigamy, and he brings error. Affirmed.

W. S. Poage, S. B. Campbell, and E. Lee Trinkle, all of Wytheville, for appellant.

John R. Saunders, Atty. Gen., J. D. Hank, Jr., Asst. Atty. Gen., and Leon M. Bazile, Second Asst. Atty. Gen., for the Commonwealth.

PRENTIS, J. The accused has been convicted of the crime of bigamy and is here alleging that several errors were committed in the course of the trial.

The fact of his first marriage, to Augusta Sult, as well as the fact of his second marriage while she was still living to Zollie Umberger Sult, the divorced wife of L. A. Sult, the brother of Augusta Sult, are both conceded. The defense is based upon the fact that the accused first obtained a decree of divorce from Augusta Sult Corvin in Barbour county, W. Va., and he relies upon that decree as a bar to this prosecution.

The facts leading up to the prosecution, all of which are pertinent for the consideration of the decisive question to be determined, may be thus stated: He was first married in 1903, in Wythe county, Va., and lived there with his wife for a number of years, but they separated on December 3, 1916. The causes of the separation were his apparent interest in and affection for one Zollie Umberger Sult (she being then the wife of L. A. Sult, his own wife's brother), which conduct, if not criminal, was so notorious as to lead to a breach of intimate relations with his wife followed by separation and ultimately by a divorce, in Virginia, of Zollie Umberger Sult from her husband, L. A. Sult, upon the ground of her intimacy with the accused. The uncontradicted testimony of Augusta Corvin was that she was a good and faithful wife; that she had to leave her husband because of the relationship existing between him and Mrs. Sult, and that when she remonstrated with him he told her that it was none of her business, and finally that when he got certain business fixed up he and Zollie were going to leave; that he told her (his wife) that either he or she must leave, and that if she did not leave him she would not stay there very long; and that thereupon she obtained refuge at Simon Umberger's house on December 3, 1916. It also appears in the evidence that about the time of the separation the accused saw Simon Umberger, the father of Zollie Umberger Sult, and requested him to advise his wife, Augusta, to sue him for a divorce, and at the same time to advise Sult to sue his wife, Zollie Umberger Sult, for a divorce, so that he (the accused) and Zollie Umberger Sult might marry each other, and at about the same time he also approached Mrs. Walter Umberger, a daughter-in-law of the same

Simon Umberger, and made a proposition to give his wife certain household property and \$400 in money if she would get a divorce from him, upon condition, however, that L. A. Sult should get a divorce from his wife, accompanied by the statement that he would not pay one cent of the amount unless Zollie was divorced from her husband, and these two witnesses also testify that the accused asked them at that time if they would not rather have him live in Wythe county with Zollie Umberger Sult than to take her away from there and not marry her.

Thereafter, on October 15, 1917, the accused was indicted on the charge of unlawfully and without just cause deserting, and willfully neglecting and refusing to provide for the support and maintenance of, his wife, Augusta Corvin; she being then in destitute and necessitous circumstances. He made his defense, on October 29th was found guilty as charged in the indictment, and his punishment therefor was fixed at 90 days on the state convict road force at hard labor and a fine of \$250. After the discharge of the jury the trial court, with the consent of the accused, ordered him to pay to the clerk of the court for the support of his wife the sum of \$12.50 per month, payable on the first day of each month for the period of one year, and released him from custody on probation during that period, upon condition that he enter into a recognizance, with surety, in the penalty of \$500, conditioned for his appearance at court whenever so ordered within the year, and also to appear on the first day of the October term, 1918.

The accused did not testify in this case, but it otherwise appears that he went to the city of Washington and worked on the street car line immediately after he left Virginia; that he there saw Zollie Umberger Sult, who was clerking in a store in that city in the fall of 1917. Thereafter, about March, 1918, he was employed as a farm laborer in Barbour county, W. Va., by W. H. Wentz, and worked there until late in the fall of 1919; that Zollie Umberger Sult visited the Wentz place two or three times while the accused was there, and was finally employed by Wentz to go to the farm to look after his mother, and that she and the accused both boarded and slept in the Wentz home there.

On May 19, 1919, the accused instituted his suit for divorce against his wife, Augusta Corvin, alleging that he was then, and for more than one year had been, a resident of the state of West Virginia; that his wife had willfully deserted him without any just or reasonable cause therefor; and twice in his bill fixes the date of such desertion as December 3, 1915, the truth being that the separation occurred a year later, on December 3, 1916. He proceeded to mature his case by order of publication, alleging that he was informed that his wife, the defendant, was

a resident of the state of Virginia. He undertook to establish the facts alleged by the evidence of himself and Zollie UMBERGER Sult.

The West Virginia statute (West Virginia Code, § 3640), provides, among other things, that a divorce from the bond of matrimony may be decreed "to the party abandoned," "where either party willfully abandons or deserts the other for three years."

It appears, then, that at the time his suit was instituted the date of separation or abandonment was misstated in the bill. We think it may be fairly inferred that this was not a mere inadvertence, because of these circumstances: The date fixed for the taking of depositions was November 21, 1919, and on that day no witnesses appeared, so that the commissioner continued the proceedings until December 26, 1919, and when examined neither of the witnesses corrected the erroneous statement appearing in the bill, though they carefully refrained from expressly repeating the falsehood, and merely testified that the desertion or separation had continued for more than three years, without stating when the period began. One answer of the accused was that they had "been separated three years past." At the time his testimony was given the separation had continued three years, but his lack of frankness is apparent when it is observed that he failed to give the date of the separation, which, if he had given truly, would have disclosed that at the time of institution of the suit the court was without jurisdiction to grant the relief sought. Neither in the bill nor in the testimony was the attention of the West Virginia court directed to the true cause of the separation. No allusion whatever was made to these material and significant facts, viz., that the accused had in Virginia been adjudged the party at fault, guilty of an inexcusable desertion of his wife, required to contribute to her support, that he was on probation, and had been required to enter into a recognizance for his appearance before the Virginia court.

It is claimed for the accused that the divorce decree, thus obtained in West Virginia, creates a perfect defense in this prosecution, both under the full faith and credit clause of the federal Constitution and because of the comity which should exist between the states and the respect due by one state to the judicial proceedings of another. This introduces a question about which much has been written, and has been raised many times and under varying circumstances. We do not think that we can add anything of value to this general discussion, and hence shall confine ourselves to the precise facts of this case.

[1] It seems to be settled since the case of *Haddock v. Haddock*, 201 U. S. 562, 26 Sup. Ct. 525, 50 L. Ed. 867, 5 Ann. Cas. 1, that in cases like this, where the matrimonial domicile was in one state and the divorce is grant-

ed in another state at the suit of one consort, who has acquired, or who has claimed to acquire, a bona fide domicile in such other state, a decree there obtained without personal service of process and without an appearance of the defendant is not binding upon the courts of the state of the original matrimonial domicile, under the federal Constitution. It is otherwise, however, where the suit is properly brought in the state of the matrimonial domicile of the parties against a consort who has left that state and gone to another. Under such circumstances the suit may be matured against the absent party by constructive service of process, and courts of the state in which the parties had their matrimonial domicile have jurisdiction to enter a decree in conformity with the laws of that state, which must be given full faith and credit in the other states of the Union, under the federal Constitution. *Atherton v. Atherton*, 181 U. S. 155, 21 Sup. Ct. 544, 45 L. Ed. 794; *Thompson v. Thompson*, 228 U. S. 551, 33 Sup. Ct. 129, 57 L. Ed. 351. So that if this divorce is a bar to this prosecution, it can only be because of the respect which this state will pay to the decree as a matter of comity.

It seems to be always conceded or announced in such cases that a divorce obtained in a foreign jurisdiction which is based upon fraud will not be recognized when questioned in another jurisdiction. Paraphrasing the language used in *Thompson v. State*, 28 Ala. 21, it may be said that if the accused did not go to West Virginia with the determination to make it his legal domicile, or if he went there merely for the purpose of obtaining a divorce, intending to remain no longer than was necessary to accomplish his purpose, or if the divorce was obtained by fraud, the decree of the West Virginia court is void, and the accused, in marrying another woman and thereafter cohabiting with her in this state while his former wife still was living, is guilty of bigamy.

By express provision of our statute (Code 1919, § 4533), the crime is complete in this state if under an invalid marriage in another state there shall thereafter be cohabitation under such marriage in this state.

In *Magowan v. Magowan*, 57 N. J. Eq. 322, 42 Atl. 330, 73 Am. St. Rep. 645, a divorce in Oklahoma was held invalid in New Jersey; this being said:

"Where the plaintiff in a suit for divorce is required by statute to have been a bona fide resident of the state in which this suit is brought for a fixed period of time, in order to enable him to maintain his suit, the ascertainment by the court of the fact of such residence necessarily precedes a consideration of the merits of the case, and the determination of that question by the court is final, not only in the courts of that state but in every other jurisdiction where the validity of the judgment comes in question, unless such determination

has been procured by fraud. When, however, the adjudication has been procured by fraud, it is without extraterritorial effect, and the judgment will be treated as void in the courts of a sister state."

The court there also held that it was not precluded from inquiry into whether the party who obtained the divorce was in fact a bona fide resident of New Jersey at the time he instituted his suit for divorce in Oklahoma.

In *Dumont v. Dumont* (N. J. Ch.) 45 Atl. 107, the substantial facts were these: The husband was a diamond setter in New York, and, on being accused by his wife of undue intimacy with another woman, refused to live with her any longer. He offered to supply her with evidence upon which she could secure a divorce from him, which she declined, and begged him not to desert her. He then left her, went to Dakota, rented a room in a small town where there was no demand for diamond setting, set up a bench and a chair, sent out circulars, and pretended to be in the diamond setting business, but his work came chiefly from New York. After the three months' residence which was required by statute in Dakota, he sued his wife for divorce, and on the trial swore that she had deserted him for a year, that he came to Dakota to establish himself in business, and intended to remain there forever. After securing his divorce by default, he immediately returned to New York, resumed his old employment, and married the woman with whom he had previously been intimate. It was held by the Court of Chancery of New Jersey that he was never domiciled in Dakota, that his divorce was procured by fraud on the court, and was therefore void, and hence was no defense to a suit by his wife for divorce on the ground of adultery in New Jersey.

In *Goolsby v. State*, 100 S. E. 788, a conviction of bigamy was sustained in Georgia, although the accused there had obtained a divorce in Alabama against his wife, who at the time of the institution of that suit was still a resident of Georgia, having obtained jurisdiction in Alabama by order of publication. The conviction was sustained because the court concluded that the evidence justified the jury in finding that the accused was a resident of the state of Georgia at the time he instituted his suit in the state of Alabama.

In *State v. Herron*, 175 N. C. 754, 84 S. E. 698, a conviction of bigamy is sustained notwithstanding a decree of divorce entered in Georgia upon constructive service of process upon the wife who remained in North Carolina, and upon the ground of the bad faith and fraud of the accused in attempting to acquire a domicile in Georgia.

In *Dunham v. Dunham*, 162 Ill. 589, 44 N. E. 841, 35 L. R. A. 70, it is held that a wife who upon separation from her husband goes

into another state for the purpose of obtaining a divorce and brings a suit without disclosing the fact that a suit is pending in the state of her former residence, involving the same matters alleged as a cause of divorce, and in which she has appeared, is guilty of such a fraud as to invalidate a decree of divorce obtained by her, although the pendency of the prior suit could not have been pleaded in abatement or bar of her divorce suit.

The general subject is discussed elaborately in notes in 59 L. R. A. 135; 18 L. R. A. (N. S.) 647; 3 R. C. L. 798; 9 R. C. L. 508 et seq.

[2-4] Bearing the facts of this case in mind, and applying the rule that fraud vitiates judicial proceedings, even where they appear to be regular in form, it seems to us that there can be no doubt in this case that the trial judge correctly referred the question to the jury by an instruction which authorized them to disregard the West Virginia divorce decree if they believed beyond a reasonable doubt that the accused practiced fraud in obtaining the divorce in West Virginia which is relied on by him, by offering false testimony for the purpose of obtaining it; the other requisites for conviction having been either proved or admitted.

This instruction can be justified, even if it be conceded that the accused acquired a bona fide residence in West Virginia, though as to this the evidence is weak and inconclusive when all of the circumstances are considered, for it must be remembered that very soon after he obtained the decree in West Virginia he married the woman with whom he had been so long apparently intimate, and returned with her to Wythe county to live. The decree was entered in January, 1920; the date of his marriage in Maryland is not given, but they together returned to Wythe county in the spring of 1920. There is much here, then, in his conduct to justify the conclusion that he had no other reason for going to West Virginia than the securing of the divorce there, which he could not obtain here, and that he always intended to return to Virginia. His mother had property in Wythe county, Va., and had frequently urged him to return, and he had neither property interest in West Virginia nor any prospective property interest there such as he had in Virginia.

Waiving this inquiry, however, can there be any doubt as to the fraudulent character of the West Virginia proceeding? The bill suppressed the material fact that so far from its being true that his wife had deserted him without cause (and he relied solely on this ground for the divorce in West Virginia), taking the most favorable view of the evidence, he acquiesced in the separation, while the additional truth is, for his wife's testimony in this respect is uncontradicted, that she was driven from home by him pursuant

to his avowed and active efforts to force her to sue him for divorce because of his own default. He sought and obtained the decree by a false statement of the date of the separation, while, if he had stated the true date, his bill would have been demurrable because it would have appeared therefrom that at that time when it was filed no ground for divorce existed under the West Virginia statute. In the depositions of himself and his only witness, they suppressed the truth by deceptive and ambiguous testimony. This divorce decree, thus based upon deceit and fraud, would doubtless be annulled by the courts of West Virginia upon proper presentation of the facts here appearing, and in a case like this, where there was no appearance by the defendant nor service of process upon her, should be held to be a nullity everywhere. The fraud here, then, is so patent and palpable that, whatever difference of view there may be as to many questions which can be raised as to the extraterritorial effect of decrees of courts where the jurisdiction over the defendant is based solely upon constructive service of process, we think that no court would accord any respect to this decree.

[5] Among the errors as to procedure which are assigned is that the court erred in overruling the demurrer to the indictment upon the ground that it should have negatived the exception contained in Code 1919, § 4539. The crime of bigamy is completely described in section 4538, and section 4539 does not constitute a part of the description of the offense, but is disconnected with the statutory description of the crime and only affords the accused certain grounds of defense—among them a divorce from the bond of a previous marriage. This question has been recently considered and decided by this court adversely to that contention in the case of *Sickel v. Commonwealth*, 124 Va. 821, 97 S. E. 783, 99 S. E. 673, and this, we believe, accords with the general rule in other jurisdictions. 7 C. J. 1166, and cases cited; 3 R. C. L. 807.

[6] There is an exception, also, growing out of these circumstances: The commonwealth introduced a witness to show that the accused admitted that he had been married in Maryland. Upon cross-examination the witness was questioned as to the alleged divorce in West Virginia, and, having testified that the accused so claimed, said that he showed him a copy of the divorce decree. The accused then attempted to put a copy of the divorce decree in evidence, but the commonwealth objected to the introduction of the document. The court, having permitted the entire conversation to be detailed by the witness, declined to allow the paper to be introduced at that stage of the proceeding unless the accused would adopt the witness as

his own for the purpose of introducing the decree. He declined to do this, and excepted to the ruling.

[7] We find no ground for reversal in this action of the court. The divorce was clearly matter of defense, the burden of proving which was upon the defendant, and if he desired to prove it at that stage of the prosecution he should have accepted the court's suggestion. This identical paper was afterwards introduced by the accused, and he suffered no wrong or injury because of the circumstance of which he complains.

The other objections to the testimony have been disposed of by what we have previously said.

In order to test the good faith of the defendant and his motives in connection with the divorce proceedings in West Virginia, it was proper to introduce the material facts referred to, which culminated in that suit, as well as his conduct immediately thereafter, so as to determine whether the decree had been obtained in good faith or by deceit and fraud.

[8] The basis of another assignment of error is the refusal of the court to give this instruction, offered by the accused:

"The court instructs the jury that the failure of the defendant, Lucian Corvin, or of Zollie Corvin, to testify in this case, creates no presumption against the defendant, and is not to be considered by the jury in arriving at their verdict."

It is claimed that this should have been given because of Code 1919, § 6211, which provides that husband and wife in criminal cases may be allowed to testify in behalf of each other, and that the failure of either so to testify "shall create no presumption against the accused, nor be the subject of any comment before the court or jury by the prosecuting attorney." Manifestly, the action of the court was proper. The section relied upon relates primarily to the competency of witnesses, and applies where the existence of the relation of husband and wife appears. It has no reference to a state of facts such as were developed upon this trial. The vital question here at issue was whether or not Zollie Umberger Sult was the wife of the accused. The court could only have given the instruction upon the assumption that she was his wife, and this would have invaded the province of the jury, for that was the very question which they had to determine. Neither the accused nor his alleged wife testified, and the jury were properly instructed that his failure to testify created no presumption against him and was not to be considered by the jury in arriving at their verdict. This was all that he was entitled to.

We find no ground for reversal in the rec-

ord. The divorce decree upon which the accused relied was obtained by fraud and deceit, and under the testimony here adduced the jury could not have properly found otherwise. In this changing world human nature changes little, if any, and those who persist in defying public sentiment by violating the written law, when it is based upon reason and supported by sound public policy, are as sure to receive a punishment adjudged to fit the crime to-day as was Zimri on that day long ago when he defiantly brought a Midianitish woman into the Hebrew camp, in the sight of Moses and the congregation before the door of the tabernacle.

Affirmed.

BURKS, J., absent.

(131 Va. 406)

ZIGLER v. SPRINKEL, City Treasurer.

(Supreme Court of Appeals of Virginia. Sept. 29, 1921.)

1. Mandamus ⇐148—Petitioner's interest in enforcement of laws sufficient.

When the performance of a public duty is sought to be coerced, petitioner's interest, as a citizen, in the enforcement of the laws, is sufficient to entitle him to proceed in mandamus.

2. Elections ⇐83—Treasurer's list must include all voters who paid poll taxes assessed against them "during" any or all the three years preceding that of election.

In view of Const. 1902, § 21, giving one the right to vote if he has paid all poll taxes assessed against him "during the three years next preceding," the city treasurer, under section 38, and Code 1919, § 109, requiring him to file a list of all who have paid the poll taxes required by the Constitution "during the three years next preceding," must place on such list the names of all who have paid the taxes required as a prerequisite to their right to vote at the ensuing election, whether that be the payment of such taxes for one, two, or all three years, section 38 merely furnishing the evidence of the discharge of the requirements imposed by section 21, the word "during" in which means, not "throughout the continuance of," but "in the time of," nor is the right of persons coming into a city from another city within such period to inclusion in the list affected by Code 1919, § 110, entitling them to have their names entered on application to the court, though not entitled to vote on the treasurer's certificate under Code 1919, § 115.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, During.]

Error to Circuit Court, Rockingham County.

Petition by E. A. Zigler for a writ of mandamus against H. Sprinkel, Treasurer of City of Harrisonburg. Writ denied, and

petitioner brings error and supersedeas. Mandamus awarded.

John Paul, John W. Morrison, and Chas. A. Hammer, all of Harrisonburg, for plaintiff in error.

H. W. Bertram, of Harrisonburg, for defendant in error.

SAUNDERS, J. This is a petition by R. A. Zigler and others, praying the circuit court of Rockingham county to award a writ of mandamus, directed to H. A. Sprinkel, treasurer of the city of Harrisonburg, commanding and compelling said treasurer to comply with the requirements of section 38 of the Constitution of Virginia and section 109 of the Code of Virginia, requiring him as such treasurer, at least five months before each regular election, to file with the clerk of the circuit court a list of all persons who have paid, not later than six months prior to such election, the state poll taxes required by the Constitution during the three years preceding the one in which said election is held.

It is alleged in the petition that the petitioner, as well as other citizens of the city of Harrisonburg, are entitled to "the information which the list should embrace, and that the said treasurer is required by law to publish a list which shall correctly set forth the names of persons assessed with capitation taxes, and showing the years for which such taxes have been paid, prior to the six months preceding the general election to be held in November, 1921." It is further alleged that said treasurer has "refused and declined to certify such a list," but has certified to the clerk of the circuit court of Rockingham county a list of persons which purports to be a list of persons in the city of Harrisonburg "who have paid their capitation taxes assessed or assessable against them for the years 1918, 1919, and 1920 prior to and including May 7, 1921," and has certified that the names appearing thereon are a list of voters "who have paid their capitation taxes prior to and including May 7, 1921." Proceeding, the petition charges that this list is incorrect, in that the same does not contain either the names of all young persons who became of age at such time that they were not chargeable with three years' taxes, but chargeable with one or two years only, as the case might be, or the names of those persons who, coming into the city from the counties of this state, or from other states, have paid in said city the taxes required of them as a prerequisite for voting. The petition alleges that the number of these omitted persons is considerable.

The defendant treasurer demurred to this petition, but his demurrer was overruled. Thereupon he filed an answer in which, among other things, he alleged that he was

required by law to file a list of those persons only who had paid their taxes for the full period of three years next preceding the year in which an election is held, and not less than six months prior to said election. In this regard the treasurer specifically states:

"Respondent further says that he is advised that all that he is empowered and required to do is to place upon said list such persons as he has legal knowledge and information have paid all of the taxes assessed, or assessable, against them for the years 1918, 1919, and 1920, and paid within the period prescribed by law, and that this has been done by him in the list certified by him to the clerk as above stated."

The case was heard upon the petition and the answer of the defendant, and the trial court, for reasons expressed in writing and lodged with the papers as a part of the order, denied the petition for mandamus. To this action of the trial court a writ of error and supersedeas was awarded by one of the judges of this court.

[1] The demurrer to the petition for mandamus was properly overruled. When the duty the performance of which is sought to be coerced is a public duty, and the interest relied on by the petitioner in mandamus is the interest which the petitioner has in the enforcement of the laws, then such interest is a sufficient interest to entitle him to maintain the proceeding. *Clay v. Ballard*, 87 Va. 787, 794, 13 S. E. 262.

"Where the question is one of public right, and the object of the mandamus is to procure the enforcement of a public duty, the people are regarded as the real party, and the relator at whose instigation the proceedings are instituted need not show that he has any legal or special interest in the result; it being sufficient to show that he is a citizen and as such interested in the execution of the laws." *High on Extr. Rem.* § 431.

See, also, *Tazewell v. Herman*, 108 Va. 416, 60 S. E. 767, 61 S. E. 752, and *Smith v. Bell*, 113 Va. 667, 75 S. E. 125.

[2] The learned judge of the trial court, in construing section 38 of the Constitution, and interpreting it to mean that the persons to appear on that list are the persons who have paid their poll taxes for the entire period of three years next preceding the year of election, considers that the "case turns upon the meaning to be given to the words 'during the three years' as used in the section supra of the Constitution." He concludes that the word "during," as used, means "throughout the course or continuance of." Hence the further conclusion that the persons to be listed are the persons who have paid their poll taxes "throughout the continuance of" the entire period of three years.

In aid of this conclusion he cites the use of the word "during" in other sections of the Constitution. For instance, in section 21

it is provided that a duly registered person shall have the right to vote, provided that he, unless exempted, shall have personally paid "at least six months prior to the election, all state poll taxes assessed or assessable against him, under this Constitution, during the three years next preceding that in which he offers to vote," etc. Obviously the word "during" in the foregoing connection does not mean "throughout the continuance of," in the sense that such a registered person, as a prerequisite to voting, must have paid taxes for each of the years embraced in the three-year period. On the contrary, it means that as a prerequisite for voting such registered person must pay the taxes with which he is assessed, or for which he is assessable, during said three-year period. If he is assessable with poll taxes for two years only of the three-year period, and pays those taxes whether assessed or not, he is entitled to vote. So if he is assessable for only one year, and pays that tax. Such persons have paid all the taxes required of them by the Constitution as a prerequisite of the right to vote during the three-year period, whether their payments were for one year, or for two years, and are as fully endowed by the Constitution with the right to vote as the person who is assessable with poll taxes for each year of the three-year period, and has paid the same. Hence the meaning of the word "during" in this section is the meaning given by Webster—that is to say, "in the time of." If the meaning suggested in the opinion of the learned trial court is given to this word in the foregoing connection, it would inevitably follow that a duly registered person, liable for poll taxes for only one year, or two years, of the three-year period, would not become entitled to vote upon the payment of such taxes, since obviously he has not paid for the full period of three years, though he has paid in full the poll taxes required of him during such period.

Section 21 prescribes the conditions for voting of a registered person. Section 38 is intended to furnish the evidence that the registered person has qualified himself to vote by the discharge of the requirements imposed by the section *ubi supra*.

In the case of *Tilton v. Herman*, 109 Va. 503, 64 S. E. 351, this court construed the meaning and effect of the words "personally paid." Referring to the treasurer's list, the court used the following language:

"This case is the sequel of the case of *Tazewell v. Herman*, 108 Va. 416, 60 S. E. 767, 61 S. E. 752, 2 Va. App. 387, recently decided by this court, in which it was held that said list to be made up and filed by the treasurer should only contain the names of those persons who at least six months prior to the election had personally paid the poll taxes required of them as a prerequisite to their right to register and vote at an ensuing regular election."

If the view taken of the list in this citation is the correct view, then unquestionably a treasurer must place on his list the names of all persons who at least six months prior to an election have "*personally paid the poll taxes required of them as a prerequisite to their right to register and vote at the ensuing regular election.*" (Italics supplied.) In some cases the prerequisite to vote is the payment of one year's poll tax; in other cases it is the payment of poll taxes for two years; in still other cases it is the payment of poll taxes for three years; but there is no distinction in the right to vote of the persons in these three classes, provided the poll taxes are paid as required. Hence, when the court said in *Tilton v. Herman*, supra, that the treasurer's list, as made up and filed, should contain only the names of those persons who had personally paid the poll taxes required of them as a prerequisite to their right to vote, this requirement as to the contents of said list included every person who, with respect to the payment of poll taxes as a prerequisite to his right to vote, had discharged the obligation imposed upon him individually in this regard by the positive mandate of the Constitution.

Article 2 of the Virginia Constitution deals with the elective franchise. Section 38 is a part of that article. This section provides for a list which is to be used at the elections established by law. It is an election list, and affords evidence of the prepayment of the capitation taxes required by the Constitution as a prerequisite to the right to register and vote. A person who is only assessed or assessable with poll tax for one or two years, as the case may be, and who has paid the same as required for voting purposes, is entitled to vote, and in consequence to have the treasurer's list afford evidence of this prepayment. This is considered to be in harmony with reason and the proper construction of the constitutional provisions.

As this court has said, in *Tazewell v. Herman*, 108 Va. 421, 60 S. E. 768:

"The principal, if not the only, purpose for which the [treasurer's] list is required to be filed is to provide record or at least written evidence that the persons named in the list have complied with the provisions of the Constitution in paying their poll tax, so far as such payment is made a prerequisite to their right to vote."

Section 38 provides how persons omitted from the treasurer's list may secure a place on same. But this right to apply to the court to correct said list is afforded to all those persons who have paid their capitation taxes and whose names have been improperly omitted. In the view of the learned judge of the circuit court of Rockingham county, only those persons who have paid their poll taxes for the full three years preceding the election year are entitled to a place on the

list. Hence, if the name of such a person has been erroneously omitted for one of the three years in question, he is entitled to the aid of the court to have his name entered for the omitted year. But, as a corollary to this ruling, it would follow that a person who has paid the taxes required of him, whether it be for one or two years, has no right to apply to the court for a place on the list, since he was not originally entitled to be included by the treasurer, and therefore has not been improperly omitted. The language of section 38 does not justify the foregoing limitation of persons entitled to a place on the list, and hence entitled, if omitted, to apply to the court for relief. Says the section:

"Within thirty days after the list has been posted, *any person who shall have paid his capitation tax, but whose name is omitted from the certified list, may,*" etc. (Italics supplied.)

The words "*any person who shall have paid his capitation tax, but whose name is omitted from the certified list,*" etc., are certainly comprehensive enough to include the persons who are chargeable for the purposes of voting with one or two years' taxes only, and who have paid the same. Moreover, the reason of the law advises us that it was intended to apply to such persons as fully as to persons who have paid for three years. A person who is chargeable with poll taxes for a lesser period than three years, and pays the same within the prescribed time, is as fully entitled to vote by virtue of section 21, if otherwise qualified, as the person who pays for the full three years. Hence the same fundamental considerations which cause the names of voters in the latter class to be placed on the treasurer's list, which is evidence "that the provisions of the Constitution have been complied with by the payment of poll taxes, so far as such payment is made a prerequisite to their right to vote," indicate as compellingly that all other persons who have paid, as required by the Constitution for the purposes of voting, the poll taxes with which they are assessed or assessable, are entitled to a like inclusion in said list. If a person who has paid one year's tax in another county, and two years' taxes in the county in which he offers to vote, or a person coming from another state, who is chargeable with capitation taxes for only one or two years and has paid the same, or a young man who is chargeable with and has paid his taxes for a like period, is not entitled to be placed upon the treasurer's list, then it follows that, in exercising the right to vote afforded by section 21, such voter must prove the prepayment of his capitation taxes six months prior to the election by means of his receipted tax tickets or otherwise. The necessity of recourse to such evidence was regarded as an evil, and was intended to be avoided

by the framers of the Constitution when they enacted section 38, providing for the preparation and posting of a treasurer's list of voters who had conformed to the constitutional requirements in respect of the payment of their poll taxes. Section 38 provides that the treasurer's list shall contain the names of "all persons in his county or city who have paid, not later than six months prior to such election—[i. e., the succeeding general election] the state poll taxes required by this Constitution during [i. e., in the time of] the three years next preceding that in which such election is held," etc. The use of the word "required" is significant. Evidently it refers to the poll taxes necessary to be paid by the individual persons as a prerequisite to the right to register and vote. These persons are not concerned with paying, for the purposes of registry and voting, any taxes other than their own, nor for such purposes are they required to pay any poll taxes save those with which they are assessed or assessable. Light is cast upon the purpose of the treasurer's list and the meaning of the word "required" in the foregoing connection by a later paragraph of this section which says:

"Further evidence of the prepayment of the capitation taxes required by this Constitution as a prerequisite to the right to register and vote may be prescribed by law."

The clear implication of this latter paragraph is that the treasurer's list is evidence of the prepayment of the capitation taxes required by the Constitution, as a prerequisite to the right to register and vote. Hence the persons who have prepaid to the treasurer the capitation taxes required of them, respectively, as a requisite to voting, whether the same was for one year, two years, or three years, are equally entitled to be placed upon said treasurer's list and to enjoy the benefit to be derived therefrom.

Amplifying a portion of the first sentence of section 38, according to its true meaning, the same would read:

"A list of all persons in his county, or city, who have paid to such treasurer, not later than six months prior to such election, the state poll taxes required by this Constitution of said persons, respectively, in the time of the three years next preceding that in which such election is held, as a prerequisite to the right to register and vote," etc.

This list, as stated supra, is a list for voting purposes, and must be considered from that point of view. It is true that the clerk is to forward a certified copy of the corrected list to the auditor of public accounts, but this is only as a check upon the treasurer, since he is not to be charged with "the amount of the poll taxes stated therein,"

when he has previously accounted for the same.

The learned judge of the trial court makes a distinction between young men coming of age after February 1st of a year in which an election is held and those who come of age before February 1st of said year. For instance, in any given year, say the year 1921, some young man may come of age after February 1st of that year, while others may have become 21 prior to that date. With respect to young men in the former class, the opinion seems to conclude that their names should go on the treasurer's list for the year 1922, and, if their taxes continue to be paid, for the year 1923, and of course for the year 1924. With respect to the young men in the latter class, supra, and persons who have not resided in the state long enough to be chargeable with three years' taxes, as well as persons who have paid taxes for one or two years in another county, the trial court considers that they must use their tax receipts, or in the case of the voters from another county their tax certificates, to prove the payment of their taxes to the judges of election; that is to say, they must use them until they shall have paid their taxes for the full period of three years, when they will go upon the list. Why the Constitution should be so construed as to make these distinctions, thereby keeping the names of the foregoing persons from the treasurers' list, and compelling the undesirable use of tax receipts to prove the necessary prepayment of the poll taxes required by the Constitution, is not apparent. Of course, as to persons coming from another county, the law provides for the use of the certificate of the treasurer of the former county to prove the payment of taxes in that county, but the taxes for the one year or two years succeeding are paid to the treasurer of the new county of residence. If, as stated in *Tazewell v. Herman*, supra, the principal, if not the only, purpose for which the list is required to be filed is to provide written evidence that the persons named in the list have complied with the provisions of the Constitution by paying their poll taxes so far as such payment is made a prerequisite to their right to vote, it is not perceived why all persons who have complied with the Constitution in this respect, and who are not otherwise provided by law with a prescribed means of proving such payment, are not entitled to be upon this list and to the use of same as evidence of prepayment, inasmuch as this list is made conclusive evidence of the facts therein stated for the purpose of voting.

Counsel for defendant contends in his brief that—

"As to persons coming into a county or city from another state, at such time as would entitle

tle them by virtue of the two-year period of residence to vote, and who would therefore be required to pay taxes for one year only, and have paid them, but have been omitted from the list, ample provisions have been made, both by section 38 of the Constitution and section 110 of the Code, whereby they may have their names placed upon said list upon personal application to the court, or the judge in vacation, and the introduction of proof to establish their right, even if it should be held that these persons would not be entitled to vote on the certificate of the treasurer under the provisions of section 115 of the Code."

But a person applying to the court under section 110 of the Code to be placed upon the treasurer's list must establish that he has paid his capitation taxes; otherwise he has not been improperly omitted. Improper omission carries the implication that the party complaining should have been properly included in the first instance. Hence, if the persons referred to in the citation *supra* are entitled to establish in court the payment of their poll taxes, and the consequent right to a place on the treasurer's list, from which they have been improperly excluded, it would seem that such persons should have been primarily included in said list. Their right to such primary inclusion is established by the conclusion of law that all persons who have paid their poll taxes within the three-year period and whose names are not found on the treasurer's list have been improperly excluded therefrom.

Confining our holding to the narrow issue presented in the instant case, we conclude that it is the duty of the treasurer of the city of Harrisonburg to put upon his list the names of all persons within his city who have been assessed with and personally paid, not later than six months prior to the general election in November, 1921, their state poll taxes for all or any of the years 1918, 1919, and 1920, unless it appears to said treasurer from the books and papers of his office that such persons have failed to so pay the taxes with which they have been assessed for one or more of the foregoing years. Persons thus delinquent should not be placed upon the list.

This court will therefore enter an order (a copy of which when served shall have the force and effect of a writ of mandamus) requiring the treasurer of the city of Harrisonburg to forthwith make out, certify, and file with the clerk of the circuit court of Rockingham county a list including the names of the persons ascertained in the above finding to be entitled to a place on same, but who have been heretofore omitted. This list shall be arranged alphabetically by wards, and shall state the white and colored persons separately, and shall be verified by the oath of the treasurer.

Mandamus awarded.

(121 Va. 267)

VIRGINIA WHOLESALE CO., Inc., v. TOWN OF APPALACHIA et al.

(Supreme Court of Appeals of Virginia. Sept. 22, 1921.)

Municipal corporations ~~§~~966(1)—Towns held to have statutory authority to impose ad valorem town tax on capital of merchants.

Code 1904, § 1043, as amended and re-enacted by Acts 1915, c. 111, not having been affected in that respect by the Segregation Act of 1915, held to authorize a town to impose a local ad valorem property tax on the capital of merchants employed in the town; such capital being intangible personal property taxable under the general power of taxation.

Error to Circuit Court, Wise County.

Proceeding by the Virginia Wholesale Company, Inc., against the Town of Appalachia and others for refunding of an ad valorem tax and penalty. An order denying relief was entered, and plaintiff brings error. Affirmed.

This is a proceeding in which the plaintiff in error moved the court below, under section 2389 of the Code of 1919, for relief from the payment, and to require the return and refunding of an ad valorem tax and penalty thereon, which tax the town of Appalachia, one of the defendants in error, by a levy ordered by its council, imposed for town purposes upon the capital of the plaintiff in error employed in its business as a merchant in such town on the 1st day of February, 1919 (which tax and the penalty thereon aggregated the sum of \$1,634.50 and was paid under protest, on the ground that the town was without authority to impose such tax.

The court below, by its order which is under review, declined to grant the relief sought, the effect of which was to hold that the town was authorized by law to make such levy and collection, and that the same was valid.

Bullitt & Chalkley, of Big Stone Gap, for plaintiff in error.

Morton & Parker, of Appalachia, for defendant in error.

SIMS, J., after making the foregoing statement, delivered the following opinion of the court:

The case turns upon the decision of the following question, namely:

1. Did section 1043 of the Code, as amended and re-enacted by Acts 1915, pp. 146, 147, delegate to the towns of the state the power to impose an ad valorem town tax on the capital of merchants employed in business in the towns?

This question must be answered in the affirmative.

The question is one of original grant of power to tax, "to which the rule of strictissimi juris applies," as is said in the opinion of this court delivered by Judge Kelly on the rehearing of *Richmond v. Drewry-Hughes Co.*, 122 Va. 178, at page 194, 90 S. E. 635, 94 S. E. 989. We look, then, to see if section 1043 aforesaid plainly conferred the power in question.

This section as it stood prior to the enactment of the Segregation Act in 1915, so far as material, read as follows:

"The council of every city or town shall * * * order a city or town levy of so much as in their opinion is necessary to be raised in that way in addition to what may be received for licenses and from other sources. The levy so ordered may be * * * upon any property therein, and on such other subjects as may at the time be assessed with state taxes against persons residing therein." (Italics supplied.)

The section as amended and re-enacted by Acts 1915, pp. 146, 147, reads as follows:

"The council of every city or town shall * * * order a city or town levy of so much as in their opinion is necessary to be raised in that way in addition to what may be received for licenses and from other sources. The levy so ordered may be * * * upon any property therein subject to local taxation and not expressly segregated to the state for purposes of state taxation only, and on such other subjects as may at the time be assessed with state taxes against persons residing therein. * * * " (Italics supplied.)

The italicized language next above is the only new language in the statute. In the petition and brief for the plaintiff in error much significance is attached to the language "property therein *subject to local taxation*," and it is urged that this indicates that the town must look elsewhere than to section 1043 in order to find the statute law which authorizes the "local taxation" by the town. But when we look to the Segregation Act, passed by the same Legislature which amended and re-enacted said section 1043 and used the new language aforesaid, we see at once that the new language "subject to local taxation" was added to the statute (section 1043), merely in order to restrict the otherwise broad meaning, that the city or town levy was authorized to be made on *all* "property therein," to the meaning that the city or town levy was authorized to be made on *such* "property therein" as is "subject to local taxation"; i. e., as is not segregated for state taxation under the Segregation Act. Hence it is plain that, inasmuch as the capital of merchants is such property as has not been segregated for state taxation, it is still subject to town taxation, if it was subject to that taxation as the statute (section 1043) stood before 1915; for in the Segregation Act (Acts 1915, c. 63) it is expressly provided as follows:

"The capital of merchants shall not be subject to state taxation, but may be taxed locally as prescribed by law."

The subject under consideration then comes to the precise question of whether section 1043 aforesaid, as it stood prior to the enactment of the Segregation Act in 1915 authorized the town tax in question: Was that tax therein and thereby "prescribed by law"?

It is admitted in the argument for the plaintiff in error that the Legislature has conferred upon cities and counties the authority to impose both a license tax upon merchants and an ad valorem tax upon their capital employed in business and that the same authority might have been conferred by the Legislature on towns; but it is urged with ability and force that there are cogent reasons why such authority should have been conferred on cities and counties and yet have been withheld from towns. And it is argued that it is at least left in doubt whether such authority has been conferred upon towns because, it is urged, as appears from *City of Norfolk v. Griffith-Powell Co.*, 102 Va. 115, 45 S. E. 889, and *Richmond v. Drewry-Hughes Co.*, supra, 122 Va. 178, 90 S. E. 635, 94 S. E. 989, the source of the authority of the cities of the state for their general power of taxation is found in their charters. But this argument overlooks the holding in the latter case that such source of authority is found in section 1043 aforesaid, as well as in the charters of the cities. It is there said that the statutory provisions conferring the authority—

"authorizing a tax on merchants' capital at such rate as the * * * city authorities deem necessary and proper * * * are found in section 69 of the charter of the city of Richmond [under which the tax here in question was levied] and in section * * * 1043 of the Code, * * * " etc. (Italics supplied.)

See *Richmond v. Drewry-Hughes Co.*, 122 Va. at page 187, 90 S. E. 635, 94 S. E. 989.

And a reading of section 1043 aforesaid demonstrates that whatever authority is thereby conferred on cities is also conferred upon towns.

It is true that the *Drewry-Hughes Company Case* held, as urged for the plaintiff in error, that the capital of merchants is not within the class of property which is embraced in schedule C of the tax bill. But such case does not hold, as is contended in argument for plaintiff in error, that such capital is not "property" within the meaning of section 1043 aforesaid. On the contrary, the following is expressly stated and held in the opinion in that case on the rehearing:

"It is conceded that the capital of merchants is 'intangible personal property' within the meaning of the tax laws. * * * Such capital is excepted from taxation by the state in the ordinary sense (that is, upon an ad valorem basis), and is, therefore, not within the class

of intangible property segregated for state taxation, but is subject to be taxed locally 'as prescribed by law.' The ultimate and decisive question, therefore, is: What is meant by the phrase, 'as prescribed by law'? Does it mean the prescribed rate * * * mentioned in the Segregation Act, or does it mean that the local taxation of merchants' capital is to be controlled by other statutory provisions outside of the terms of that act? We feel constrained * * * to adopt the latter view. * * *

"Statutory provisions outside of the Segregation Act, contemplating and authorizing a tax on merchants' capital at such rate as the * * * city authorities deem necessary and proper, and thus responding to the expression 'as prescribed by law,' are found in section 69 of the charter of the city of Richmond (under which the tax here in question was levied) and in section * * * 1043 of the Code, * * *" etc. "The purpose of the General Assembly seems to have been to leave merchants' capital to be taxed by localities practically as it had been prior to the passage of the Segregation Act. * * *

And it is also stated, further on in the same opinion, with specific reference to Schedule C:

"We hold that merchants' capital is not embraced in the classification of that schedule, but remains where it has practically always been, in a class to itself, subject to a license tax only by the state, but liable to a local property tax."

It is true that the authority of towns to impose the tax in question was not directly involved in the Drewry-Hughes Co. Case, and we have not regarded what is there said as conclusive of the question presented in the case now before us, and we have considered such question with an open mind; but, in view of what is there said in reference to the authority conferred on cities by section 1043 aforesaid, that decision certainly cannot be regarded as holding that merchants' capital is not "property" within the meaning of such section.

Coming back again, then, to the consideration of section 1043 in question, it seems to us plain that it authorized the towns, as well as cities, of the state, to impose "a local property tax" for town purposes on all property, in contemplation of law within the corporate limits, not segregated by the state for state taxation; that, subject to the last-stated limitation, this statute conferred a general power of taxation on the towns; that merchants' capital, not having been segregated by the state for state taxation, is intangible personal property, taxable as such by the towns under such general power of taxation; that, no question being raised before us as to the proper situs for taxation of the intangible personal property of the plaintiff in error, we must regard that situs as being, under the well-settled rule of law on the

subject, within the town of Appalachia, and hence we must regard such property as being within such town limits in contemplation of law; and therefore we are of opinion that there was no error in the order of the court below under review, and it will be Affirmed.

(131 Va. 288)

PHLEGAR'S EX'R v. SMITH et al.

(Supreme Court of Appeals of Virginia.
Sept. 22, 1921.)

1. Limitation of actions §44(5)—Action to enforce trust deed securing bond for loan barred 20 years after maturity of bond.

A suit to enforce a trust deed securing a bond for payment in five years of a loan of a trust fund was barred 20 years after maturity of the bond, though the maker was also the assignee of the interest on such fund during the lifetime of his assignor.

2. Life estates §21—Holder of life estate in interest on fund from sale of lands cannot set off value thereof in action on trust deed securing bond for borrowed principal.

An assignee of the interest for assignor's lifetime on a trust fund, realized from the sale of lands, who borrowed the principal and executed a bond and trust deed to secure payment within five years, could not, if sued on the deed, set off the present value of such life estate; one having a life estate in a fund arising from proceeds of the sale of land not being entitled to have the value thereof commuted and paid in gross instead of annual interest on the fund, unless the parties so agree.

3. Limitation of actions §104½, New, vol. 6 Key-No. Series—Set-off does not prevent statute from running on principal demand.

The existence of a set-off does not prevent the statute from running on the principal demand.

4. Mortgages §424—Though money from sale of decedent's lands treated as real estate, limitations applicable to action to enforce trust deed securing loan thereof to assignee of interest thereon for assignor's life.

Though money realized from the sale of a decedent's land must be treated as real estate, the statute was applicable to an action to enforce a trust deed securing a bond for the loan of such funds to the assignee of the interest thereon for assignor's lifetime.

Appeal from Circuit Court, Montgomery County.

Suit by Archer A. Phlegar's executor against A. B. Smith and others. Decree for defendants, and complainant appeals. Affirmed.

M. H. Tompkins and Ellett & Phlegar, all of Christiansburg, for appellant.

Harless & Colhoun and Jordan, Roop & Sowder, all of Christiansburg, for appellees.

BURKS, J. The facts of this case are undisputed, and are very fairly set forth in the petition for appeal as follows:

"The chancery suit of Abell's Adm'r v. Wilson et al. was brought in Montgomery court in November, 1879, to enforce a vendor's lien on 260 acres of land owned by the then deceased wife of John W. Wilson. By decree, John W. Wilson was given, as curtesy, the interest to be derived throughout his lifetime on \$480.58 which arose from the land sale after paying off the vendor's lien. A daughter, Lucy Wilson, was born in 1874, and was still an infant at the time the land of her deceased mother was sold under court order to satisfy the vendor's lien. This daughter was decreed as heir of her mother the surplus money, \$480.58, after her father's death. This sum of \$480.58 Archer A. Phlegar, receiver in the said suit, was ordered by decree at the May term, 1884, to land for 5 years at a time on real estate security, the decree expressly permitting the loan to be made to W. H. Smith if he so desired.

"A written assignment by John W. Wilson to W. H. Smith of the former's life interest in the money was already introduced into the suit and recognized by decree as valid. Thus W. H. Smith, as assignee, was entitled to the interest throughout John W. Wilson's lifetime on the \$480.58.

"On July 12, 1884, Receiver Phlegar loaned the \$480.58 to W. H. Smith, taking his 5-year bond therefor with a trust deed lien on certain Montgomery county farm land owned by W. H. Smith. This land was entirely different from the land of Mrs. Wilson which had been sold to satisfy a vendor's lien. On July 23, 1884, the trust deed was duly recorded in Montgomery county's Deed Book Y, p. 175, and was filed in the suit as an exhibit with Receiver Phlegar's report to the November term, 1884, of the making of the loan to W. H. Smith, at which term and on which report of Receiver Phlegar's action a decree of confirmation was entered.

"W. H. Smith died a good many years ago. There was no occasion or reason for Receiver Phlegar to collect interest from W. H. Smith on the bond for money loaned, because W. H. Smith himself was entitled to the interest as assignee from John W. Wilson as long as Wilson lived. So no interest seems to have ever been collected. The bond executed by W. H. Smith to Receiver Phlegar remains wholly unpaid, and the trust deed securing same remains wholly unreleased.

"As shown by Receiver Phlegar's itemized report to the November term, 1884, and receipts filed therewith, the costs of the suit were all paid at the time the loan was made.

"By deed dated December 11, 1889, and duly recorded on April 21, 1891, W. H. Smith sold the trust deed land to L. H. Thurman. On December 29, 1903, the same land was sold to A. B. Smith at auction under decree of Pulaski circuit court in the judgment lien suit of Miller's Ex'r v. Thurman's Adm'r et al. A. B. Smith still owns this land under a commissioner's deed made shortly after his purchase, and has been in possession continuously since his purchase.

"The proceedings in the suit of Miller's Ex'r v. Thurman's Adm'r in the Pulaski court were had with no reference at all to the fact that the suit of Abell's Adm'r v. Wilson et al. was pending in Montgomery circuit court, in which latter suit the land sold under decree of the Pulaski court was pledged under a trust deed as security for money that had been decreed to Lucy Wilson, an infant, to the principal of which money she was entitled after her father's death. No account of liens was taken in the Pulaski suit, and neither the trustee nor the beneficiary under the trust deed securing the money loaned by Receiver Phlegar to W. H. Smith was made a party to the Pulaski suit.

"The suit of Abell's Adm'r v. Wilson et al. was pending on the docket of Montgomery circuit court continuously from 10 years before Thurman bought from W. H. Smith the security land until after A. B. Smith bought this land at auction from the commissioner in the Pulaski suit on December 29, 1903.

"John W. Wilson died on May 16, 1918. About a month thereafter his daughter Lucy (whose married name was then Lucy Wilson Ward) filed her petition in the suit in Montgomery circuit court styled Abell's Adm'r v. Wilson et al., in which petition she asked the court to order her sum of \$480.58, with interest from her father's death, to be paid over to her now that her father was dead. To her petition (or an amendment thereof) B. M. Hagan, as executor of Receiver Archer A. Phlegar, then also deceased, and A. B. Smith were made defendants.

"As the result of Lucy Wilson Ward's aforesaid petition and answers of the aforesaid defendants thereto, the question which arose between Receiver Phlegar's executor of the one part, and A. B. Smith of the other part, and which question is now presented to the Supreme Court of Appeals of Virginia, is this: Has the right to raise the money owing to Lucy Wilson Ward by enforcing the trust deed which W. H. Smith executed on July 12, 1884, to John R. Johnson, trustee, to secure Receiver Phlegar, become barred by limitation, or is this land now liable in A. B. Smith's hands under the trust deed which W. H. Smith placed thereon to secure the fund he borrowed from Receiver Phlegar?"

It is claimed on behalf of the appellant that the right of action on the bond and deed of trust executed by Smith never accrued until the death of John W. Wilson, the life tenant, because, as is claimed:

"Receiver Phlegar could not have compelled repayment of the money by W. H. Smith so long as Wilson lived. If sued by the receiver when the bond apparently became due on July 12, 1889, W. H. Smith could have successfully set up the defense (and no doubt would have done so) that all costs of the suit were paid, that the receiver had no need of the money, that the ends of justice did not demand Smith to pay before Wilson's death, that he (Smith) as assignee from Wilson, was entitled to interest on the money so long as Wilson lived, and that, since the money was amply secured by real estate, he, as maker of the bond, was not com-

pellable to pay off the bond before Wilson's death."

It is further claimed that Phlegar, receiver, held the fund in trust as well for the life tenant as for the remainderman, and that, if he had sued to recover on the bond, or proceeded to enforce the deed of trust, Smith would have had the right to set off his life estate in the fund. The further claim is made that the fund sought to be recovered is real estate, and that for some reason, not disclosed by the argument and not otherwise apparent, the statute of limitations is not applicable to the claim. None of these claims is sound.

[1, 2] The fund was under the control of the court, and it was the duty of the court to see that it was preserved so that the life tenant might enjoy the income from it, and the remainderman might receive the principal on the termination of the life estate. The court was under no obligation to lend the money to the life tenant at all, or, if it did, for any particular length of time. It recognized the fact that there might be a change in value of any security that might be offered, and, while it directed the loan to be made to Smith if he desired it, it was particular to provide that the loan should be made for "not exceeding 5 years at a time." Smith well understood that the loan was to be made only for a period of five years, and that the return of the money could be demanded at the expiration of that time. He thereupon executed his bond to the receiver whereby he promised to pay to the receiver "five years after date, with interest from date" the sum of \$480.58. When this time expired the court had the right to demand payment and to change the investment for any reason it pleased, or without reason. Smith had given his solemn promise under seal to return the money at that time, and he could not evade it. This bond was secured by a deed of trust on real estate, and the court could at any time after its maturity have enforced it. But the act of limitations began to run on both the bond and the deed of trust at the maturity of the bond. The bond became barred in 10 years, and the deed of trust in 20 years, from that date. The running of the statute was neither prevented nor stayed by the fact that Smith was entitled to the interest on the fund during the lifetime of Wilson. Nor was he entitled, if sued, to set off the present value of an estate for the life of Wilson against his obligation to return the principal in five years. As said in *Amer. Nat. Bank v. Taylor*, 112 Va. 1, 70 S. E. 534, Ann. Cas. 1912D, 40:

"As a general rule, a party who has a life estate in a fund arising from the proceeds of the sale of land is not entitled to have the

value of his life estate commuted and paid to him in gross instead of the annual interest on the fund, unless the parties in interest agree to it."

[3] But, even if he could have claimed such set-off, that fact would not have prevented the statute from running. The existence of a set-off does not prevent the statute from running on the principal demand.

[4] The fund in controversy was the proceeds of the sale of land of which the wife died seized in fee. For the purpose of ascertaining the rights of the parties thereto the court properly held that the money must be treated as real estate, and decreed curtesy therein to the husband and the remainder to the only daughter. This is all that the doctrine of conversion has to do with the case. The money as such was thereafter loaned to Smith under the circumstances hereinbefore detailed.

The right to enforce the deed of trust has long since been barred by the statute of limitations. Hence there was no error in the decree of the trial court so holding, and said decree is accordingly affirmed.

Affirmed.

SIMS, J., absent.

(181 Va. 234)

POWERS v. LONG et al.

(Supreme Court of Appeals of Virginia. Sept. 22, 1921.)

1. Trusts \S 44(1)—Evidence insufficient to establish parol trust in land.

In a suit to establish a parol trust in land conveyed by the father of the parties to respondent under an alleged agreement to reconvey to complainants, evidence held insufficient to establish the trust.

2. Trusts \S 44(3)—Proof required to establish parol trust in land stated.

To establish a parol trust in land, the declaration must be shown to be unequivocal and explicit, and established by clear and convincing testimony.

Appeal from Circuit Court, Dickenson County.

Bill by Cotella Long and another against E. M. Powers. From the decree, defendant appeals, and appellees assign cross-error. Reversed and dismissed.

W. S. Powers, the father of the appellant and appellees, on May 11, 1898, executed and acknowledged a deed conveying three certain tracts of land therein described to appellant. This deed was duly recorded on September 26, 1900, and is as follows:

"This deed, made this eleventh day of May, 1898, by and between W. S. Powers, party of the first part, and E. M. Powers, party of the second part,

"Witnesseth that, for and in consideration of

the sum of four hundred and fifty dollars in hand paid, the receipt of which is hereby acknowledged, the party of the first part has this day bargained and sold to the party of the second part all the following described real estate lying and being in Dickenson county, Virginia; One tract on the waters of Sally branch containing one hundred and fifty acres, more or less, and joins the lands of A. J. Mullins, Louisa Kennady, and others; one tract on Alley's creek, containing fifty acres more or less, joining the lands of Ida Kennady and others; one tract on Crane's Nest river, containing twenty-five acres, more or less, sold by the boundary, and not by the acre, joins the lands of Mueliad Mullins and others—to have and to hold forever. Party of the first part warrant the title generally to the land hereby conveyed.

"Given under my hand and seal this above date written. W. S. Powers. [Seal.]"
(Italics supplied.)

The bill in the cause alleges:

'That "the said conveyance to the said E. M. Powers was impressed with a direct express [parol] trust and agreement between the said E. M. Powers the grantee and W. S. Powers, the grantor, that the said E. M. Powers would hold the land conveyed until the children of the said W. S. Powers became 21 years old, and then, in furtherance of the said trust, the said E. M. Powers was to convey the said land to the children of the said W. S. Powers by deed of general warranty when they should reach the age of 21 years; the portion each was to receive being ascertained and understood by said trust agreement."

The bill then alleges that when the appellees became 21 years of age, appellant, in pursuance of said trust, conveyed to them a portion of the land to which they were entitled, and, without stating the definite acreage or otherwise describing the alleged deficit, the bill prayed that the appellant may be required to convey to the appellees the remainder of the land to which they were entitled under the said parol trust, and for general relief.

The answer of the appellant, E. M. Powers, denies that he accepted said conveyance upon any trust agreement, promise, or understanding, express or implied, to the effect that "he was afterwards to convey the same to complainants or any one else." The answer thereupon alleges:

That, on the contrary, said grantor "conveyed this land to respondent voluntarily and for the purpose of hindering, delaying, and defrauding his creditors; that no consideration deemed valuable in law passed from respondent to the grantor for said conveyance, before or at the time the same was made, but that several years thereafter respondent did pay to said W. S. Powers, his grantor, full and adequate value for the part of said land now owned by him, which respondent had surveyed off to himself, which amounted to 15.91 acres"; that the conveyance respondent made to appellees was made at the request of said W. S. Powers; that respondent was under no legal obligation to make

such conveyance, but did so "out of respect to the wishes of his father and the like respect for the moral rights of his brother and sister to share in the property of their father. * * *"

Although there were a number of persons, who were members of the family and intimate associates of the grantor, examined as witnesses, there is absolutely no evidence in the case of any declaration of trust having been made by the grantor to any one at the time of or before the aforesaid conveyance, except the testimony of the grantor, which appears from his deposition filed in the cause in behalf of appellees, which was taken 20 years after the conveyance was made, and that testimony consists of the following vague general statements on cross-examination:

"A. I suppose the whole 321 acres [the three tracts conveyed by the deed, which in fact contained more land than the quantities mentioned in the deed] was deeded to him [E. M. Powers] with the understanding that he was to make certain conveyances according to our agreements. * * *

"Q. Isn't it a fact that E. M. Powers didn't know that you had made this conveyance to him, I mean the deed of 1898, for a long time after the deed was made and recorded?

"A. Of course he knew the contract before the deed was ever made, and I never claimed any of the property since 1898.

"Q. Isn't it a fact that you never mentioned this fact to E. M. Powers until a long time after the deed was made?

"A. No, sir.

"Q. Please give the time and place where you had a conversation or contract with E. M. Powers what he was to do with this land, or about you going to convey it to him.

"A. I don't remember. It was somewhere in Virginia. The time was some time prior to the deed."

The father had five children—E. M. Powers, the appellant, Mrs. Susie Dotson, Mrs. Maggie Kennedy, and the appellees, Mrs. Cotella Long and Scott Powers, Jr., who were living at the time of the deed in 1898, and, so far as appears, were also living at the time this suit was brought, and when the depositions were taken. None of them testified in the case, except E. M. Powers and Scott Powers, Jr.

Scott Powers, Jr., was examined as a witness in behalf of the appellees, and testified in substance that he knew of the sale by his father of the 10 acres of land, covered by the writing presently to be mentioned, to E. M. Powers, made some 9 or 10 years after 1898, and of the agreement between them on the boundaries of such land, of which the witness gives a description.

Walter Kennedy, the husband of Mrs. Kennedy, was examined as a witness for the appellees, and testified to the effect that, about 9 or 10 years after the deed of 1908, he was present when the said father and the

appellee, E. M. Powers, "were talking of trading" for 10 acres of the 15.91 acres aforesaid, and that E. M. Powers had lived on this 10-acre piece of land ever since, and that the witness—

"had never heard him [E. M. Powers] say anything about being a trustee, except, when I took my wife's deed to him, he said he couldn't sign the deed, unless I had an order from his father, or he was present, I believe."

This witness' testimony is also to the effect that there was no designation by the father of the parcel of land Mrs. Kennedy was to get until the year 1904, when he "showed her what part of the land she could have," and that they built there about a year before it was surveyed, and that the boundaries of it were not fixed until it was surveyed, a month or two before Mrs. Kennedy got her deed in 1905.

R. A. Long, the husband of the appellee, Mrs. Long, was a witness in the case for appellees, and his testimony is to the effect that when the appellant, E. M. Powers, executed the aforesaid deed to Mrs. Long, E. M. Powers said:

"That he was to deed this land as Scott [his father, W. S. Powers] wanted it deeded, or when he wanted it deeded to the children, words to that effect."

R. A. Long filed with his deposition a copy of the following writing, which he says he saw in the possession of appellant, E. M. Powers, in the original of which, however, the "fifteen" before the word "acres" had been plainly written over an erasure of the word "ten." Long's testimony is to the effect that otherwise this appeared to be a genuine writing signed by the said father, W. S. Powers, as of the date thereon of July 8, 1907. This writing, as it appears in the record, is as follows:

"I have this day bargained and sold to E. M. Powers fifteen acres of land on the waters of Alley's creek, in Buchanan county, Virginia, at the price of twenty dollars (\$20.00) per acre, including storehouse; balance to be paid hereafter. This July 8th, 1907."

"[Signed] W. S. Powers."

In the testimony of the father as to the trust, he first states on examination in chief, that—

"I divided it [the three tracts of land conveyed by the deed of 1898], and deeded a portion to W. R. Keil, and another portion of it to Susie Dotson, my daughter, and another portion of it to Maggie Kennedy, another one of my daughters, and then I deeded the remainder to E. M. Powers, with the understanding that he was to deed all the remaining part to Cotella Long and Scottie Powers [the appellees], except 10 acres, including his [E. M. Powers'] house.

"Q. Did you give to E. M. Powers any writing for this 10 acres?

"A. Yes, sir; I think I did, showing what he was to have.

"Q. Now do you remember the number of acres that the following deeds contained, namely: To W. R. Keil, Maggie Kennedy, Susie Dotson, and the bond to E. M. Powers?

"A. I do not remember the amounts in any of the deeds except Maggie Kennedy's, which was 59 acres, and the amount of the title bond was 10 acres, as I remember."

Then immediately in sequence in the deposition occurs the following questions and answers:

"Q. Then, if I understand you correctly, you had made this division of your land before you conveyed it to E. M. Powers as trustee in the year 1898, and that since that time he has executed conveyances to all the parties named, except the complainants in this suit?

"A. My recollection is that he made these deeds, and I joined in as a release; yes, certainly, the division had been made, and each boundary had been allotted to them, and the lines drawn, at the time of the execution of the deed of 1898.

"Q. Do you know about the date of the title bond that you executed to E. M. Powers for the acres including the storehouse?

"A. I don't remember.

"Q. Was this title bond to E. M. Powers for the 10 acres after the year 1898?

"A. I don't remember whether it was or not."

This is all of this witness' testimony on examination in chief, except the answers to the usual formal introductory questions to a witness. A portion of his testimony on cross-examination has been given above. The following additional excerpts from and references to his testimony on cross-examination and re-examination will be given:

The sole explanation this witness gives as the reason for his making the deed of 1898 appears from the following question and answer on his cross-examination:

"Q. Why did you deed all your real estate to E. M. Powers?

"A. One reason was at the time I was in bad health and did not know what was going to happen."

This witness admits, in substance, that a brother of his, Willie Powers, and himself, had been engaged in the mercantile business under the firm name of Powers Bros., prior to 1898, and that at the time the deed of 1898 aforesaid was executed this firm had failed in business. He denies that he was heavily indebted at that time, and states that—

"I owed a few debts at that time, but they were very small. I paid a hundred cents on every dollar I owed."

There is no evidence in the cause showing the amount of the indebtedness of this witness or of the firm of Powers Brothers at that time; but it is an uncontroverted fact shown in evidence (without any objection to

the testimony on the part of appellees on the ground that the answer of appellant was not sufficiently specific in its allegations to permit such proof to be introduced) that, at or about the same time the said deed of 1898 was made by W. S. Powers, the partners of Powers Bros. made a deed to the same E. M. Powers and the wife of Willie Powers, which was in fact fraudulent as to the creditors of the grantors, conveying to them a 200-acre tract of land, which was all the real estate owned by the firm, which was afterwards conveyed by the grantees in accordance with the request of W. S. Powers.

It is an uncontroverted fact shown in evidence that there was no consideration for either of these deeds at the time they were made.

The witness W. S. Powers admits that he and E. M. Powers agreed on the boundaries supposed to contain the 10 acres of land which he sold the latter, and that he then put E. M. Powers into possession of it.

The preponderance of the other evidence in the case clearly shows that E. M. Powers paid his father in full for the 10 acres of land as early as 1907 or 1908, and that the son then had the land surveyed practically according to the boundaries agreed on between himself and his father, and it surveyed out approximately 10 acres, which the son fenced in and took possession of; that before that time or subsequently the father became indebted to this son in the further sum of about \$100, and the son without any express authority from the father had the same surveyor, who made the former survey, survey off an additional quantity of land which surveyed out 5.91 acres, approximately, which the son claimed the right to hold in satisfaction of such \$100 indebtedness, and was extending his fences so as to inclose it when this suit was instituted.

W. S. Powers admits on recross-examination that he never marked out any of the boundary lines of the land which was conveyed to Mrs. Kennedy as aforesaid before "It was surveyed at the time the deed was made, or about the time the deed was made."

The tract of land first mentioned in the deed of 1898 as containing 150 acres, in fact contained, as it would seem from the evidence, about 174.65 acres. It appears from the uncontroverted evidence in the case that this was the only tract which the father at any time intended his children to have; that, of the residue of the land conveyed by such 1898 deed, the father, after 1898, sold a portion to the son, E. M. Powers, who paid him for it in full, and afterwards held and conveyed it away as undisputed owner; that either before or after 1898 the father sold the balance of said residue of land to one W. R. Keil, and that after 1898 it was conveyed by E. M. Powers to a vendee of W. R. Keil.

The record is not very explicit on the subject, but the preponderance of the evidence indicates that, if the 150-acre tract as described in the 1898 deed contained 174.65 acres, it was, after 1898, disposed of by the son E. M. Powers as follows: He conveyed at the requests of the father, made at the time the respective deeds were made, all after 1898:

To Mrs. Dotson.....	39	acres
To Mrs. Kennedy.....	59.75	
To Mrs. Long.....	59.99	
The son himself retaining.....	15.91	
	<hr/>	
	174.65	

The appellant, E. M. Powers, testified that he was away from home when the deed to him of 1898 was made; that he did not know it had been made until some years afterwards; that nothing was said to him by his father on the subject of this deed prior to the execution and recordation of it; that he thereafter executed the deeds, as and when requested by his father, conveying all of the land away as aforesaid, except that which was bought by himself and paid for as aforesaid, and the 5.91 acres which he considered that he had the right to hold in satisfaction of his \$100 debt aforesaid. He first denies, but subsequently practically admits, that he altered the writing given him as a title bond by his father for the 10 acres of land therein mentioned, making it read "fifteen" acres instead of "ten" acres, because he claimed that his father had written him a letter about the year 1915 to have the land he had paid for surveyed off and to convey the balance to the appellees, and he construed this to authorize him to have the additional 5.91 acres surveyed off, as he did, as above stated, although he admitted that the matter of his buying this additional 5.91 acres of land from his father had never been expressly mentioned between them, and that, accurately speaking, his father had never authorized him to do this. The letter referred to was not introduced in evidence.

The wife of E. M. Powers testified as a witness for appellant and stated that W. S. Powers told her that he made the deed of 1898 to E. M. Powers because he (W. S. Powers) was in debt and in order to keep the land conveyed thereby from being sold for his debts. She said this statement was made to her about a year before the date of her testimony. (No objection was made to this testimony by appellees on the ground that the answer was not sufficiently specific in its allegations to permit its introduction.)

John Perrigan, who married a stepdaughter of W. S. Powers, was examined as a witness for appellant, and testified to the effect (without objection being made to the testimony as hearsay) that the general understanding in the family of W. S. Powers was that the deed of 1898 to appellant was made

by W. S. Powers to keep the land from being sold by his creditors, and that it was the opinion of the children "that they would get the land or their proportionate part of the land": that he never heard the children say it in that way exactly, and that he did not know that he "ever heard them say in what way or who would make the deed," but that that was "the sort of opinion"; and that he never "heard E. M. Powers or W. S. Powers," that he could remember, "say anything binding either way." He does not testify when this "opinion" arose.

The court below, by the decree which is under review, held that the appellant was entitled to hold the 10 acres of land sold to him by W. S. Powers, being a part of the tract of land which is first mentioned in the aforesaid deed of 1898 from W. S. Powers to appellant, but required the latter to convey to the appellees the unconveyed portion of such tract of land, which embraces the 5.91 acres of the 15.91 acres of land in controversy as aforesaid. This action of the court is by the appellant assigned before us as error. The appellees assign as cross-error the action of the court in holding that the appellant is entitled to hold the ten acres of land just mentioned.

Chase & McCoy, of Clintwood, and D. F. Kennedy, of Wise, for appellant.

S. H. & G. C. Sutherland, of Clintwood, for appellees.

SIMS, J. after making the foregoing statement, delivered the following opinion of the court:

The whole case for the appellees turns upon the following question:

[1] 1. Is the parol declaration of trust relied upon by appellees in this case shown to "be unequivocal and explicit and established by clear and convincing testimony"?

The question must be answered in the negative.

[2] That the standard of proof required to establish a parol trust in real estate is that stated in the question is well settled. *Fleenor v. Hensley*, 121 Va. 387, 93 S. E. 582; *Taylor v. Delaney*, 118 Va. 203, 86 S. E. 831.

In the case before us the proof is neither clear nor convincing that there was any declaration of trust at the time of or prior to the execution and delivery of the deed of 1898 from W. S. Powers, the father, to his son, the appellant. The evidence, it is true, very clearly shows that there was no consideration at the time for the deed of 1898, and that the father some 9 or 10 years after 1898 decided to sell a portion of the land claimed by appellees to appellant, and to give the residue of the tract, which is especially drawn in question in this suit, to the other children; but the preponderance of the evidence, as we think, establishes that the fa-

ther did not himself decide to make these gifts until long after 1898, to wit, shortly before or at the times the appellant made the respective deeds of land to the other children, in accordance with the requests of the father, made from time to time after 1898, that he should do so.

The only reason given by the father in his testimony for the making of the deed of 1898 in question is stated in his testimony as follows:

"One reason was at the time I was in bad health and did not know what was going to happen."

This statement, along with the absence of any testimony, even of the father, of any "unequivocal and explicit" declaration of trust until after 1898, and the total absence of any other evidence from any other source of any declaration of trust whatsoever having been made by the father until long after 1898, convinces us that the father made no declaration creating any trust until after the deed of 1898 was delivered and had vested in the appellant the absolute title to all of the land thereby conveyed. It is unnecessary for us to decide whether the prime motive for the making of the conveyance by the father was to shield the land from the chance of its being sold to pay his debts; for, whether that is true or not, the testimony, even of the maker of the deed, does not go any farther than to show that he made a voluntary conveyance to the son of all the land he then owned (three tracts, containing some 321 acres), because he (the grantor) "was in bad health and did not know what was going to happen," depending upon the son to afterwards "make certain conveyances according to our agreements," without stating explicitly or unequivocally what those agreements (or "contracts," as he calls them in another place) were, with his own statement excepting, as of 1898, 10 acres from the alleged trust, which the evidence in the case clearly shows was not mentioned between him and the son until nine or ten years afterwards, with his first statement showing that there was no actual decision made by the donor to give any of the land to the children until the deeds were made to them, which were made after 1898, with his subsequent statement, made in answer to a leading question, to the effect that the division was made in 1898, left in a most general, vague, and unexplicit form, contradicted in part by his own subsequent statements, and wholly contradicted by the other evidence in the case showing that no division or designation of boundaries of the land given to the children was ever made until long after 1898. This evidence in effect shows as we think, that there was in truth no gift to these children until the deeds to them were made, long after 1898, as aforesaid. Such gifts were, of

course, necessarily subject to the absolute conveyance which had been made to the appellant in 1898, and dependent for their going into effect upon the assent of the appellant thereto, and his voluntary execution of conveyances putting the same into effect.

Other circumstances shown in the statement preceding this opinion tend strongly to confirm the conclusion just stated, but it is unnecessary to recapitulate them here. What has been said is sufficient to show our reasons for holding, as we do, that the proof in the cause fails to establish the parol trust sought to be set up by the bill of the appellees in this cause.

It follows that there is no merit in the cross-assignment of error of appellees, with respect to the provisions of the decree under review, holding that the appellant is entitled to hold the ten acres of land therein mentioned; but as there is error in the decree in so far as it holds that the appellant should make any further conveyance of land to the appellees, we will enter our decree reversing the decree under review in that particular, and dismissing the bill, at the costs of the appellees.

Reversed and dismissed.

PRENTIS and BURKS, JJ., absent.

(131 Va. 47)

GILMER v. FRANCISCO.

(Supreme Court of Appeals of Virginia.
Sept. 22, 1921.)

1. Appeal and error \S 781(4)—Case rendered moot by execution before supersedeas of order for removal of fence.

The case on appeal by G. from an order that the sheriff remove a fence erected by G. on his land, as claimed by him, but in the road of petitioner, and in violation of an injunction, as claimed by petitioner, becomes moot, so that appeal will be dismissed, by the fence being removed, pending the appeal, before the execution of the supersedeas bond; the case not being one in which the right of G. to have restoration of the fence is involved.

2. Injunction \S 215—Right to land not determinable in ex parte proceeding for removal of fence erected in violation of injunction.

G. not appearing in an ex parte proceeding by L. to have removed by the sheriff a fence erected by G. in the road of L. and in violation of an injunction, as claimed by L., the court was without jurisdiction to affect, by an order therein, any right and title of G. to the land on which the fence was located.

Appeal from Circuit Court, Scott County.

Ex parte application by W. W. Francisco for an order for removal by the sheriff of a fence erected by T. P. Gilmer in claimed

violation of an injunction. From such an order, said Gilmer, claiming the fence was on his own land, appeals. Appeal dismissed.

It appears from the record that in a proceeding commenced before the board of supervisors by applicants, one S. L. Redwine and the appellee, W. W. Francisco, which was appealed to the circuit court by the appellant, T. P. Gilmer, a right of way for a road over the land of the appellant was condemned and established as a private road, to be built and kept up by the applicants, upon a location designated in the report of S. T. Mitchell, surveyor, of his survey thereof, and in the order of the board of supervisors as beginning at a certain known beginning point, about which there is no controversy, to wit:

"In the county road at the intersection of an old road and a line of a boundary of land deeded by Henry Osborne and wife to Charles Harris, dated January 16, 1847, thence [and this is the line in controversy in the case] with said line S. $19\frac{1}{2}^{\circ}$ E. 426 $\frac{1}{2}$ feet to a stake, corner to Jake Harris," etc.

The final order of the circuit court, which approves the order of the board of supervisors and thus establishes the road in the proceeding mentioned, was entered on January 18, 1917.

It appears from the record that subsequently a suit for injunction was instituted in the same circuit court by Redwine and Francisco against the appellant, Gilmer, his agents, etc., to restrain him and them from in any way interfering with said road and the use thereof by the complainants. The only parts of the record in that suit which appear in the record before us are an order of July, 1917, granting a preliminary injunction "according to the prayer of the bill," and the final decree in such suit, entered March 15, 1918, in which the cause is brought on to be heard "upon the bill and exhibits, the answers and exhibits, * * * and the evidence in support of the bill," and the court decreed perpetuating the preliminary injunction and decided:

"That the complainants are entitled to the road as established by the board of supervisors and approved or affirmed by this court on the law side thereof, the center line of which road is the survey made and reported by T. S. Mitchell, surveyor."

On June 19, 1919, Francisco presented a complaint in writing to the judge of said circuit court, in vacation, in which he recited the granting by the court of said preliminary and perpetual injunctions, alleged that the latter was still in force, further alleged that since the granting of such injunction "some person or persons has or have" placed a fence so as to take approximately three-fifths of the road as located—

alleging that the fence begins at or near the west edge of the road or right of way and gradually deflects from the west side until it crosses the center line of the road as located, that it is practically impossible to travel over the road with a wagon, that the fence obstructs the road and violates the injunction, and that said fence also interferes with the use of said road by complainant.

The complaint then charges, on information and belief, that T. P. Gilmer and two other persons named "built the fence and obstructed the road," and filed therewith two affidavits, which are to the effect that the fence was built, as charged in the said complaint, by T. P. Gilmer and the two other persons aforesaid; that affidavits were presented when T. S. Mitchell, surveyor, surveyed the road and "put in the stakes marking the center line of the survey and the boundary lines"; and that the fence obstructed the road as so located on the ground, as alleged in said complaint.

The said complaint prayed:

(1) "That your honor issue a rule, attachment, or such process as is proper for said T. P. Gilmer" and the two other persons aforesaid, "directing them to appear before your honor at such time and place as your honor may direct"; (2) "that such further order enter or process issue as will require said parties to obey the mandate of the circuit court;" (3) "that an order be entered directing the sheriff to remove said fence and obstructions from said road, and, if necessary, authorizing the sheriff to summon T. S. Mitchell, the surveyor, to point out the survey as established by the court and make report thereof;" and (4) "that any other or further order necessary be entered."

Thereupon, on June 19, 1919, in vacation, the judge of said circuit court entered an order, reciting the presentation and prayer of the said complaint, "that a rule be awarded against T. P. Gilmer" and said two other persons "for violating the injunction" orders aforesaid, and reciting the filing of said affidavits with said complaint. Whereupon the order states that, "it appearing from an examination of the facts presented that a rule should be awarded," the court thereupon proceeds to award a rule against Gilmer and the other two parties aforesaid, returnable to the first day of the next ensuing September term of said court, 1919, to show cause, if any they can, why they and each of them should not be punished for contempt of court for "violating the terms of the injunction [aforesaid] by obstructing the road established by the board of supervisors * * * and affirmed by the circuit court by the order [aforesaid], and the interfering with the use thereof by the applicants. * * *"

The same order thereupon continues as follows:

"It further appearing from the facts presented that there are now obstructions in said

road which interfere with the use thereof, it is ordered that C. W. Dougherty, sheriff of Scott county, remove any and all obstructions which have been placed on said road in violation of the writ of injunction of March 15, 1918, and for the purpose of ascertaining the exact location of said road the sheriff is authorized and directed to summon T. S. Mitchell, the surveyor who shall point out the road as located by him. The sheriff will make a report of his action to the September term, 1919, of said court."

This order was spread on the books in the clerk's office of said circuit court on June 20, 1919.

On May 20, 1920, in term, the further order was entered by said circuit court in the proceeding commenced by said petition which is the order appealed from, which order, after reciting that the execution of the former order of June 20, 1919, was held up or suspended by direction of the court, and that meanwhile C. W. Daugherty's term of office as sheriff had expired, and that Creed Frayser had qualified in his stead as sheriff of the county, provided that it was—

"ordered * * * that Creed Frayser, sheriff, proceed forthwith to execute and carry out said order of June 20, 1919, and to remove said obstructions according to the direction of said order, and make report thereof to the next term of this court."

The foregoing statement shows all that is disclosed by the record in this case, upon which and upon the petition therefor the appeal was allowed. The petition for appeal, however, states that the real controversy in the case involves the right and title of the appellant, Gilmer, to the land west of the road as correctly located on the ground, in accordance with the orders of the board of supervisors and of the court establishing the same. As stated in the petition for appeal, the appellant—

"claims the center of the road to be on a line different from S. 19½° E.; that is, that the surveyor, in locating the road, actually located the same on a line different from S. 19½° E., but by mistake reported same on the degree S. 19½° E.," so that "the center of the road," as established by the orders aforesaid is not "where the surveyor actually ran the line * * * on the ground and drove the stakes."

And appellant further claims that he located his fence, which the order appealed from directed the sheriff to remove, so that it did not obstruct the road if the road were correctly located on the ground in accordance with the orders of the board of supervisors and the court aforesaid. Appellant further takes the positions in his petition that the circuit court has never had any evidence before it on which to adjudicate the question of the true location of the road on the ground in accordance with said orders establishing it, and further that the order appealed from was void, because the court had no ex parte

jurisdiction to enter it, and no jurisdiction of the appellant, so as to authorize it to enter such order, since he was not summoned and made no appearance as a party defendant to the proceeding in which the order appealed from was entered. The petition for appeal also takes the position that, since the appeal was granted, the contempt proceeding against appellant above mentioned has been dismissed. The brief for appellee does not deny that the latter allegation is correct.

The brief for appellee, however, moves this court to dismiss the appeal, and the same motion was made in oral argument, on the ground that pending the appeal the sheriff has executed the order appealed from by removing the fence aforesaid from the road as located on the ground by the surveyor, and that the road as so located has been since and is now unobstructed. And these facts are made to appear before us by satisfactory evidence, which is not controverted by the appellant.

S. H. Bond and W. H. Nickels, both of Gate City, and L. P. Summers, of Abingdon, for appellant.

W. S. Cox and J. P. Corns, both of Gate City, for appellee.

SIMS, J., after making the foregoing statement, delivered the following opinion of the court:

[1, 2] It appears from the statement preceding this opinion that we have nothing but a moot case before us, so that, upon well-settled principles, the appeal must be dismissed. *Levy v. Kosmo*, 129 Va. —, 106 S. E. 228, and cases cited.

The court below had no jurisdiction, in the *ex parte* proceeding, in which the appellant was not before the court, when the order appealed from was entered, to affect the right or title of the appellant to the land which he claims is in truth in controversy. So far as such right or title is concerned, if it exists, the order appealed from was and is plainly void, if it had no other support than appears from the record before us, as the appellant claims is the case. Whether the latter claim of appellant is correct or not, the record before us is insufficient for us to determine. It may or may not be that the question of the true location of the road on the ground in accordance with the course of the center of the road as established by the orders of the board of supervisors and the circuit court, was put in issue by the pleadings and proof in the injunction suit and decided by the final decree therein. If so, that matter would be *res adjudicata* so far as the appellant is concerned. If not so, and if not adjudicated in the road condemnation proceeding, or other proceeding in which appellant was a party, that matter is

still undetermined and unaffected by the order of court under review. Neither the bill nor the evidence in the injunction suit, nor the evidence in the road condemnation proceedings, being before us, we cannot pass upon the question as to whether the matter is *res adjudicata* because of what took place in those proceedings.

In so far as the removal of the fence is concerned, since it has been removed pending the appeal (this having occurred, as we understand it, before the writ of supersedeas was executed), no order we could enter would prevent that removal. The case not being one in which the right of the appellant to restore or have the fence restored is involved, since such right, if it exists, has not been affected by the order appealed from, we have no jurisdiction to enter upon the consideration of the question of whether the appellant is entitled to the alternate relief of a decree against the appellee requiring him to restore the fence.

The appeal will therefore be dismissed, without prejudice to the appellant to assert in any other proper proceeding such right or title as he may have, if any, to the land which he claims in his petition for the appeal to be in controversy.

Dismissed.

BURKS, J., absent.

HENINGER v. McGINNIS et al.

(131 Va. 70)

(Supreme Court of Appeals of Virginia. Sept. 22, 1921.)

1. Waters and water courses \S 107(3) — In suit to enjoin diversion of spring water, complainant held not to have sustained burden of identifying water.

On a bill to restrain the defendants from continuing to pipe water from a spring, thus interfering with the natural course of the water therefrom across the complainant's land, held that complainant did not sustain the burden of identifying the water as having come on his land, unless it was in the form of seepages.

2. Waters and water courses \S 107(2)—Party receiving water from mountain spring through seepage is not entitled to enjoin piping water from spring.

Where the waters of a mountain spring appear in a hollow on complainant's land in the form of seepage, or percolating waters only, he is not entitled to relief by injunction against owners diverting the spring water through pipes.

3. Waters and water courses \S 107(3)—Evidence held not to show reduction of flow on complainant's land, due to defendants piping from spring.

In a suit to enjoin parties owning a mountain spring from piping water, evidence held

not to show that reduction, if any, of the annual flow upon complainant's land is traceable to defendants' piping the spring.

Appeal from Circuit Court, Tazewell County.

Bill by C. T. Heninger against A. M. McGinnis and others. From decree dismissing his bill, plaintiff appeals. Affirmed.

Werth & Werth, of Tazewell, for appellant.
Greever, Gillespie & Divine, of Tazewell, for appellees.

SAUNDERS, J. This is a controversy over the diversion of the waters of a spring, referred to in the record as the "mountain spring," and situated on the land of A. M. McGinnis, in Burk's Garden, Tazewell county, Va.

In March, 1904, McGinnis and wife conveyed a portion of this land, containing about 50 acres, to Cleveland T. Heninger and others. Later Heninger acquired several of the shares of the other tenants.

From a diagram in the record it appears that the 50-acre tract adjoins the balance of the McGinnis land on the west, and is at a lower level than the spring, which was on the northern slope of a mountain. The dividing line between the two tracts is indicated on the diagram as a due north and south line. North of the spring, possibly half a mile, and near the line on the McGinnis side, is a house which at successive periods has been occupied by parties who testify in this case. The "mountain spring" is described as a medium sized, constantly flowing spring. A couple of hundred yards, more or less, below this spring, and west of the dividing line that is on the McGinnis side, its waters disappear in a small piece of marshy ground. These waters flow in a defined gully, or drain, from the spring to this little marsh, or place of disappearance. Below this marsh there is dry ground and sod, and a slight elevation across the course of the gully. On the other side of this elevated ground is a hollow, starting on the mountain south of the "mountain spring," and running downwards in a somewhat northeasterly course. This hollow starts and runs on the McGinnis land until a point is reached just above and south of the house mentioned supra. Here the course of the descending hollow crosses the line between McGinnis and the 50-acre tract, and about 50 yards further on it terminates in a sink hole in said tract. All water coming from the mountain along this hollow or channel supra disappears in this sink.

In 1911 A. M. McGinnis and wife sold and conveyed to J. B. Meek and M. Castle the "mountain spring," with the right to maintain a pipe line therefrom, save "as to the amount of water that would be carried by a half-inch pipe, which was reserved for the

benefit of the land on which the spring was situated." Thereupon the said Meek and Castle proceeded to wall in the spring, and lay a one-inch pipe therefrom in a ditch along the course of the boundary line between McGinnis' land and the 50-acre tract, crossing the water channel above mentioned near the house on the McGinnis side. This ditch was dug and the pipe line laid in May, 1911. At the spring a half-inch pipe was inserted in said line. This pipe ran to a trough on the McGinnis land, and the overflow of the trough flowed by gravitation along the old channel of the spring to the little marsh heretofore described. There it passed below the surface and disappeared.

It is the contention of the complainant, Heninger (appellant here), that the waters of the "mountain spring," after disappearing in the swamp south of the dry sod and little ridge supra, follow a subterranean channel, and appear on the other side of said ridge in the hollow which heads in the mountain. By natural flow in this channel, these waters would then run past the house previously described, and thence upon the 50-acre tract, where they would be lost in the sink hole 50 yards or more beyond said house.

In the year 1919, 8 years after the diversion of the waters of the "mountain spring" by Meek and Castle, Cleveland T. Heninger, part owner of the 50-acre tract, filed his bill in chancery against said Meek and Castle, and A. M. McGinnis, in which he set up his interest in said tract by reason of his purchase from McGinnis and others, and alleged that the operations of said parties in walling in the "mountain spring," and piping away the flow of same, had deprived him of water to which he was entitled. Complainant specifically alleged in said bill that after the establishment of said pipe line he was "wholly deprived of all water on said 50-acre tract," and to his very great detriment was compelled to drive his stock pasturing on said tract "off said land, a distance of about a quarter of a mile, to water." Further, that—

"This interruption of the natural flow of water to which he was entitled, and the consequent loss to his tract, operated to greatly depreciate the value of his land."

The court was asked to issue an injunction against the defendants, restraining them from continuing—

"to divert the flow of water from said spring away from its natural bed and channel * * * and to remove all of said obstructions to said natural flow, and to permit the whole of the natural flow of said spring to flow into and follow the natural bed and channel in which it would naturally flow, upon the removal of the obstructions, except so much as might be reasonably necessary for the reasonable use and purposes of A. M. McGinnis, to be used by him on his own land upon which said spring was situated."

The defendants answered this bill, denying:

First. That the flow of water from the "mountain spring" "had a fixed, permanent, and well-defined channel and bed through which it flowed to where it crossed the boundary line of the 50-acre tract."

Second. That "the water from said spring always flowed in a fixed, permanent, and well-defined bed and channel by gravitation through and upon the said 50 acres of land."

The answer alleged further by way of defense:

"That the water which for the greater part of the year flowed in the hollow heading in the mountain, and thence upon the 50-acre tract, came from sources other than the 'mountain spring'; that these sources of supply were springs in the hollow and seepages from the sides; that there was no evidence that the overflow from the 'mountain spring' after it sank at the little marsh on the McGinnis land ever reappeared at any portion of the course of the hollow below said spring: that the flow from this hollow upon the 50-acre tract had never been constant, but was dependent upon the rains, and was therefore irregular and capricious; that the hollow, or water course, was dry at times, both before and after the pipe line was established from the spring, and that the pipe line was in no wise responsible for any interruptions of flow in this channel at any time after its establishment; that the flow of water down said hollow which extends on to the 50-acre tract is not, and never has been, in any way diminished by reason of the removal of the water which respondents removed from the said spring through said pipe line."

The complainant filed certain exceptions to this answer, which were overruled. Thereafter both parties took depositions, and, the case coming on to be heard upon the pleadings and depositions, the court dismissed the plaintiff's bill. An appeal from this decree brings the controversy before this court for review. The questions presented are largely questions of fact, as the exceptions appear to have been properly overruled.

Conceding that the waters of the "mountain spring" flowed by a definite, marked channel to the point where they sank, and thence by a subterranean channel to the mountain hollow, reappearing there in such fashion that they could be identified, and thence proceeded by natural flow in the hollow to the 50-acre tract, it would be true that McGinnis would be entitled to such portion only of these waters as would be necessary for the reasonable use and purposes of the tract on which the spring was located, and could not dispose of or interfere with the natural flow of the surplus. But if the waters of said spring disappear wholly on the McGinnis land, and do not appear in the hollow below the ridge, save in the form of seepages in the hollow, resulting from percolations through the soil, or if the waters that

run in the hollow cannot be identified with the spring waters that disappear on the McGinnis land, then McGinnis would be entitled to dispose at will of the waters of the "mountain spring."

"The only difference in the application of the law to surface and subsurface streams is in ascertaining the character of the stream. If it does not appear that the waters which come to the surface are supplied by a definite flowing stream, they will be presumed to be performed by the ordinary percolations of water in the soil. A stream or water course consists of bed, banks, and water, and to maintain the right to a water course it must be made to appear that the water usually flows in a certain direction, and by regular channel with banks or sides and having a substantial existence, but it need not be shown that the water flows continually, as it may be dry at times." *Tampa Water Works v. Cline*, 37 Fla. 586, 20 South. 780, 33 L. R. A. 876, 53 Am. St. Rep. 262; *Roath v. Driscoll*, 20 Conn. 533, 52 Am. Dec. 352.

In *Gould on Waters* (3d Ed.) § 280, it is said:

"Water percolating through the ground and beneath the surface, either without a definite channel, or in courses which are unknown, and unascertainable, belongs to the realty in which it is found."

The following from a note to the case of *Wheatley v. Baugh*, 64 Am. Dec. 727, is cited approvingly in *Miller v. Black Rock Springs Imp. Co.*, 99 Va. 747, 40 S. E. 27, 86 Am. St. Rep. 924:

"Water percolating * * * beneath the surface, without a definite channel, or in courses which are unknown and unascertainable, is not subject to the settled law governing the rights of riparian owners. * * * Water which thus appears not to be supplied by a definite flowing stream is presumed to be the result of the ordinary percolations of water in the soil; such a presumption being necessary to obviate the difficulty of determining whether the water flows in a channel. * * * Where percolating water is found, it belongs to the realty where * * * found."

It is essential for the lower riparian owner who claims that an upper owner has diverted waters to which the former was entitled, to establish that the waters alleged to have been diverted would, without such diversion, flow in natural course upon his land. In other words, the flow on one man's land must be identified with that on the land of the neighbor.

The evidence in this case as to the source and volume of the water flowing by the mountain hollow upon the 50-acre tract is, in the highest degree, conflicting.

All of the witnesses agree that the "mountain spring" has a continuous flow which is but very little affected by weather conditions, but with respect to the other facts in issue they are in acute conflict. Nor is this a con-

dict of witnesses with unequal opportunities of observation. In large measure the witnesses testifying have been so situated in the matters of location and occupation, with respect to the premises in question that their opportunities of observation with regard to the volume of water flowing in the hollow below the "mountain spring" are practically equal. The witnesses for the complainant with substantial unanimity state that from year to year until the spring was piped, enough water flowed in the hollow to supply the wants of the 50-acre tract. Several of these witnesses lived in the house mentioned supra. On the other hand, the witnesses of the defendant, with practically equal opportunities of observation, some having lived in the same house, and others in the immediate neighborhood of the spring, state that formerly, as now, the waters in the hollow ceased to run during several months of the year, the flow being dependent upon the character of the season, and that there is at present, taking the flow from month to month, as much water flowing in the hollow, and thence to the sink hole in the 50-acre tract, as flowed before the spring was walled in and the pipe inserted. An illustration of the sharp and direct conflict between the witnesses will be afforded by the following extracts from the record placed in immediate juxtaposition. This testimony relates directly to the volume and flow of the water in the hollow at the house supra before it entered upon the 50-acre tract.

The witness for the complainant whose testimony is cited in this connection is Nannie Rhudy; the witness for the defendant is H. Rosenbaum, now chief of police at Graham, Va.

Nannie Rhudy.

Q. Do you know the 50-acre tract and the "mountain spring" involved in this case, and which has been spoken of in the taking of these depositions?

A. Yes.

Q. Did you ever live near that spring and get water from it?

A. Got water for years from it. I was raised there.

Q. How old are you?

A. Fifty-eight.

Q. How close to that spring were you raised?

A. About a half a mile from the head of it.

Q. How long did you use the water from that spring?

A. On until I was married. I was married at 21.

Q. How long did you live by it after you were married?

A. Two years. [This witness lived in the same

H. Rosenbaum.

Q. What is your age, residence and occupation?

A. Forty-nine years old; live at Graham, Va.; chief of police.

Q. Did you ever reside in Burk's Garden, and, if so, how far from the "mountain spring" in controversy?

A. I lived on the McGinnis place 2 years.

Q. When was that?

A. I have forgotten the year, about 1900 or 1901; maybe just a little bit later, maybe a year or two later. * * *

Q. During the time you were there, where did the water from the spring run?

A. The water from the spring ran down possibly 200 or 300 yards, and most of it sank. The water from the spring in controversy never did run down to amount to anything, to where we had

house subsequently occupied by Rosenbaum.]

Q. Where did you get your water during the two years you lived there, after you were married?

A. I got all my water to wash and do my housework out of that spring (I. e. from the water flowing in the channel by the house. The spring was some distance above the house.) We had another spring there on the other side of the house, that we got our drinking water from. This water got warm when it ran so far.

Q. How far had that water to run you got to use, from the "mountain spring"?

A. About a half a mile, I suppose. * * *

Q. How did you catch the water from the "mountain spring," for the purpose of using it? Did you dam the branch, or have a trough, or how did you get it?

A. We had a trough.

Q. Before you were married, you lived at or near this spring, and used this water?

A. Yes, sir, we moved there the year I was born, and lived there until I was married and 2 years thereafter.

Q. You used water out of that spring, then, 23 years?

A. Yes.

Q. You say you had a trough a half a mile below this spring. What became of the water after it left your trough?

A. It went into a sink hole on the Heninger land. * * *

Q. About how much water ran from the point where it entered the 50-acre tract to the sink hole? How much volume of water was there with reference to there being enough water to water stock on that 50 acres?

A. There was plenty of water when I was there. I never knew of any trouble.

Q. State during the 23 years that you lived there, whether the flow from that spring to the sink hole ever dried up, or not?

A. No, sir, I never saw it dry.

Q. During the summer time, did you have any scarcity of water, or plenty of water?

A. It would get low if there would come a right dry spell. I have known

our watering trough. There was another spring below this that furnished the water down to the trough [a smaller spring] where our watering place was.

Q. Then you lived in the house below the spring next to what is now known as the Heninger 50-acre tract?

A. Yes, sir.

Q. During the time you were there, did the water dry up in that branch, or gully, that ran by the house on to what is now called the 50-acre tract where it sank?

A. It did. I had to take my stock over to the other branch, the other spring. * * *

Q. When you say you had to go to that spring to water stock, to which spring do you refer?

A. I refer to the spring on the right-hand side, where we used to get water for drinking purposes, and at the spring house. [This refers to a spring near the McGinnis house that did not empty into the mountain hollow, but flowed a little way, and sank on the McGinnis land. It was not a source of supply for the water in the hollow.]

Q. About how much of the time was this branch that ran by the house dry?

A. Well, during the hot months of summer, we had no water down there except when we had heavy rains.

Q. Was that true every summer you lived there, or not?

A. Yes, sir.

Cross-Examination.

Q. About how much of the year was it dry?

A. Well, I can't say just as to the time, but during the hot months of summer.

Q. You can say about how much of the year, can't you?

A. Maybe four or five months out of the year, except when we had heavy rains.

Q. Do you mean that the water ran four or five months of the year, or was dry that long?

A. No, sir; I mean it was dry. In the winter time we always had water in that branch. We had a watering trough right at the house.

Q. Do you know whether that water came from the "mountain spring"

it to get low, but there was always water. Sometimes it would quit running in the trough in the daytime, but it would come in the night good.

Q. There was always water?

A. Always water.

Cross-Examination.

Q. This trough from which you got the water was about a half a mile below the spring?

A. Something near that. Don't know the exact distance.

Q. In speaking of the water, and water supply, you have reference to the place where you got the water at the trough?

A. Yes, sir.

Re-direct Examination.

Q. Where did all the water that flowed into that trough and on down into the sink hole come from?

A. From the spring, or along that branch. It all came down along the same way.

Q. By "that spring" you mean the "mountain spring"?

A. Yes, sir.

any part, or from the other spring you mentioned?

A. Well, there was never any water ran down from that spring [i. e., the "mountain spring"] while I was there; there was another spring up there that furnished the water for the trough.

Q. How do you know that no water ran down there from the "mountain spring"?

A. Well, sir, I lived there and was up there every day, and if there was any water running down from that place I would have seen it. There was a rise in that hollow [i. e. the hollow from the "mountain spring," not the hollow west of this spring], where the water could not run over. It didn't run over that place at all. It sank up there. How the water that came from this other spring could have been the same water; I don't know; I couldn't trace it underground; I don't know nothing about that.

Q. Is it not a fact that there is no constant and never-failing spring up that hollow [the mountain hollow] that could furnish the water to flow in the trough at the house where you lived, except the "mountain spring"?

A. Why there are two springs up there, Captain. Either one could come to the trough.

Q. Do you testify that both of these two springs are constant and never-failing springs?

A. I do; yes, sir. While I was there they were all right.

Re-direct Examination.

Q. You have stated that the spring or two springs below the "mountain spring" which fed the branch that ran by your house, were not dry the years that you were there, but the branch was dry.

A. Yes.

Q. Do I understand from this that the water from that spring, or those springs during the dry seasons always sank or disappeared before reaching the house?

A. Yes, sir; we didn't have any water there to use at all in the summer time, neither summer I was there. When there would come a wet spell, that water would run on Mr. Heninger's place, but

it would dry up maybe in a day or so. Maybe there would be a few drops in the trough, just a little, but not enough to water stock at all, and then at times it would be dry—just as dry as it is on this floor.

The evidence relied upon by the complainant to establish his case is the evidence relating to the flow of water in the mountain hollow prior to 1911, and the evidence that this flow was greatly reduced after the pipe line was established. It is contended that the coincidence of the reduction of flow in the hollow in the summer months of the year, with the diversion of the waters of the spring by the pipe line, indicates that the spring waters in their natural flow supplied a measurable proportion of the water in the hollow above the McGinnis house. Apart from the evidence that the flow of water in the hollow was greatly reduced after May, 1911, when the water was piped from the "mountain spring" by the vendees of McGinnis, there is no sufficient evidence to identify the water in the hollow with the overflow from this spring. Undoubtedly, there was flowing water in this hollow during the greater portion of the year, but there were two springs in the hollow, the larger one on the left-hand bank of the hollow going north. This would be the west bank of the hollow, or the bank opposite to the marsh where the waters of the spring disappeared. Conceivably this might be the point of appearance of the waters of the "mountain spring," though they would be more naturally expected to appear on the east bank of the hollow. But if the waters of the "mountain spring," pursuing a distinct subterranean channel appeared at this point, after sinking at the marsh, it would seem that the flow of this spring, if not as great, would be measurably as constant and regular as the flow of the parent waters. But such was not the case. The evidence shows that the flow of this spring was uncertain and irregular, and at times was so slight as to run but a short distance in the hollow. The other sources of supply in the hollow were the second spring, of which little note is taken by the witnesses, seepages along the sides of the channel, and the flow from the head of the hollow due to rains, or melting snows, and persisting during wet seasons.

The defendants put on the stand various witnesses to establish the origin of the waters in the hollow. One of these witnesses was an elderly man named J. C. Kitts, who lived for two years a few hundred yards from the "mountain spring," and who testifies in great detail on the above line. The following extracts are from his testimony:

"Q. When you lived there 25 or 30 years ago, state how the water from the spring ran down the mountain, and what became of it.

"A. Well, it came down the mountain, not very far, * * * and sank there. It was a low, marshy place.

"Q. Did all of it sink?

"A. Yes, sir, all of it sank.

"Q. Did that water that sank reappear at any time, so far as you were able to tell?

"A. No, sir; it never did, so far as I was able to see.

"Q. Do you know where the water came from that ran down the hollow, and ran on to the 50-acre tract?

"A. There are some wet weather springs up there that seep out of the bank; one spring that ran about all of the time.

"Q. On which side of the gully [i. e., hollow] was this spring?

"A. On the right-hand side, as you went up the hollow [i. e. the west side].

"Q. During the two years that you were there, state whether or not water constantly flowed on to the 50-acre tract, or whether there were times when there was no water flowing on this tract.

"A. There were times when there was no water there. In dry times of the year, there wasn't any water that ran down on that tract.

"Q. Was that true of both years you were there?

"A. Yes, sir, both years.

"Cross-Examination.

"Q. During the 2 years that you knew it, how much of the time would you say that the water did not run down there, expressed in weeks, months, or days?

"A. Well, something like, I would say, three months out of the year that it did not run down there to amount to anything at all.

"Q. Would there be any time when no water flowed down on the 50-acre tract, unless it was unusually dry time?

"A. Well, there were times when there wasn't any flowing down there at all.

"Q. Would that be when it was unusually dry?

"A. Well it would be when the weather was dry; it would not be right after a rain.

"Q. Will you tell me where the water came from that you have testified did flow on the 50-acre tract, except in the dry weather you have described?

"A. I suppose it came from the seeps along where the branch ran.

"Q. Isn't it a fact that there is no constant spring that runs all the time anywhere along the hollow leading to the 50-acre tract, other than the 'mountain spring'?

"A. None that I know of, except the springs along the branch [i. e., hollow] below the spring there.

"Q. Do you call them constant springs?

"A. No. There is one spring up there that I never saw dry. It may not go dry, but it didn't afford much water.

"Q. Would it have afforded the water that you say ran on the 50-acre tract?

"A. No, no; there was no water there except them seeps, only in wet weather.

"Q. Well, you have just said when I asked

you if that spring would have furnished the water, No, no, that it would not have furnished the water that ran on the 50-acre tract. Isn't that correct?

"A. Well, I don't suppose it would have furnished the water altogether. It would furnish it after a rain. In the wet part of the year, it would furnish the water all along down there."

This witness on re-examination stated that the bulk of the seepages into the hollow, or branch, were on the side of same next to the "mountain spring," that is to say on the other side of the little ridge from the marsh at which the spring waters disappear. Various witnesses for the defendants corroborate the above statements of the witness Kitts. There are no waters appearing in the hollow that are in any way sufficiently identified as the waters from the "mountain spring." It is possible that the seepages come from that spring, and it is further possible that the spring referred to by Kitts on the right-hand side of the hollow going up may be the re-appearance of the waters of the "mountain spring." This possibility is not denied by the witnesses for the defendants, though they do not consider that the identity of the waters is established. There is one noteworthy fact in the evidence proper to be mentioned in this connection. The pipe from the spring was laid in a ditch that followed the dividing line between McGinnis and the 50-acre tract, and crossed the hollow from the mountain near the McGinnis house, referred to supra. This ditch was dug in May, 1911. From the testimony of the complainant it would be expected that at this date water would be flowing in this channel upon the 50-acre tract, since the disappearance, or reduction of this flow is traced to the diversion of the constantly flowing waters of the "mountain spring" by the pipe line. At the time the ditch was being dug, the full flow of the waters of the "mountain spring" was emptying into the little marsh where they disappeared. Several, if not all, of the parties who dug this ditch testify that when they crossed the hollow near the McGinnis house, the same was "dry as a bone."

[1] The trial court was not satisfied that the complainant had identified the water in the hollow with the flow from the "mountain spring," unless it was in the form of seepages, or percolations through the soil, or had established by a preponderance of the evidence that the water diverted by the pipe line had reduced the flow of water upon the 50-acre tract. This burden was upon the complainant. After a careful review of the conflicting and highly contradictory evidence in the record, we are not able to draw a different conclusion from the evidence from that derived by the learned trial court, or to pronounce that conclusion to be erroneous.

[2, 3] If the waters of the "mountain

spring" appear in the hollow in the form of seepage, or percolating waters only, the complainant is not entitled to relief. Taking the view most favorable to the complainant of the evidence in the record, it is not considered that he has identified the disappearing waters of the "mountain spring," save to the extent of these seepages, or percolations; nor upon the evidence as a whole are we able to conclude that he has demonstrated that the reduction, if any, of the annual flow of the water upon his land is traceable to the piping of this spring by the defendants, Meek and Castle.

Upon well-established principles, the decree of the trial court must be affirmed.

Affirmed.

(131 Va. 325)

SURRETT et al. v. ESKRIDGE.

(Supreme Court of Appeals of Virginia.
Sept. 22, 1921.)

1. Bankruptcy § 303(3) — Evidence held to show bankrupt's conveyances to have been made with the bona fide purpose of preferring grantees to extent of bona fide debts.

In action involving validity of conveyances by bankrupt to his son and wife made within four months prior to filing of bankruptcy petition, evidence held to prove that the bankrupt, though he knew at the time he made the conveyances that he was insolvent, conveyed the land with the sole bona fide purpose of preferring the wife and son as creditors to the extent of their bona fide debts without the actual intent to deprive or defeat other creditors of any rights they might have under the Bankruptcy Act and without the contemplation that he would go or be forced into bankruptcy at any time.

2. Bankruptcy § 180 — Bankrupt's conveyances with bona fide intent to prefer creditors to extent of bona fide debts held valid; "hinder, delay, or defraud."

Bankrupt's conveyances, made with knowledge of his insolvency within four months prior to the filing of bankruptcy petition, to his son and his wife in payment of pre-existing bona fide debts, of land not exceeding in value the amount of such debts, for the sole bona fide purpose of preferring the son and wife as creditors to the extent of their bona fide debts and without actual intent to deprive other creditors of their rights under the Bankruptcy Act (U. S. Comp. St. §§ 9585-9586) or Code 1919, § 5184, relating to fraudulent conveyances, or under the common law, and without contemplation of going or being forced into bankruptcy, held not void, not having been made as a matter of law with the intent to "hinder, delay or defraud" creditors within Bankruptcy Act of 1898, § 67e, notwithstanding section 60b.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Hinder, Delay, and Defraud.]

3. Fraudulent conveyances § 115(1) — Conveyance preferring bona fide creditors valid.

Under the common law and statutes against fraudulent conveyances, an insolvent debtor, known by himself at the time to be insolvent, may make a valid conveyance of a portion or the whole of his assets to a bona fide creditor or creditors in satisfaction or on account of existing indebtedness if that is his sole purpose, and the transfer is for full value, although conveyance is intended to give such creditor a preference to the exclusion of others.

Appeal from Circuit Court, Pulaski County.

Suit by A. T. Eskridge, trustee in bankruptcy, against McNeal Surrett and others. Decree for complainant, and defendants appeal. Reversed and suit dismissed.

This suit involves the question of whether certain conveyances of property, made by the bankrupt within four months prior to the filing of the petition upon which he was adjudged a bankrupt, to bona fide creditors, for a consideration not in excess of the debts of such creditors and of the full value of the property, were made "with the intent and purpose on his" (the bankrupt's) "part to hinder, delay or defraud his creditors, or any of them," and were hence null and void under the provisions of subsection "e" of section 67 (hereinafter referred to as 67e) of the Bankruptcy Act of 1898, as amended in 1903, 1906, 1910, and 1917 (Comp. St. § 9651).

The conveyances in question were made on March 15 and 16, 1915, and thereafter duly and promptly recorded. Grantor thereafter prepared and intended to file a voluntary petition in bankruptcy. This petition was completed and sworn to on April 21, 1915, ready to be filed, but before it was filed creditors of the grantor on May 15, 1915, filed a petition upon which the bankrupt was on May 28, 1915, adjudicated an involuntary bankrupt, at which time the appellee was appointed the trustee in bankruptcy of such grantor.

One of the conveyances was made to a son of the grantor in payment of a pre-existing debt to him and in accordance with a promise of the grantor made before the grantor became indebted to the creditors in bankruptcy. The other conveyance was made to the wife of the grantor, at the request of another son, in payment of a pre-existing debt to him, and likewise in accordance with a promise of the grantor made before the grantor became indebted to the creditors in bankruptcy. The indebtedness to these two sons, which furnished the consideration for the two conveyances aforesaid, as is affirmatively shown by the evidence in the case, arose in December, 1911, when the assets of a partnership in a mercantile business, theretofore owned by the father and sons, were sold and the purchaser paid the purchase money in part

by conveying certain real estate to the father alone, instead of to him and the two sons, and the father, without objection on the part of the sons, afterwards sold this real estate and used the money in part to purchase the very real estate which was conveyed by said deeds of March 15, and 16, 1915, upon the promise on the part of the father that he would "protect the interest" of the sons in such money.

The evidence also shows that, when the father bought the real estate which was conveyed to the son, Stephen, by the deed of March 15, 1915, he intended it for this son at the time he bought it. This property had a tenant in it when it was bought, and, when the tenant moved out in October, 1913, the father put the son, Stephen, in possession of it, and the latter moved into it at that time, and has since been in possession of it claiming it as his own; that as of that time the father ceased to charge himself with interest on his \$300 of indebtedness to this son, charged the son with this property at \$300, the valuation of the property, in satisfaction of the debt, and, as he had put a lien on it in favor of the bank for \$300, the father at this time gave this son his note for \$300 as a set-off against the lien, and the son assumed the payment of this bank debt, and thereafter made payments of the interest and \$50 on the principal of such debt. The \$300 note given this son was unpaid at the time of the adjudication in bankruptcy.

The evidence in the case shows that at the time the conveyances of March 15 and 16, 1915, were made the grantor was, as sole owner, engaged in the retail mercantile business, and that his stock of goods would have inventoried at cost prices about \$3,800; that his bills receivable, consisting of store accounts on his books due him by customers would have aggregated about \$1,800, and that, not including the real estate conveyed as aforesaid, he owned four vacant lots, which were subject to a lien, but which were afterwards sold by the trustee in bankruptcy at public auction at a price which, after paying such lien, left a balance of \$179.62, making a total of \$5,779.62; that his total indebtedness then outside of that satisfied by the conveyances aforesaid was about \$4,000, leaving a net surplus upon these figures of \$1,779.62.

The evidence further shows that there was at that time none of the debts of the grantor in the hands of any attorney or collection agency for collection, so far as the grantor knew. The grantor testifies in substance that he then believed that, if his creditors would give him a reasonable time to pay along on his debts he would be able to pay them all in full from his assets left after the conveyances aforesaid had been made.

The evidence further shows, however, that unknown to the grantor, an attorney

had received for collection one of the debts of the grantor, an open account for \$265, on March 13, 1915, but this attorney did not write to the grantor about it until March 16, and the letter does not appear to have been received by the grantor until after that date. On March 19 the grantor gave the attorney a note covering this debt, payable April 10, 1915, with interest, and on April 16 he made a small payment on it. Immediately following that time this attorney received a number of other claims against the grantor, and the attorney, without any further communication with him, instituted suits against the grantor as follows: On April 16, 1915, on the claim first above mentioned for \$265; on April 17, 1915, on other claims for \$606 and \$38.83; and on April 19, 1915, on another claim for \$19.60. This attorney testifies in the case to the effect:

That, while he was pressing the debtor for payment of the claim first mentioned before suit was brought on it, the debtor stated to the attorney "that he could not pay; that he owed a good many debts, but that he wanted to pay them if he could. I think he stated that he had been giving checks dated ahead and that creditors were pushing him for payment. I know that I was insisting very strongly for my claim, feeling as though he were in failing circumstances from information I had gotten from him and others. * * * My recollection is that he stated that, if his creditors would give him some time, he hoped to pull through, but, if they pressed him, he could not do it. He stated that he owed a large amount and was making an effort to pay off all his creditors. He seemed to be fighting for time. * * *

It further appears from the evidence that the debts of the grantor asserted in the bankrupt proceedings aggregated \$3,764, which included the bank debt of \$300, which was a lien on the real estate conveyed to the son, Stephen, as aforesaid. Deducting this, there were left of these debts \$3,464.

The trustee had an inventory and appraisal made on June 3, 1915, which showed a total stock of goods valued at \$2,121; it not appearing whether the inventory was made at or below cost.

There were bills receivable on the books of the bankrupt at this time aggregating \$1,400, but which the appraisers "estimated and reported as being uncollectible, or probably 5 per cent. of same could be collected."

The trustee sold the stock "in June or July, 1915," and realized from same and bills receivable \$1,559.44.

The evidence in the case further shows that at the time of said conveyances in March, 1915, the sons and wife of the grantor did not know that he was insolvent, if he was then insolvent, and did not know that such deeds were made to hinder, delay, or defraud creditors of the grantor, if they were in fact made with such intent on the part of the grantor, nor did they or either

of them have reasonable cause to believe that such conveyances were intended to effect a preference among the creditors of the grantor.

In the decree of November 15, 1917, which settled the principles of the cause, and upon which the final decree was based, this is said:

"* * * The court doth consider that the conveyance dated March 15, 1915, from McNeal to Stephen F. Surratt and the conveyance dated March 16, 1915, from McNeal Surratt to Alice M. Surratt, filed as Exhibits C and D, respectively, with the bill, were made within four months of the adjudication of said McNeal Surratt as a bankrupt when said McNeal Surratt *was insolvent to his own knowledge*, and were made in consideration of pre-existing indebtedness from said McNeal Surratt to Stephen F. Surratt and M. T. Surratt, filed as Exhibits C and D, respectively (the latter having directed the deed, Exhibit D, to be executed to Alice M. Surratt, his mother, instead of to himself), and with the intent to prefer said Stephen F. Surratt and M. T. Surratt as creditors, and are preferences to the extent of the value of the properties thereby conveyed respectively, voidable and recoverable, under the provisions of section 67e of the federal Bankruptcy Act, though not voidable under the Virginia statutes of fraudulent and voluntary conveyances." (Italics supplied.)

The final decree of February 24, 1919, held that the value of the real estate conveyed to the son, Stephen, by the deed of March 15, 1915, was \$700, that the value of the property conveyed to the wife by the other deed was \$800, and provided that the sum of \$700 with interest from March 15, 1915, be charged as a lien against the former property, less the bank debt of \$250 as it then stood, and that the sum of \$800 with interest from March 16, 1915, be charged as a lien against the latter property, and that, unless these sums were paid to the trustee in bankruptcy within 60 days from the rising of the court, a special commissioner thereby appointed was directed to sell such property, etc.

F. W. Morton, of Pulaski, for appellants.
H. C. Gilmer, of Pulaski, for appellee.

SIMS, J., after making the foregoing statement, delivered the following opinion of the court:

[1,2] 1. We are of opinion that the evidence in the record before us presents a case in which the grantor knew, at the time he made the conveyances in question, that he *was insolvent*, in the sense that he did not have the then present ability to pay, and that his property would not realize enough to pay all of his creditors in full if they pressed for prompt payment. But we are also of the opinion that the grantor did not make the conveyances with any "intent to delay,

hinder, or defraud creditors, * * * or other persons of or from what they are or may be lawfully entitled to," within the meaning of the statute in Virginia against fraudulent conveyances (now Code 1919, § 5184), or within the meaning of the common law, but made the conveyances with the sole bona fide purpose of preferring the grantees as creditors to the extent of their bona fide debts, which did not, respectively, exceed the value of the property conveyed by the respective deeds. And we are of the further opinion that at the time the conveyances were made the grantor did not contemplate that he would voluntarily go or be forced into involuntary bankruptcy at any time, and did not make the conveyances with the intent to defeat or deprive his creditors of any rights they might thereafter have under the Bankruptcy Act; that the unlooked-for severity of the creditors in instituting suits against him forced the grantor into bankruptcy unexpectedly to and not anticipated by him at the time of the conveyances, and that the grantees at the time of the conveyances did not know or have reasonable cause to believe that it was intended thereby to give them a preference among the creditors of the grantor.

2. The sole question presented for our decision by the assignments of error is whether, upon this statement of facts, the conveyances in question were made with the intent and purpose on his (the bankrupt's) "part to hinder, delay or defraud his creditors or any of them," within the meaning of section 67e of the Bankruptcy Act of 1898, as amended in 1903, 1906, 1910, and 1917. This question must be answered in the negative.

The question under consideration is one of some nicety, but it is unattended with any real difficulty in so far as the principles involved are concerned. Difficulty often arises in the application of such principles to the facts of particular cases; but, in view of the circumstances of this particular case which appear in evidence, we have found no difficulty in such application.

The question we have to deal with was the subject of consideration by this court in *Webb v. Lynchburg Shoe Co.*, 106 Va. 726, 56 S. E. 581, and again upon the rehearing of that case, reported in 107 Va. 807, 60 S. E. 130. In that case the facts adverted to in the opinion were that the bankrupt on October 1st sold the whole of her property, except household goods amounting to \$250, which she claimed as exempt (the property sold consisting of a stock of goods and book accounts), for \$7,500, \$7,100 of which she distributed among three creditors, and paid the residue in small sums upon certain other debts, leaving other creditors' debts amounting to \$5,864.47 on which nothing was paid. On the very next day after said sale the bankrupt employed counsel to prepare for

her a voluntary petition in bankruptcy. This petition was sworn to on October 4th, filed on October 7th, and she was adjudicated a bankrupt on October 10th. Commenting on these facts, this court said in the opinion delivered by Judge Keith:

"* * * In the case before us it appears that the debtor, *in contemplation of bankruptcy* and immediately before filing her petition, being insolvent, disposed of substantially the whole of her estate to certain creditors," etc. (Italics supplied.)

What the case holds, as stated in the conclusion of the opinion, is as follows:

"In this case (without going into a discussion of the evidence in detail) we think the facts adverted to * * * were such as to entitle the plaintiff in error to have a jury say whether Webb made the payment under consideration with intent to hinder, delay, or defraud her creditors, and that instruction 5, asked for by the plaintiff in error [which would have submitted that question of fact to the jury] should have been given."

There are, it is true, expressions in the opinion in the Webb Case on the first hearing, and also upon the rehearing, which are capable of the construction that the court meant to say that, where the conveyance or transfer is made within four months of the filing of a petition in bankruptcy, the existence of the mere intention on the part of the bankrupt at the time of the conveyance to prefer certain creditors to the exclusion of others is such constructive fraud, or fraud per se, as must be regarded as embodying the "intent and purpose on his [the bankrupt's] part to hinder, delay or defraud his creditors," within the meaning of section 67e of the Bankruptcy Act aforesaid. Much of the argument before us has been over the question of whether this court in the Webb Case did so hold or intend to so hold, or whether it held or intended to hold that the mere intent of the bankrupt in such case to prefer certain creditors to the exclusion of others is not such constructive fraud or fraud per se as must be regarded as embodying the intent and purpose aforesaid mentioned in section 67e of the Bankruptcy Act. We think that the latter, and not the former, is the true meaning and intent of the holding of this court in the Webb Case. We think that what this court in that case meant to hold and actually held was that the "intent and purpose" in question, in order to bring the conveyance or transfer within the condemnation of section 67e aforesaid, must be an actual intent to defraud creditors—that is, an actual intent to deprive creditors of something to which they were lawfully entitled.

[3] Now at common law and under the Virginia statute against fraudulent conveyances it is well settled, and is unquestioned before us, that an insolvent debtor, known

by himself at the time to be insolvent, may make a valid conveyance of a portion or the whole of his assets to a bona fide creditor or creditors, in satisfaction or on account of existing indebtedness, if that is the sole purpose of the debtor, and the transfer is for full value, although such conveyance may and is intended by the grantor and grantee or grantees to give such creditor or creditors a preference to the exclusion of others in the distribution of the assets of the debtor. In such case other creditors are not lawfully entitled to any share in the assets transferred to the preferred creditor or creditors. What the law sanctions cannot be regarded as unlawful. In such case it is only where the transfer is not made with the sole purpose on the part of the debtor of making a bona fide preference among his creditors, and where that is merely an incident of the transaction, used as a cloak for some other purpose which is fraudulent in actual intent, that the transfer is regarded as unlawful.

As said by Lord Mansfield in *Codogan v. Kennett*, 2 Cowp. 432, concerning the statute 13 El. c. 5, and the common law:

"* * * The statute does not militate against any transaction bona fide, and when there is no imagination of fraud. And so is the common law. But, if the transaction be not bona fide, the circumstances of its being done for a valuable consideration will not alone take it out of the statute."

And so in the case of a conveyance by the debtor, making a preference among his creditors, executed within four months of the filing of the petition in bankruptcy, which does not fall within the condemnation of section 60b of the Bankruptcy Act (Comp. St. § 9644), because there is an absence of the grantee's having reasonable cause to believe that the enforcement of the transfer would effect a preference among the creditors of the grantor. But, while in such case the mere making of the preference does not show an intention on the part of the grantor to take from the other creditors anything to which they are lawfully entitled, so as to bring the case within the condemnation of 67e of the Bankrupt Act, if the conveyance were made by the grantor in contemplation of bankruptcy, and for the actual purpose of defeating the operation of that act in the matter of the equal distribution of assets among creditors which it requires, that would be an actual intent to deprive creditors of something to which they would be lawfully entitled, and would bring the case within section 67e of such act. And so would any other actual fraudulent intent against creditors, existing on the part of the debtor at the time of the conveyance, superadded to the intent to make a preference. It is not the mere intent to make or the mere result of making a preference between creditors which section

the condemns, but the superadded intent on the part of the debtor to do something further, to wit, to deprive the creditors, or some one of them, of something they are lawfully entitled to.

And such is the holding in the case of *Coder v. Arts*, 213 U. S. 228, 29 Sup. Ct. 436, 53 L. Ed. 772, 16 Ann. Cas. 1008, decided since the decision of the *Webb Case*, with respect to the proper construction of 87e of the Bankruptcy Act aforesaid. In that case the bankrupt was insolvent at the time he made the conveyance in question, and knew at the time that he was insolvent. The conveyance, a mortgage, was made May 2, 1904. The debtor filed his voluntary petition in bankruptcy on July 27, 1904. At the time the mortgage was given neither the creditor preferred thereby nor his agent acting on the matter had reasonable cause to believe that it was intended to give him a preference. The Circuit Court of Appeals certified the above in its finding of facts, and also that the bankrupt "did not make the mortgage [of May 2, 1904] with any intent or purpose on his part to hinder, delay, or defraud his creditors, or any of them."

What the Supreme Court says in the unanimous opinion of the court in the *Coder Case* is so exhaustive and conclusive upon the subject we have under consideration that we shall quote at length from the opinion as follows:

"The decision of the case requires consideration of certain sections of the Bankruptcy Act. Section 60, subd. 'a' (as amended by section 13, 32 Stat. at L. 799, c. 487; U. S. Comp. Stat. Supp. 1907, p. 1031), provides:

"A person shall be deemed to have given a preference if, being insolvent, he has, within four months before the filing of the petition, or after the filing of the petition, and before the adjudication, procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class."

"Such preferences may be set aside under the condition named in subdivision 'b' of section 60 (as amended by section 13), which is as follows:

"If a bankrupt shall have given a preference, and the person receiving it, or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person."

"Manifestly, this conveyance could not be set aside under the provisions of section 60b. For, while it is true that, under the facts found, the conveyance might be deemed a preference, as a transfer of property which would have the effect of enabling one creditor to obtain a larger percentage of his debt or claim than other

creditors of the same class, yet, as it is distinctly found that neither the mortgagee nor his agent had any reasonable cause to believe that it was intended to give a preference, the same could not be avoided under section 60b.

"The reliance in this case is upon section 67e of the act. This section, so far as it is necessary to consider it, reads as follows:

"d. Liens given or accepted in good faith, and not in contemplation of or in fraud upon this act, and for a present consideration, which have been recorded according to law, if record thereof was necessary in order to impart notice, shall not be affected by this act.

"e. That all conveyances, transfers, assignments, or incumbrances of his property, or any part thereof, made or given by a person adjudged a bankrupt under the provisions of this act, subsequent to the passage of this act, and within four months prior to the filing of the petition, with the intent and purpose on his part to hinder, delay or defraud his creditors, or any of them, shall be null and void as against the creditors of such debtor, except as to purchasers in good faith and for a present fair consideration; and all property of the debtor conveyed, transferred, assigned, or incumbered as aforesaid shall, if he be adjudged a bankrupt, and the same is not exempt from execution and liability for debts by the law of his domicile, be and remain a part of the assets and estate of the bankrupt, and shall pass to his said trustee, whose duty it shall be to recover and reclaim the same by legal proceedings or otherwise for the benefit of the creditors." 30 Stat. at L. 564, c. 541, U. S. Comp. Stat. 1901, p. 3449.

"It is the contention of the appellant that, as the necessary consequence of the giving of the mortgage under consideration was to hinder, delay, or defraud creditors of the bankrupt in the collection of their debts, Armstrong must be presumed to have intended such consequences, and the mortgage is therefore voidable.

"A consideration of the provisions of the Bankruptcy Law as to preferences and conveyances shows that there is a wide difference between the two, notwithstanding they are sometimes spoken of in such a way as to confuse the one with the other. A preference, if it have the effect prescribed in section 60, enabling one creditor to obtain a greater portion of the estate than others of the same class, is not necessarily fraudulent. Preferences are set aside when made within four months, with a view to obtaining an equal distribution of the estate, and in such cases it is only essential to show a transfer by an insolvent debtor to one who himself or by his agent knew of the intention to create a preference. In construing the Bankruptcy Act this distinction must be kept constantly in mind. As was said in *Githens v. Shiffer*, 112 Fed. 505: 'An attempt to prefer is not to be confounded with an attempt to defraud, nor a preferential transfer with a fraudulent one.' In *Re Maher*, 144 Fed. 503-506, it was well said by the District Court of Massachusetts:

"In a preferential transfer the fraud is constructive or technical, consisting in the infraction of that rule of equal distribution among

all creditors which it is the policy of the law to enforce when all cannot be fully paid. In a fraudulent transfer the fraud is actual—the bankrupt has secured an advantage for himself out of what in law should belong to his creditors, and not to him.

"Is the conveyance voidable under subdivision 'e,' § 67? Under the terms of that subdivision a fraudulent conveyance is made void as to creditors, except as to grantees in good faith and for a present fair consideration. The provision saving conveyances to purchasers in good faith and for a present fair consideration prevents such conveyances from being declared void by the act, although they have been made by the bankrupt with the intent on his part to hinder, delay, or defraud his creditors. But the act does not dispense with the necessity of showing, to avoid a conveyance or transfer under section 67e, that the bankrupt had the actual intent to hinder, delay, or defraud creditors. What is meant when it is required that such conveyances, in order to be set aside, shall be made with the intent on the bankrupt's part to hinder, delay, or defraud creditors? This form of expression is familiar to the law of fraudulent conveyances, and was used at the common law, and in the Statute of Elizabeth, and has always been held to require, in order to invalidate a conveyance, that there shall be actual fraud; and it makes no difference that the conveyance was made upon a valuable consideration, if made for the purpose of hindering, delaying, or defrauding creditors. The question of fraud depends upon the motive. *Kerr, Fraud and Mistake*, 196, 201. The mere fact that one creditor was preferred over another, or that the conveyance might have the effect to secure one creditor and deprive others of the means of obtaining payment, was not sufficient to avoid a conveyance; but it was uniformly recognized that, acting in good faith, a debtor might thus prefer one or more creditors. *Stewart v. Dunham*, 115 U. S. 61, 20 L. Ed. 329, 5 Sup. Ct. Rep. 1163; *Huntley v. Kingman & Co.*, 152 U. S. 527, 38 L. Ed. 540, 14 Sup. Ct. Rep. 688.

"We are of opinion that Congress, in enacting 67e, and using the terms 'to hinder, delay or defraud creditors,' intended to adopt them in their well-known meaning as being aimed at conveyances intended to defraud. In section 60 merely preferential transfers are defined, and the terms on which they may be set aside are provided; in 67e, transfers fraudulent under the well-recognized principles of the common law and the Statute of Elizabeth are invalidated. The same terms are used in section 3, subd. 1, in which it is made an act of bankruptcy to transfer property with intent to hinder, delay, or defraud creditors. Such transfers have been held to be only those which are actually fraudulent. It was so held in *Lansing Boiler & Engine Works v. Ryerson*, 63 C. C. A. 253, 128 Fed. 701. Considering the language, which is identical with that in section 67e, the Circuit Court of Appeals, speaking through Judge Severns, said:

"The language of subsection 1 of section 3 is the familiar language of statutes against conveyances fraudulent as against creditors, and we think there can be no doubt that Congress intended the words employed should have the

same construction and effect as have for a long period of time been attributed to those words. *Githens v. Shiffer* (D. C.) 112 Fed. 505. And, so construed, the test of the conveyances intended by subsection 1 of section 3 is that of the bona fides of the transfer. *Loveland, Bankr.* (2d Ed.) § 51. For it is the well-settled law that a conveyance made in good faith, whether for an antecedent or present consideration, is not forbidden by such statutes, notwithstanding the effect may be that it hinders or delays creditors by removing from their reach assets of the debtor.

"And to the same effect is the decision of the Circuit Court of Appeals of the Second Circuit in *Re Bloch*, 74 C. C. A. 250, 142 Fed. 676, in which that court had occasion to consider the meaning of section 67e as applicable to 57g of the act, as amended 1903, requiring the surrender of preferences voidable under section 60, subd. 'b,' or of fraudulent conveyances voidable under section 67e, in order to make proof of a claim, and, in considering section 67e, Judge Townsend, speaking for the court, said:

"We think Congress must be presumed to have intended by the introduction of section 67e to require a surrender only of such transfers as would have been fraudulent at common law, or would constitute an act of bankruptcy under section 3 of the act. In *Githens v. Shiffer*, supra, the bankrupt used the proceeds of a sale of property to prefer certain creditors. The court, upon a review of the authorities, held that section 3 applied only to those transfers which, according to the established course of authority, constituted a fraudulent transfer at the time of the passage of the Bankruptcy Act, and held that a mere preferential transfer, as distinguished from a fraudulent one, was not an act in bankruptcy under said section 3.

"The question as to whether a transfer is made with intent to hinder, delay, or defraud depends upon whether the act done is a bona fide transaction. *Loveland, Bankr.* 391; *Cadogan v. Kennett*, 2 Cowp. 435; *Lansing Boiler & Engine Works v. Ryerson*, supra. An intent to defraud is the test of the right to avoid a transfer under section 67e.

"In dealing with this question this court said, in *Thompson v. Fairbanks*, 196 U. S. 516, 49 L. Ed. 577, 25 Sup. Ct. Rep. 306:

"There is no finding that, in parting with the possession of the property, the mortgagor had any purpose of hindering, delaying, or defrauding his creditors or any of them. Without a finding to the effect that there was an intent to defraud there was no invalid transfer of the property within the provisions of section 67e of the Bankruptcy Law."

"That it is essential to show actual fraud in order to invalidate conveyances under section 67e is the view of the text-writers upon this subject. *Loveland, Bankr.* (3d Ed.) 476; *Collier, Bankr.* (6th Ed.) 562; 1 *Remington, Bankr.* § 1498."

It is true the Coder Case was decided upon the finding of facts by the court below. The opinion more than once, in parts not quoted, alludes to that situation. And that finding of facts certified that the bankrupt did not make the transfer in question "with

any intent or purpose on his part to hinder, delay, or defraud his creditors, or any of them." But, if the Supreme Court in the Coder Case had had a case before it in which that actual intent existed at the time the transfer was made (the conveyance not having been made for a present consideration), there can be no doubt that the court would have held that the transfer was void under section 67e of the Bankruptcy Act. But this does not in any way impair the fact that the holding of the Supreme Court is precisely what we have set forth above as our understanding of the holding of our own court in the Webb Case.

And while, of course, the fact that an insolvent debtor has, by the conveyance or transfer in question, made a preference among his creditors, is a circumstance which, along with all the other circumstances in the case, will be taken into consideration in determining whether there was an actual intent to defraud creditors, our finding of facts, above set forth, is to the effect that in the case before us the superadded fact of the existence of an actual intent on the part of the grantor to defraud his creditors was absent. So that we have before us precisely the case which was before the Supreme Court in the Coder Case, that is, one in which the facts are that the insolvent grantor, knowing himself at the time to be insolvent, made the transfer in question with the sole intent and purpose to prefer certain bona fide debts to the exclusion of the debts of other creditors. Hence the conclusion necessarily follows that the case before us does not fall within the operation of section 67e aforesaid.

And it is not even contended before us that the grantees were affected with the constructive knowledge mentioned in section 60b aforesaid, so as to bring the case within the condemnation of that section.

It is true that in *Dean v. Davis*, 242 U. S. 438, at page 444, 37 Sup. Ct. 130, at page 131, 61 L. Ed. 419, at page 444, which is cited and relied on by appellee, in the opinion of the Supreme Court, delivered by Mr. Justice Brandeis, this is said:

"A transfer, the intent (or obviously necessary effect) of which is to deprive creditors of the benefits sought to be secured by the Bankruptcy Act 'hinders, delays or defrauds creditors,' within the meaning of section 67e."

But the court is there referring to the obviously necessary effect which the debtor actually had in mind, or in contemplation, at the time of the transfer. In that case the facts were, as stated in the opinion of the court, that the debtor not only knew that he was insolvent and that he was making a preferential payment, but that he made such preferential payment to avoid a threatened criminal prosecution, and the court said that he must have known that suspension of his

business and bankruptcy would result from the giving and recording of such a mortgage; that is to say he must have made the transfer in actual contemplation of bankruptcy. And, although this was true, the court does not even then hold that such facts per se show that the case comes within section 67e aforesaid; but, immediately following the quotation next above, the opinion proceeds as follows:

"*Van Iderstein v. National Discount Co.*, 227 U. S. 575, 582, 57 L. Ed. 652, 654, 33 Sup. Ct. Rep. 343, points out the distinction between the intent to prefer and the intent to defraud. * * * Making a mortgage to secure an advance with which the insolvent debtor intends to pay a pre-existing debt does not necessarily imply an intent to hinder, delay or defraud creditors. * * *"

On the other hand:

"The fact that the money advanced is actually used to pay a debt does not necessarily establish good faith. It is a question of fact in each case what the intent was with which the loan was sought and made."

All of which is in entire accord with the Coder Case.

This is made still plainer by reference to the case of *Van Iderstine v. National Discount Co.*, 227 U. S. 575, 33 Sup. Ct. 343, 57 L. Ed. 652. The Supreme Court affirmed the Circuit Court of Appeals in that case. In the opinion of the Circuit Court of Appeals, reported in 23 Am. Bankr. R. 345, 174 Fed. 518, 98 C. C. A. 300, this is said:

"There is a marked distinction between a preferential payment and a fraudulent conveyance. Every preferential payment must to some extent hinder and delay creditors, but it is not necessarily a fraudulent conveyance."

The Coder Case is here referred to and quoted from. The opinion then continues as follows:

"A preferential payment may be constructively fraudulent, but it is not in and of itself a fraudulent conveyance. It can only become the latter in the unusual case where actual fraud in addition to the preference is established. Thus a secret trust in favor of a person making such payments might turn a mere preference into a fraudulent conveyance. But there is no proof in this case of any intent to hinder or defraud creditors more than the preferential payments in themselves would have hindered them."

In the opinion of the Supreme Court in the case last cited (227 U. S. at page 582, 33 Sup. Ct. at page 345, 57 L. Ed. at page 654), this is said:

"There is no necessary connection between the intent to defraud and that to prefer, but, inasmuch as one of the common incidents of a fraudulent conveyance is the purpose on the part of the grantor to apply the proceeds in such manner as to prefer his family or business connections, the existence of such intent to pre-

fer is an important matter to be considered in determining whether there was also one to defraud. But the two purposes are not of the same quality, either in conscience or in law, and one may exist without the other. The statute recognizes the difference between the intent to defraud and the intent to prefer, and also the difference between a fraudulent and a preferential conveyance. One is inherently and always vicious; the other innocent and valid, except when made in violation of the express provisions of a statute."

The decrees under review must therefore be reversed, and we will enter a decree dismissing the bill, with costs to applicants.

Reversed and dismissed.

(131 Va. 178)

JABBOUR BROS. v. HARTSOOK.

(Supreme Court of Appeals of Virginia. Sept. 22, 1921.)

1. Landlord and tenant ⇨291(13) — Verdict for defendant held not supported by evidence.

Where the lease forbade subletting and provided for termination for arrears in rent, but defendant sublet part of the property and agreed to pay additional rent therefor, undisputed evidence in an action for unlawful detainer that the increased rent had not been paid when notice to quit was served, which terminated the lease, held insufficient to sustain a verdict for defendant.

2. Landlord and tenant ⇨108(2)—Tender of overdue rent after termination of lease ineffectual.

Where a lessor gave notice of termination of the lease for nonpayment of rent, a tender of such rent after the time fixed by the notice for delivery of possession was too late.

3. Landlord and tenant ⇨108(1)—Contract provisions as to termination of lease held controlling.

Where a lease authorized lessor, if the rent was in arrears and unpaid, to terminate at the expiration of 10 days from time of giving notice, neither the common-law rules as to procedure to terminate a lease for nonpayment of rent nor the statute on the subject had any application.

Error to Law and Chancery Court of City of Roanoke.

Action by T. E. B. Hartsook against Jabbour Bros. A verdict for defendants was set aside, judgment rendered for plaintiff, and defendants bring error. Affirmed.

This is an action of unlawful detainer instituted by the defendant in error, Hartsook, to recover of the plaintiffs in error, Jabbour Bros., a partnership (composed of several partners whose names need not be here stated), certain storerooms located in the city of Roanoke.

The several premises were all demised by Hartsook, the lessor, to Jabbour Bros., the lessees, by a single lease in writing, bearing date and executed November 9, 1918. The lease contained the following provisions with respect to the use of the premises, etc., namely, that the premises were—

"to be used for general wholesale merchandise and for no other purpose, for the term of (36) thirty-six months, to commence on the 1st day of May, 1919, at the rent of * * * \$295.00 per month, payable in regular monthly payments of \$295.00 at the office of the agent of the lessor in the city of Roanoke on the 1st day of June, 1919, and each successive month thereafter during the continuation of this lease. The above letting is upon the following terms and conditions:

"First. Lessee will, without any previous demand therefor, pay the specified rent at the time, and in the manner above provided. * * *

"Second. Lessee shall not, without the written consent of the lessor first indorsed hereon, use the said premises nor allow them to be used for any purpose other than is herein provided, nor assign this lease, nor underlet the said premises or any part thereof for the whole or any part of the said term. * * *

"Seventh. It is further agreed that, if said rent shall at any time be in arrears and unpaid, or if the lessees shall fail to comply with any of the conditions of this lease, * * * lessor may cause a notice to be left on the premises of his intention to determine the same, and at the expiration of ten days from the time of leaving such notice this lease shall absolutely determine."

There was a trial by jury which resulted in a verdict for the defendants, the lessees, Jabbour Bros. This verdict the trial court set aside and entered judgment for the plaintiff lessor, Hartsook, and the lessees have appealed.

The material evidence, conflicts in the evidence, and other pertinent matters are as follows:

Some time prior to April 22, 1919, the said lessees underlet one of the storerooms, designated in the record as "the corner room (Market Square)," and also alike designated as "room No. 103 on Market Square," to one Constantine, to be used for a candy and fruit store—i. e., for sale of candy and fruit, among other things. This subletting was in fact for a period of one year to begin on May 1, 1919. There is a conflict in the evidence as to whether the lessor, Hartsook, knew of the length of this subletting until the next February or March, but there is evidence tending to show that he knew of this prior to or on April 22, 1919, and we will regard that as a fact in the case. It is an uncontroverted fact that the lessor, Hartsook, on or before April 22, 1919, knew that Jabbour Bros. had sublet said corner storeroom to Constantine and objected to this subletting of such room, to be used for the sale

of candy and fruit, in an interview, or interviews, with one of the partners of Jabbour Bros. On April 22, 1919, according to Hartsook's testimony, he went over to see one of the partners, whom he mentions, and said to him:

"I understand that you have rented this building [the said corner storeroom] to Mr. Constantine." And they said, 'He is a poor fellow, and we haven't any goods to go in there yet, and I thought I would let him go in there until we got some goods to go in there.' And I said, 'That is not in accordance with our contract, and I insist on your not putting him in.' And I went back and wrote a letter and said that, 'If you do put him in there I am going to charge you additional rent.'"

This letter was as follows:

"Hartsook & Cleaton,
"Real Estate—Rental Agents

"Roanoke, Va., April 22, 1919.

"Jabbour Bros., Market Square, City—Dear Sirs: This is to notify you that in subrenting the corner room (Market Square) for candy and fruit store is not in accordance with our contract, as it was distinctly agreed upon to use same for merchandise in dry goods line only and I told Mr. Jibran (Jabbour) that I understood the party on the corner had rented same and that it was unsatisfactory to do so, and by so doing I will demand an additional rent of \$12.50 per month while he remains a tenant, so you will have to charge the new tenant the advance.

"This will be your sufficient notice to that effect.

"Yours very truly,

"Hartsook & Cleaton,
"By T. E. B. Hartsook."

The testimony of and for the lessor, Hartsook, is silent as to whether Jabbour Bros., on or after the receipt of this letter, consented to its stipulation for and agreed to pay the extra rent of \$12.50 per month thereby demanded. Such testimony is to the effect that Jabbour Bros. never actually paid or offered actual payment of this extra rent until the tender of their check, dated April 8, 1920, which included this accrued extra rent to April, 1920, which tender was made on April 8, 1920, as is hereinafter further mentioned.

The testimony of one of the Jabbour Bros. as to what occurred on the last-named subject when they received the letter of April 22, 1919, is, so far as in point, as follows:

"Mr. Hartsook brought this letter and says, 'Being as you all are going to rent to this man, we must have \$12.50 more for this store.' * * * I told Mr. Hartsook it would be all right. * * *"

Following this, Constantine took possession of said corner storeroom and entered upon his subtenancy on May 1, 1919.

There is other testimony of this witness in

the record to the effect that his concern had a large expense in putting the corner store in condition for use, and that subsequently they did not pay the extra rent because they were asking Mr. Hartsook not to insist on it because of the said expense they had been put to and because they had been really trying to meet Mr. Hartsook's wishes and get Constantine to vacate the store and hoped to do so, but failed, and that when Mr. Hartsook rendered a bill in December, 1919, for the extra rent then accrued the witness "assured him if that was the only penalty we would be willing to pay it," but did not in fact then or afterwards pay it, as they were taking all the time they could get on it and hoped to get Hartsook to waive his demand for it up to the time of their receipt of the notice to vacate, presently to be mentioned.

The \$295 monthly rent stipulated for in the original lease was promptly paid each month by the lessees and accepted by the lessor up to and including the month of March, 1920.

On the side of the lessor, Hartsook, the testimony is to the effect that he did not intend to insist on the payment of the extra rent for which he stipulated in the letter of April 22, 1919, and which the testimony for Jabbour Bros. shows they agreed to pay, if Jabbour Bros. had gotten Constantine to vacate the corner room aforesaid within a short time, and that they kept leading him along by fair promises as to getting Constantine out and hard luck talk from time to time until December 20, 1919, when he wrote them the letter, which so far as material, is as follows:

"Hartsook & Cleaton

"Real Estate and Rental Agents

"Roanoke, Va., Dec. 20, 1919.

"107 Terry Building.

"Jabbour Bros., Market Square, Roanoke, Va.—Dear Sirs: We herewith submit a bill for extra rents of \$75.00 to December 1, 1919, on corner room now occupied by George Constantine, confectioner.

"My notice of April 22d notified you that the subrenting of same to this tenant was not in accordance with the terms of your contract, which was to be used for dry goods business. I agreed to allow you \$12.50 on account of cleaning up Koontz & Feather's room. I must insist on your complying with our contract on the building in regard to kind of business.

"Your further subrenting No. 107 Market Square for wholesale fruit and produce, which we have repeatedly demanded be removed, and you have failed to comply, so we must insist upon the change of business in accordance as per contract and in violation of same will demand \$12.50 per month rent on same as a penalty.

"Respectfully, Hartsook & Cleaton,
"By T. E. B. Hartsook."

(It will be noted that this letter refers to another subletting besides that to Constan-

tine of another storeroom covered by the lease, but, as this is not material to the decision of the case, details of such alleged subrenting are omitted.)

Still the accrued and past due extra rent was not paid, and the matter dragged along, Constantine still remaining in the corner room, and Jabbour Bros. continued promising Hartsook to do all they could to get him out as soon as they could, when, on March 23, 1919, the following notice from the lessor was delivered to the lessees, to wit:

"Roanoke, Va., March 22, 1920.

"To Jibran J. Jabbour, Raffey J. Jabbour and Abraham J. Jabbour, Trading as Jabbour Bros., Market Square and Nelson Street, Roanoke, Va.—Gentlemen: By the terms of my lease with you, dated November 9, 1918, covering storerooms on Market Square, Nos. 108, 106, 107, and on Nelson street, Nos. 210 and 212, No. 210 Nelson street being the room on the second floor above 212 and 214 Nelson street, it is provided that you as lessee shall not, without my written consent, use the premises nor allow them to be used for any purpose other than as provided in said lease, nor assign or underlet the premises or any part thereof for the whole or any part of the term.

"You have repeatedly violated these conditions and terms of the lease against subletting, and on that account I have elected to terminate said lease on Saturday, April 3d, and hereby demand that you vacate said lease premises on Saturday, April 3d, and give me possession of same that day.

"In my letters of April 22, 1919, and December 20, 1919, I protested against the use of the corner room on Market Square by George Constantine in his confectionery business, and I also objected to the subrenting of No. 107 Market Square to the Wholesale Fruit & Produce Company, and told you that, if you permitted these subtenants which I objected to, you would have to pay \$12.50 additional per month on each of them. As you have not paid the additional sum of \$12.50 per month, and refused to do so, and have insisted on violating the terms of the lease by allowing these subtenants to remain, I have also elected to terminate this lease, because of your failure to pay this additional rent, and hereby notify you that I have terminated the lease, and demand possession, as aforesaid, on April 3, 1920.

"Very truly yours, T. E. B. Hartsook."

On April 8, 1920, Jabbour Bros. tendered to the lessor, Hartsook, their check for the \$12.50 per month unpaid and extra rent aforesaid, both on the room occupied by Constantine and No. 107 Market Square aforesaid, claimed by the lessor as aforesaid, to and including March, 1920, but the lessor then refused to accept payment of such rent, insisting upon the termination of the lease, per his said notice of March 22, 1920, delivered to the lessees on March 23, 1920; and the lessor on April 14, 1920, instituted this action.

Other matters are referred to in the opinion of the court.

A. B. Hunt, of Roanoke, for plaintiffs in error.

Woods, Chitwood, Coxe & Rogers, and Jackson & Henson, all of Roanoke, for defendant in error.

SIMS, J., after making the foregoing statement, delivered the following opinion of the court:

There are several assignments of error by the lessees, the plaintiffs in error, complaining of the action of the trial court in giving and refusing instructions; but, as the verdict of the jury was in favor of the lessees to the full extent of their claim, if there was error in such action of the court, it will not be considered by us, as it was manifestly harmless error so far as the lessees are concerned.

The sole remaining assignment of error is that the trial court erred in setting aside the verdict of the jury and in entering judgment for the lessor, defendant in error, Hartsook. This presents the following question:

[1] 1. Was the verdict of the jury plainly wrong or without evidence to support it?

This question must be answered in the affirmative.

[2] In view of the fact that the evidence in the case shows that by mutual agreement between the lessor and the lessees, entered into before the term of the demise began, the monthly rent reserved was increased by \$12.50 per month from the beginning of the term, that such extra rent was "in arrears and unpaid" when the notice was given on March 23, 1920, so that such notice terminated the tenancy 10 days thereafter, to wit, on April 3, 1920, in accordance with the seventh clause of the lease, and the tender on April 8, 1920, of the rent in arrears, being after such termination, was too late to prevent the termination which had already occurred, and as there was no conflict in the evidence on those subjects, it seems plain to us that there was no evidence before the jury to sustain the verdict for the lessees, and that the verdict was plainly contrary to the evidence.

This being so, all the other matters in controversy in the case concerning whether under the second clause of the lease there was a forfeiture because of the subletting or a forfeiture because of the use of the premises for a purpose other than for general wholesale merchandise provided for in the lease, or whether such forfeitures were waived by the lessor by his acceptance of rent prior to the giving of the notice last mentioned, and other interesting questions raised in connection with these subjects in behalf of the respective parties and the authorities cited and relied on upon those questions and subjects, become immaterial, and hence need not be dealt with in this opinion.

[3] The seventh clause of the lease provides that, if the rent shall "at any time

be in arrears and unpaid," the lessor may terminate the lease at the expiration of 10 days from the time of giving the notice, such as was given as aforesaid. Hence neither the common-law rules on the subject of what a landlord must do to terminate a lease because of nonpayment of rent nor the statute in Virginia on the subject have any application. The subject is governed and controlled in the case in judgment by the express contract of the parties and by the action of the lessor in accordance therewith.

We are therefore of opinion that there was no error in the action of the trial court in setting aside the verdict of the jury and in entering judgment for the lessor.

The judgment under review will be affirmed.

BURKS, J., absent.

(131 Va. 275)

POWERS et al. v. HOWARD et al.

(Supreme Court of Appeals of Virginia. Sept. 22, 1921.)

1. Equity §446—Bill of review lies as to error of law apparent on the record.

A bill of review does not lie to review errors in the determination of facts, but if error of law be apparent from an inspection of the record in a cause, and a final decree has been entered, a proper case is *prima facie* presented.

2. Equity §446—Admission of deposition of incompetent witness held apparent on record.

A bill of review will lie as to error in admitting the deposition of an incompetent witness, where the decree expressly mentioned the deposition and the exception thereto; such matter thus appearing upon the record.

3. Witnesses §146—Husband of party to action held incompetent.

In a suit by an administrator to enforce liens against a husband and wife, the husband was incompetent to testify as to whether the wife was liable as surety only, in view of Code 1904, § 3346a, making the consort of a party to such a proceeding an incompetent witness.

4. Equity §460—Bill of review should specify errors relied on.

A bill of review ought to specify with some degree of accuracy and definiteness the errors relied on.

5. Appeal and error §172(1) — Matters not mentioned in bill of review not considered.

On appeal from the dismissal of a bill of review, an assignment of error as to a matter not mentioned in the bill will not be considered.

6. Equity §464—No relief on bill of review unless errors clear.

Where on bill of review, if the decree complained of should be reversed the parties could not be put in statu quo, the court will not grant relief unless the errors complained of are clear

and have been specifically excepted to and pointed out in the original proceedings.

7. Equity §445—Infants may impeach decree only on same ground as adults.

While Code 1919, § 6316 (Code 1904, § 3335), extends the time within which infants may file a bill of review, it does not authorize them to attack decrees upon any grounds except those which would be available to adults.

Appeal from Circuit Court, Washington County.

Bill of review by Marie Powers and another, by next friend, against D. H. Howard, trustee, and others. From a decree dismissing the bill on demurrer, complainants appeal. Affirmed.

Oglesby & Burks, of Roanoke, for appellants.

Henry Roberts, Fulkerson & Davis, Peters, Lavinder & Peters, and Donald T. Stant, all of Bristol, for appellees.

KELLY, P. In a lien creditors' suit, styled N. P. Oglesby, Adm'r, v. M. F. Powers et al., formerly pending in the corporation court of the city of Bristol, and finally disposed of and dismissed from the docket of that court in April, 1909, certain real estate theretofore owned by M. F. Powers and Nora M. Powers, his wife, was sold to satisfy the liens thereon. Nora M. Powers was dead when the suit was brought, and her two surviving children, Marie and Bernice, both at that date under 14 years of age, were made parties defendant, and appeared by guardian ad litem.

In the summer of 1918, Marie and Bernice Powers, who had not as yet attained their majority, suing by their next friend, filed a bill of review, seeking to have corrected in their favor certain errors alleged to be apparent on the face of the record. The defendants to this bill of review, composed chiefly of the several purchasers of the property sold in the original cause, demurred thereto, and the circuit court of Washington county, to which the cause had been duly removed, entered a decree sustaining the demurrer and dismissing the bill. From that decree this appeal was taken.

[1] The general rules and principles by which the courts are to determine whether a bill of review will lie in a given case for errors apparent on the face of the record are well settled. The law on the subject is stated by Mr. Lile in his *Equity Pleading and Practice*, § 142, as follows:

"A bill of review does not lie to review or correct errors of judgment in the determination of facts. If there be error in this particular, after a final decree, it can be corrected only by an appellate court. But if error of law be apparent from an inspection of the record in the cause, and a final decree has been entered, a

proper case for a bill of review is *prima facie* presented."

To the same effect is the opinion by Judge Christian in *Thomson v. Brooke*, 78 Va. 180, 163, wherein he says:

"It is well settled that a bill of review can only be brought upon two grounds: First, upon newly discovered evidence; and, second, upon errors of law apparent upon the face of the record. * * * As to errors of law, they must be such as appear on the face of the decrees, orders, and proceedings in the cause, arising on facts either admitted by the pleadings or stated as facts in the decrees. Such errors of law, and such only, may be corrected by a bill of review. But if the errors complained of be errors of judgment in the determination of facts, these can only be corrected by appeal."

In 2 Beach on Modern Equity Procedure, § 857, the author says:

"For the purpose of examining all errors of law, the bill, answers and other proceedings are, in this country, as much a part of the record before the court as the decree itself; for it is only by a comparison with the former that the correctness of the latter can be ascertained."

In 1 Hogg's Equity Procedure, § 211, p. 272, it is said:

"The meaning of the phrase, 'error apparent upon the face of the decree,' is not so restricted as the words would seem to imply. It embraces all that appears upon the face of the proceedings, including whatever was embodied in the issue. It really means error of law, disclosed by the record, as contradistinguished from a mistaken conception of fact as shown by the evidence in the cause. To determine on bill of review whether or not error of law exists, the court will examine the original bill, the answer filed in the cause, all orders and decrees made and entered therein, the commissioner's report so far as errors on the face thereof are concerned, and all the other proceedings, to ascertain whether upon the whole case error of law has been committed."

While there are occasional expressions on the subject in the decisions and the textbooks which might seem to suggest a more restricted rule, the propositions asserted in the last two of the above quotations are generally recognized and fully supported by authority. *Cary v. Macon*, 4 Call (8 Va.) 606; *Wroten v. Armat*, 31 Grat. (72 Va.) 228, 260; *Rawlings v. Rawlings*, 75 Va. 76, 88, 89; *Pracht & Co. v. Lange*, 81 Va. 711, 721; *Daingerfeld v. Smith*, 83 Va. 81, 93, 1 S. E. 599; *Gills v. Gills*, 126 Va. 526, 543, 101 S. E. 900; *Bank v. Shirley*, 26 W. Va. 563; *Whiting v. Bank*, 13 ret. 8, 10 L. Ed. 33, 37; *Putnam v. Day*, 22 Wall. 60, 22 L. Ed. 764, 765; *Story's Eq. Pl.* § 407.

[2] The first alleged error apparent on the face of the record is that the court in the original proceedings held M. F. Powers to be an incompetent witness, on the ground

that the previous death of his wife, Nora M. Powers, rendered him incapable of testifying. Counsel for appellees contend that, even if this ruling of the court was an error, and material, it did not "appear upon the face of the record" in such way as to be reached by bill of review. We do not take this view of the question. The deposition of Powers was taken before the commissioner appointed to report on liens and their priority, and was excepted to on the ground above indicated; and the commissioner, without specifically passing upon the objection, but plainly indicating that he gave no weight or effect to the deposition, made up his report, and along therewith returned the deposition, referring the objection to the court for action. The decree expressly mentioned the deposition and exception, and in terms sustained the latter. This action clearly appears upon the face of the record, and if it is error and material, it is not a conclusion of fact depending upon the evidence, but is an error of law, which under the above authorities may be taken advantage of by bill of review.

[3] Upon the merits of the question, however, we are of opinion that there was no error in the ruling of the court as to the competency of M. F. Powers as a witness. The material facts in this connection are as follows: Among the liens sought to be enforced in the original suit were two deeds of trust and three judgments in respect to which it appeared from the records that M. F. Powers and Nora Powers, his wife, were jointly liable as principal debtors. The purpose of the Powers deposition was to prove that as to these deeds Mrs. Powers was liable only as surety for her husband. The property of both was heavily incumbered, but it is claimed that a substantial part of the real estate owned by Mrs. Powers, mother of the appellants, would not have been reached and subjected to sale if she had been treated as a surety of instead of as a principal with her husband. Assuming that this latter proposition would have been true—namely, that the M. F. Powers property would, if first exhausted in satisfaction of the liens against him and his wife, have prevented the sale of a substantial part of her property—was he a competent witness to prove the essential fact of her relationship as his surety? We think not. The entire discussion of this point upon the part of counsel for appellants is addressed to the provisions of section 3346, clause 2, Code 1904, upon the apparent assumption that the court held M. F. Powers to be an incompetent witness under that section. In answer to this assumed ground of the decision by the lower court, it is argued: (a) That since Powers and his wife were parties of the same part, or on the same side of the contract represented by the deeds of trust, he was not incompetent under the terms of the statute; and (b) that "he was not testifying

in his own favor or in favor of any other person whose interest was adverse to that of the party who was incapable of testifying," and was therefore not within the interdiction of the statute. The soundness of this argument may be conceded, but the court probably based its conclusion, not upon section 3346, clause 2, but upon section 3346a, which contains the following disqualification:

"Where one of the original parties to a contract, matter, or other transaction which is the subject of investigation is incapable of testifying by reason of death, insanity, infancy, or other legal cause, and the other party to such contract, matter, or transaction is made incompetent to testify by subsection 2 of section 3346 of the Code of Virginia, then in such case the consort of either party shall be incompetent to testify in relation to such contract, matter or transaction," etc.

In this case, as correctly stated in the petition for appeal, and as pointed out and insisted upon by counsel for appellees, "the parties to these two contracts were M. F. Powers and Nora M. Powers, his wife, of the one part, and Kirkpatrick & Howard, trustees, and H. G. Peters, trustee, of the other part." The contractual relationship of Mrs. Powers was the subject-matter of the investigation, so far as the exception here under consideration was concerned. Nora M. Powers was dead at the time the deposition of M. F. Powers was offered and objected to on that ground. In this situation, all three of the trustees were incompetent to testify by virtue of the provisions of section 3346, clause 2, and the result was that by the terms of section 3346a, just quoted, when Powers was called on as the consort of Nora M. Powers, deceased, he was clearly incompetent as a witness.

[4] The second ground upon which the bill of review sought to have the decree of sale in the original cause reversed was stated thus:

"It was error to cancel the sale to H. G. Peters of the James W. Jefferson property."

This is the only allegation in the bill with reference to the Jefferson property. It is probable that the validity of this complaint depended upon the competency of M. F. Powers, and that the adverse decision upon that point renders any further discussion of this alleged error immaterial, but we need not rest our decision of the question upon that ground. The decree confirming the sale of the various properties in the original cause contained this statement:

"As to the lot reported as sold to H. G. Peters at the purchase price of \$306 being the J. W. Jefferson lot, it appearing that the proceeds from the sale of the other property was sufficient to satisfy all liens in these proceedings reported prior to the conveyance by M. F. Powers to J. W. Jefferson, this sale to the said H. G. Peters is annulled and set aside."

It might be possible to go through the record in the original cause and find out all about the Jefferson property, but it is not deemed necessary or proper to undertake this task. A bill of review ought to specify with some degree of accuracy and definiteness the errors relied upon. It nowhere appears that the action of the court in this respect was excepted to, and there is nothing so far as we observe upon the face of the record to show that such action was erroneous. No error having been pointed out in the bill of review, we dismiss this point from further consideration.

The two alleged errors already discussed are the only ones which were directly alleged in the bill of review. There is a statement in the bill "that the rents and profits of the real estate of Nora M. Powers was ample to pay within five years" the amount, if any, for which she was liable. And, while there is no direct charge to that effect, it is possible to interpret the reference to the rents and profits as an allegation that the court ought to have had an account taken and a report made thereon, and that its failure to do so was error. As a matter of fact, however, there was a report as to the rental value of all the properties in the original suit, and the point here made was not raised there at all. Its efficacy, in any event, depends upon the deposition of Powers, which we have held was properly excluded.

[5] It is claimed in the petition for appeal that the court erred in the original case in not selling certain property, of the estimated value of \$250, referred to as the James O. Powers property. As this matter is not even mentioned in the bill of review, the assignment of error based thereon is not good, and we need not consider it further.

It is also said in the petition for appeal that the court erred in the original cause in allowing 5 per cent. commission to the commissioner, or trustee, who sold the property, but, like the matter referred to in the last paragraph, this error was not in any way adverted to in the bill of review, and must be disregarded here.

[6] The numerous properties involved in this case were sold to sundry purchasers in February, 1909, for a total price of \$14,885, the money was all paid in cash, and the sales to the various purchasers confirmed in April, 1909. Since that time there have been various changes in the ownership. It is practically certain that if the decree complained of should be reversed, the court could not put the other parties in statu quo. Under these circumstances the courts are properly reluctant to undertake to grant relief unless the errors complained of are clear and have been specifically excepted to and pointed out in the original proceedings. *Phipps v. Wise Hotel Co.*, 116 Va. 739, 82 S. E. 681.

[7] It is true that the appellants are infants, but as a general rule in cases like

this they can only impeach the decrees complained of on grounds which would be available for that purpose to an adult. The statute (section 6316 of the Code of 1919; section 3335, Code 1904) extends the time within which infants may file a bill of review, but it does not authorize them to attack decrees as a general rule upon any grounds except those which would be available to other parties. *Zirkle v. McCue*, 26 Grat. (87 Va.) 517, 528.

Upon the whole case, we are of opinion that the circuit court was right in sustaining the demurrer to the bill of review, and its decree will be affirmed.

Affirmed.

BURKS, J., absent.

(131 Va. 126)

HINES, DIRECTOR GENERAL OF RAILROADS, v. GARRETT.

(Supreme Court of Appeals of Virginia. Sept. 22, 1921.)

1. Appeal and error \S 994(2)—Truth of testimony for jury.

In action by passenger wrongfully discharged beyond place of destination for damages for being raped while walking back, the court, on appeal from judgment for passenger, will not consider the questions of the passenger's veracity and the truth of her story as to being raped, but must treat the narrative as true; the veracity and the truth of her story being questions for the jury.

2. Carriers \S 276(3)—Evidence held to prove rape of passenger discharged beyond destination.

In action by passenger wrongfully discharged beyond place of destination for damages sustained in being raped while walking back, evidence held to sustain passenger's story as to the assault, notwithstanding failure to find assailants.

3. Carriers \S 247(4)—Relationship of carrier to passenger continues until passenger reaches destination or voluntarily departs at other point.

The relationship and liability of a carrier to a passenger will ordinarily continue until the passenger has reached his destination, but may be terminated at some other point by the passenger's voluntary departure from the carrier's vehicle.

4. Carriers \S 271—Carrier's duty in general as to passenger carried beyond destination stated.

Generally carrier must stop train at station for which a passenger holds a ticket and must give passenger reasonable opportunity to disembark and must return passenger carried beyond destination to the station for which he holds a ticket, but is not required, in all cases, to run the particular train back to the station; the question of its duty to so do depending on the circumstances, including the

distance the train has traveled before mistake is discovered.

5. Carriers \S 278(1)—Whether train carrying passenger beyond destination should have backed to station held for jury.

In action for being carried beyond destination, whether the train should have been backed to place of destination, on discovery of mistake less than a mile beyond the station, notwithstanding a railroad rule prohibiting movement against current of traffic without orders from superintendent of transportation, held for the jury.

6. Carriers \S 278(1)—Whether passenger carried beyond destination voluntarily left train held for the jury.

In action by 18 year old passenger carried a mile beyond destination for being raped while walking back, whether she voluntarily left the train and terminated the relationship of carrier and passenger held for the jury.

7. Carriers \S 271—Not liable for rape of passenger walking back after having voluntarily left train beyond station.

Eighteen year old passenger, who was an intelligent young woman, in business for herself, and accustomed to riding on trains, and who voluntarily left train after having been carried one mile beyond her station, could not recover from the railroad damages sustained in being raped while walking back to station, having voluntarily terminated her relationship as a passenger and having assumed the risk.

8. Carriers \S 278(1)—Whether rape upon passenger walking back to station was proximately caused by wrongful ejection held for jury.

In action against railroad by 18 year old passenger wrongfully discharged beyond her station, requiring her to walk back a distance of one mile along unprotected route known to have been infested by tramps, hoboos, and other disreputable characters, whether rape committed on her while walking back was proximately caused by the wrongful ejection from train held for the jury.

9. Carriers \S 271—Bound to know character of place at which it wrongfully discharges passenger.

A carrier, in the discharge of the high duty which it owes to its passengers, is bound to know the character of the place at which it wrongfully discharges them.

10. Carriers \S 271—Passenger ejected from train after having been carried beyond station did not assume risk of walking back.

Eighteen year old girl carried beyond her station, who was, in effect, ejected from train, having been required to act hastily and without reasonable opportunity for deliberation, and who was raped while walking back to station, did not assume the risk of walking back.

11. Negligence \S 62(3)—Exposing to act by third person causing injury actionable.

The rule that no responsibility for a wrong attaches when an independent act of a third person intervenes between the negligence

complained of and the injury does not apply where the very negligence alleged consists of exposing the injured party to the act causing the injury.

12. Carriers ⚡284(2)—Must protect passenger against anticipated danger.

A carrier having reason to anticipate danger of an assault on a passenger must protect the passenger against such danger.

13. Appeal and error ⚡1178(6)—Case remanded for determination of one question only where on all other questions parties have had a fair trial.

Under Code 1919, § 6365, the appellate court, in reversing judgment for failure to submit issue to jury, will remand the case merely for determination of such issue and not for a trial de novo, where the parties have had a fair trial upon all other questions.

Appeal from Circuit Court, Fairfax County,

Action by Julia Mae Garrett against Walker D. Hines, Director General of Railroads. Judgment for plaintiff, and defendant appeals. Reversed and remanded, with directions.

Barbour, Keith, McCandlish & Garnett, of Washington, D. C., for appellant.

C. Vernon Ford and Wilson M. Farr, both of Fairfax, for appellee.

KELLY, P. The plaintiff is a young girl between 18 and 19 years of age, and the object of the suit is to hold the defendant, Director General of Railroads, liable in damages for two acts of rape upon her person, committed by two men shortly after she had been, as she alleges, negligently required to leave the defendant's train in a dangerous and unprotected place.

The evidence was in some material respects conflicting, but substantially the following facts were either conclusively established or supported by evidence which would have justified the jury in accepting them as true: The occurrences complained of transpired in daylight, but very shortly before dark, on the 2d day of February, 1919. The plaintiff was a passenger on the defendant's train and held a ticket from the city of Washington, D. C., to a station called Seminary, in Fairfax county. The train failed to stop at Seminary, and thereupon another passenger, one W. L. Garnett, who also held a ticket for that station, called the attention of a flagman to the fact that he had bought a ticket for that place and wanted to get off. The train was then stopped, and Garnett alighted and walked by a near way to his home. About that time the plaintiff told the conductor she had a ticket to Seminary, and she was about to get off, but he directed her to wait, as he intended to back the train to the station. This occurrence took place about seven-tenths of a mile beyond Seminary. She did step back, but the train, instead of moving backward,

pulled ahead, and she asked the conductor what he intended to do, saying she thought he was going back to the station. He then said that he could not go back because he was afraid he would run into another train, and that she would therefore have to go on through and be sent back to Seminary on the next train, or else get off at that point. She testified that the conductor's manner was very rough, and that he seemed indifferent to what happened to her; and it is fairly inferable from the evidence (if his testimony in conflict be rejected) that she understood him to mean that if she did not get off at that point he would carry her on all the way through to Richmond before starting her on the return journey, which would involve a long trip in the night and much discomfort and inconvenience. Thereupon she said to him, "Let me off;" and he stopped the train and she left the car. About the same time a man wearing a United States army uniform, generally referred to in the record as a soldier, got off the train on the opposite side. The plaintiff started back in the direction of Seminary, walking alongside the track. The soldier followed, and shortly overtook her, taking hold of her arm and asking if he might accompany her home. She denied this request, and he thereupon forcibly carried her across the track and down a high embankment to an obscure spot, where he pushed her to the ground and ravished her. After accomplishing his fiendish purpose, he left her, and has never been identified. Within a few moments thereafter, and while she was still trying to arise from the ground, a man dressed in citizen's clothes, described by her as a civilian, appeared and ravished her the second time. He likewise disappeared, and has never been identified. A vigilant and extensive search for the assailants was made, but without success. After both of these horrible occurrences, she struggled to her feet, came back to the surface of the railroad grade, and was then met by two citizens living in the neighborhood, who escorted her to her home. One of these parties, a Mr. Cockrell, had, from his home a few hundred yards away, seen the plaintiff leave the train, with the soldier following. His attention was diverted and he did not see them leave the railroad grade, but a few minutes later saw that they had disappeared. This fact aroused his suspicion, and he called a companion and they sat out to see what had become of the young woman. They testified that when they met her she was in a most pitiable condition, her clothing soiled and disarranged, her mouth bleeding, her face dirty, and her mental condition plainly evidencing that she had been subjected to some horrible treatment. Her mother testified that upon an examination of her person she found that the plaintiff had been subjected to physical violence, and that there were convincing evidences that she

"had been misused." A physician who was called and examined her next day was summoned as a witness in her behalf, and was in attendance at the beginning of the trial, but did not testify because before a convenient and orderly point for his testimony had been reached he was called away by professional duties and plaintiff's counsel deemed it unnecessary to require him to come back.

[1, 2] There is no direct claim made before us that the plaintiff fabricated in whole or in part the story upon which she brings this suit, but there seems to be an implied contention to this effect. The questions involving her integrity and veracity and the probable truthfulness of her narrative, however, if, indeed, such questions are intended to be presented to us, were peculiarly questions for the jury; and we must now treat that narrative as true. And it is proper to add that upon a critical examination of the record we do not think her story is seriously discredited. Her character for chastity and for truth and veracity is not impugned or discredited by anything which appears in the record; and her account of the alleged outrages was so fully accredited in the community where she lived that earnest and prolonged, though futile, efforts were made to locate and arrest her assailants.

The point at which the plaintiff left the train was about four-fifths of a mile from the flag station known as Seminary, and there was abundant evidence to show that on the right-hand side of the railroad track, leading back from that point to Seminary, there was a ravine or depression locally known as "Hoboes' Hollow," "Tramps' Hollow," and "Tramps' Den," which was then, and had been for at least a year (during the whole of the régime of the Director General of Railroads), habitually frequented and infested by hoboes, tramps, and questionable characters. The attractiveness of the place for such characters is fully explained in the record.

There was a verdict and judgment for the plaintiff, and the defendant brings the case here for review.

There were 12 general assignments of error, and the actual number was materially larger, owing to the fact that 2 of the assignments dealt more or less particularly with each of the unnecessarily numerous instructions involved, but we think the merits of the case and the substantial differences between the parties may be reduced to two questions: (1) Was the plaintiff ejected from the defendant's train under such circumstances as to entitle her to claim the relationship of a passenger until she had returned to Seminary station, the point to which she held a ticket? (2) If so, can the assaults to which she was subjected be regarded as proximately caused by such wrongful ejection from the train?

1. It is contended that the plaintiff is not

entitled to recover because she had voluntarily terminated her relationship as a passenger by accepting the alternative which the conductor offered her and leaving the train. This defense is good if the proposition upon which it rests is supported by the facts.

A brief discussion of the principles of law applicable in this connection will be helpful in reaching a correct answer to the question now under consideration.

[3] The relationship and liability of a carrier to a passenger, having once commenced, will ordinarily continue until the passenger has reached his destination; but such relationship and liability may be terminated at some other point by the passenger's voluntary departure from the carrier's vehicle. 4 R. C. L. § 499, p. 1046; 6 Cyc. 541; 10 C. J. 628; 5 Am. & Eng. Ency. L. (2d Ed.) pp. 497, 500; Commonwealth v. Boston & M. R. Co., 129 Mass. 500, 37 Am. Rep. 382.

[4] When a passenger holds a ticket for a particular station, the general rule is well settled that the train must be stopped at that station and a reasonable opportunity given the passenger to disembark. If it does not stop and the passenger is carried beyond his destination, then it is the duty of the carrier to return him to the station to which he holds a ticket. This does not mean, however, that in all cases the carrier is bound to run the train back to the station; that, of course, will depend upon circumstances, including, in particular, the question as to how far the train has gone beyond the passenger's destination before the mistake is discovered.

In *Samuels v. Richmond, etc., R. R. Co.*, 35 S. C. 493, 14 S. E. 943, 28 Am. St. Rep. 883, 888, a case in which a female passenger had been carried perhaps 400 yards beyond the destination called for in her ticket and then rudely ejected at a damp and rough place, the court, in dealing with the general duty of the carrier under such circumstances, said:

"If the carrier can with safety discharge his passenger at the point of destination, such passenger has the right to such action; and if from any cause and in a reasonable distance from such station that has been passed without the passenger having been afforded an opportunity to alight at his destination such omission is discovered, it is the duty of the carrier to return such passenger to that destination. It will not be excused because it is inconvenient or troublesome; it will only be excused upon the proof of some controlling exigency, and the burden of such proof is upon the carrier the moment the passenger proves that he had the right of passage to a certain point and a compliance on his part with ordinary care, and that such point of destination was passed by the carrier without giving the passenger an opportunity of getting off."

The general rule, as stated in the above quotation, is undoubtedly sound and just, and is fully supported by authority and by

common sense and justice; but it must be remembered that the passenger who has been carried beyond his destination is not the sole person to be considered. See *Yazoo & M. V. R. Co. v. Hardie*, 100 Miss. 132, 55 South. 42, 967, 34 L. R. A. (N. S.) 740, 742, Ann. Cas. 1914A, 323. If it would be imprudent or unsafe, or a manifest inconvenience to other passengers, by reason of the distance beyond the station to which the train had proceeded before the mistake was discovered, to back to the station, the only alternative left, with a due regard to the safety and rights of other passengers and a proper consideration for an efficient public service, is to allow the passenger to get off, if he requests to do so, or, if he prefers, carry him on to the next station and return him, free of charge, by next train, to the station to which he held a ticket. In such case, whether the passenger elects to leave the train and return on foot or by other means to his destination, or to accept the other alternative suggested, he would have a right of action against the carrier, and could recover such damages as naturally and proximately resulted from its default in carrying him by his station. By a voluntary departure from the train at some other than the point of destination the relationship would be terminated, and the question of damages might very materially be affected.

[5] In the instant case the train had proceeded nearly a mile beyond the station. There was a rule of the company, as disclosed by the evidence, which in itself was a reasonable rule, to the following effect:

"On a double track (as in this case) no movement must be made against the current of traffic without orders from the superintendent of transportation."

But there was also evidence upon which the jury might properly have found that under a reasonable interpretation and application of this rule the conductor would not have violated it nor caused the other passengers any risk or disproportionate inconvenience if the train had been backed to Seminary. No scheduled train was to follow soon, and under the block system in effect upon that road, if any train followed it could only enter the block under caution.

[6] Furthermore, the evidence was such as that reasonable men might have differed as to whether the plaintiff could be said to have voluntarily left the train at the point in question. She was suddenly placed in a perplexing situation. She says the conductor treated her rudely, and made no explanation as to what he meant by carrying her through and sending her back, and there is room to contend that she did not, in legal contemplation, voluntarily sever her relationship as a passenger by leaving the train under these exciting and embarrassing circumstances. In other words, there is a view

of the evidence under which she might be regarded as having been coerced or unduly induced to take the course which she did in leaving the car. In such a case she certainly could not be held, as a matter of law, to have forfeited her relationship as a passenger. *Stevens v. Kansas City Elevated Ry. Co.*, 126 Mo. App. 819, 105 S. W. 26.

On the other hand, the testimony of the conductor and other witnesses on behalf of the defendant, if taken alone and accepted at its face value, would have warranted the jury in finding that she did voluntarily and deliberately give up her rights as a passenger, and voluntarily terminate the relationship. The question thus became one which should have been submitted to the jury on proper instructions.

[7] The plaintiff's instructions did not, in our opinion, adequately submit this question to the jury, and those asked for by the defendant on that subject were rejected. This was error. We shall not discuss the instructions in detail. What we have said will be a sufficient guide for the trial court in formulating instructions when the case comes to trial again. It only remains to say that, if the jury should find that the plaintiff did exercise a free will and deliberate judgment, unhampered by any improper conduct on the part of the conductor, and decided to leave the train rather than incur the inconvenience of taking the other course, then she did terminate her relationship as a passenger and assumed the risk of the consequences which befell her. She had not attained her majority, but she was an intelligent young woman, in business for herself, accustomed to riding on trains, and legally competent to make a deliberate choice.

[8] 2. Coming now to the second question, and assuming in this discussion that the plaintiff did not, in legal contemplation, voluntarily leave the train and thus end the relationship of carrier and passenger between her and the defendant, could the jury, under the evidence as to the character of the place, have been permitted to find that the assaults to which she was subjected were proximately caused by her wrongful ejection from the train?

With this question we have no difficulty; it is clearly to be answered in the affirmative.

In the case of *N. & W. Ry. Co. v. Whitehurst*, 125 Va. 260, 263, 99 S. E. 568, 569, Judge Burks, delivering the opinion of this court, said:

"The 'foreseeableness,' or reasonable anticipation of the consequences of a wrongful or negligent act, is not the measure of liability of the guilty party, though it may be determinative of the question of his negligence. When once it has been determined that the act is wrongful or negligent, the guilty party is liable for all the consequences which naturally

flow therefrom, whether they were reasonably to have been anticipated or not, and in determining whether or not the consequences do naturally flow from the wrongful act or neglect, the case should be viewed retrospectively; that is to say, looking at the consequences, were they so improbable or unlikely to occur that it would not be fair and just to charge a reasonably prudent man with them. If not, he is liable. This is the test of liability, but when liability has been established, its extent is to be measured by the natural consequences of the negligent or wrongful act. The precise injury need not have been anticipated. It is enough if the act is such that the party ought to have anticipated that it was liable to result in injury to others. *City Gas Co. v. Webb*, 117 Va. 269, 84 S. E. 645; *Pulaaki Gaslight Co. v. McClintock*, 97 Ark. 576, 134 S. W. 1189, 1199, 32 L. R. A. (N. S.) 825; *Cooley on Torts* (Student's Ed.) p. 33; *Hill v. Winsor*, 118 Mass. 251; 25 *Harvard Law Review*, 245, 246; 1 *Shear. & Red. (5th Ed.)* § 28, and cases cited."

See, also, to same effect, *Tripp v. City of Norfolk*, 129 Va. —, 106 S. E. 360; *Judy v. Doyle*, 130 Va. —, 108 S. E. 6.

Applying the rule above quoted, bearing in mind the high degree of care due by a carrier to its passengers, and assuming that the plaintiff did not voluntarily leave the train, but was coerced or persuaded to do so at an improper and dangerous place, the case, to say the least of it, was clearly one in which the jury might have properly found in her favor. It requires no resort to a retrospective view of the facts to reach this conclusion. The consequences which overtook this young woman were sufficiently probable to charge any responsible party with the duty of guarding against them. No 18 year old girl should be required to set out alone, near nightfall, to walk along an unprotected route, passing a spot which is physically so situated as to lend itself to the perpetration of a criminal assault, and which is infested by worthless, irresponsible and questionable characters known as tramps and hoboos; and no prudent man, charged with her care, would willingly cause her to do so. The very danger to which this unfortunate girl fell a victim is the one which would at once suggest itself to the average and normal mind as a danger liable to overtake her under these circumstances. It is no answer to the proposition to say that the presumption is that crimes of this character will not be committed. The presumption applies under ordinary circumstances, but it is not to be indulged, and ordinarily prudent men do not indulge it, to the extent of regarding it safe to expose a young woman to such a risk as the plaintiff in this case incurred in passing "Hobo Hollow" as the shades of night were approaching. The fact that there were numerous houses within a few hundred yards of the place does not relieve the situation, if the jury believed, as it might have done, that the place itself was

dangerous and unprotected. And when it is recalled that the care which the carrier owed to her, assuming that she was still a passenger, was not merely ordinary care and prudence, but the highest degree of care which could be expected from human foresight, it is clear that there was a view of the evidence under which the defendant was liable for the injuries which she sustained as having been proximately caused by its breach of duty.

[9] There is a suggestion that the evidence does not show that the defendant in this case knew of the dangerous character of the vicinity through which the plaintiff would have to walk in order to reach her destination. In view of the evidence, it is difficult to see how the defendant could have failed to know the general reputation of this place. But it was not incumbent upon the plaintiff to show such knowledge. A carrier, in the discharge of the very high duty which it owes to its passengers, is bound to know the character of the place at which it wrongfully discharges them; and if the defendant wrongfully required the plaintiff to get off at a dangerous place without knowing it, it did so at its peril.

[10] Nor can it be said that the plaintiff assumed the risk of the danger. That depended upon whether she acted deliberately and voluntarily; and under the present branch of the case we are assuming, that which the jury might under proper instructions have found, that she was, in effect, ejected from the train by having to act hastily and without reasonable opportunity for thought or deliberation in an emergency which was wrongfully brought about and improperly dealt with by the defendant.

The chief defense under this branch of the case seems to be based upon the proposition that, even if the plaintiff was negligently required to leave the train, the assaults upon her cannot be regarded as the proximate cause of that negligence, because they resulted from an independent act of third persons over whom the defendant had no control and with whom it had no relation. Numerous authorities are cited in support of this proposition. We shall content ourselves, in the main, by saying that only a few of the cases relied upon appear to us difficult of substantial distinction from the present case, and that to such as are in conflict with the views herein expressed we are unable to give our approval. A case very strongly relied upon by the defendant in this connection is that of *The Lusitania* (D. C.) 251 Fed. 715, 732. In that case the opinion by the District Judge was devoted principally to the consideration of the question of negligence, and after a very full and careful review of all the evidence the conclusion was reached that there was no negligence shown, and that therefore the claimants were not entitled to recover. After having reached

this conclusion, the opinion proceeds to say that, even if the evidence had established negligence, there could have been no recovery because the destruction of the vessel resulted from an independent illegal act, and could not be regarded as the proximate result of such negligence. This latter proposition may therefore very properly be regarded as a dictum in the *Lusitania Case*, but, whether so or not, we cannot give our assent to it as applied to the case in hand.

[11, 12] We do not wish to be understood as questioning the general proposition that no responsibility for a wrong attaches whenever an independent act of a third person intervenes between the negligence complained of and the injury. But, as pointed out by Judge Keith in *Connell v. C. & O. Ry. Co.*, 93 Va. 57, 24 S. E. 467, 32 L. R. A. 792, 57 Am. St. Rep. 786, this proposition does not apply where the very negligence alleged consists of exposing the injured party to the act causing the injury. It is perfectly well settled and will not be seriously denied that, wherever a carrier has reason to anticipate the danger of an assault upon one of its passengers, it rests under the duty of protecting such passenger against the same.

The Virginia cases relied upon by the defendant do not sustain its position. Neither in the case of *Connell v. C. & O. Ry. Co.*, supra, nor in *Fowkes v. Southern Ry. Co.*, 96 Va. 742, 32 S. E. 464, could the defendant have been reasonably expected to anticipate the consequences for which the plaintiff sought to recover. Those cases applied the same rule which we have applied in this case, and held that the proximate result of negligence is a result which ought to have been foreseen in the light of attending circumstances.

[13] Upon this branch of the case, there was no error in the instructions, or otherwise, to the prejudice of the defendant, and we think, therefore, that the plaintiff should recover the amount of the damages fixed by the verdict of the jury, unless at another trial a jury, upon instructions in accordance with the views hereinbefore expressed, should find for the defendant upon the question as to whether the plaintiff exercised a free and voluntary choice in leaving the train. If they should so find, there should be a final judgment for the defendant. Upon all other questions, including the amount of damage, the parties have had a fair trial, and we shall therefore remand the cause solely for the determination of the one question indicated. This course is taken pursuant to section 6365 of the Code of 1919, which provides that—

“A civil case shall not be remanded for a trial de novo except where the ends of justice require it, but the appellate court shall, in the order remanding the case, if it be remanded,

designate upon what questions or points a new trial is to be had.”

Reversed.

(130 Va. 584)

ADDINGTON v. GUESTS RIVER COAL CO.

(Supreme Court of Appeals of Virginia. Sept. 22, 1921.)

1. Trial \S 139(1)—Demurrer to evidence overruled if reasonably fair-minded men might have differed.

On demurrer to the evidence, the court must decide in favor of a demurree if the evidence is such that the jury might have found a verdict for him, or if reasonably fair-minded men might have differed.

2. Master and servant \S 236(1)—Servant must protect himself from known dangers.

A servant must provide for his own safety from such dangers as are known to him, or which are discernible by ordinary care on his part.

3. Master and servant \S 154(1)—Warning necessary only where servant is ignorant of danger.

The master is required to inform servant of dangers ordinarily incident to the service only where the danger is known, or ought to have been known, to the master, and is not known to and cannot reasonably be expected to be discovered by the exercise of ordinary care by the servant on account of youth or inexperience.

4. Master and servant \S 107(5)—Rule requiring safe place inapplicable to work changing character of place.

A master who employs a servant to engage in dangerous work must use ordinary and reasonable care to make the place of work as reasonably safe as the nature of the work permits, but such rule does not apply when the work consists in constantly changing the character of the place for safety as the work progresses.

5. Master and servant \S 217(1)—Risk of known dangers assumed.

A servant assumes all ordinary risks of the service, and generally all risks from causes known to him, or readily discernible by a person of his age or capacity in the exercise of ordinary care.

6. Master and servant \S 247(1)—Servant's negligence, proximately contributing to injuries, precludes recovery.

A servant cannot recover for injuries by master's negligence if he has himself been guilty of negligence that either solely caused or proximately contributed to the injuries.

7. Master and servant \S 217(23)—Coal miner held to have assumed risk of fall of slate.

An experienced coal miner familiar with the use of props to prevent fall of draw slate from ceiling of mine, assumed the risk of the fall of draw slate by continuing to work with knowledge that there was a loose slab of draw slate in ceiling after the danger thereof had

been called to his attention without setting prop, which had been furnished by master to support the rock.

Error to Circuit Court, Wise County.

Action by W. B. Addington, Administrator, against the Guests River Coal Company. Judgment for defendant on demurrer to evidence, and plaintiff brings error. Affirmed.

Fulton & Vicars, of Wise, for plaintiff in error.

Bullitt & Chalkley, of Big Stone Gap, for defendant in error.

SAUNDERS, J. This is an action to recover damages for personal injuries to the plaintiff in error's intestate.

The defendant company demurred to the evidence, and the jury rendered a verdict for the plaintiff subject to this demurrer. This demurrer was sustained by the court, and judgment entered for the defendant. Thereupon the plaintiff applied for and secured a writ of error from one of the judges of this court. The action of the trial court sustaining the demurrer to the evidence is assigned as error.

The defendant was the owner and operator of a coal mine near Tacoma in Wise county, Va. Some time during the year 1918, John M. Sparks (plaintiff's intestate) applied for and secured work as a miner in this mine, his particular assignment being to dig and load coal. While engaged in this work, in August, 1918, a large piece of rock, called draw slate, fell upon Sparks, inflicting injuries causing his death.

This draw slate is an intervening rock stratum in the roof, or ceiling of a coal mine lying between the coal and the sandstone top. The thickness of this stratum varies in different mines. The quality of this draw slate also varies. In some mines it is rotten and friable; in others it is tough. The slate in this particular mine was blue slate, "tough slate," as it is described by one of the witnesses. This overhanging slate stratum is liable to fall from the ceiling when the support of the underlying coal is removed. Hence, as the work of removal proceeds, the draw slate must be supported by wooden props. Loose, or cracking slate, carries its own indication of danger, and affords a warning that its possible fall must be provided against by suitable props.

Hinton, a colored man who was hauling, or "pulling coal," for Sparks at the time he was injured, testifies that when he returned to the room, after taking out a car, he found intestate under the rock which had fallen during his absence. This rock the witness describes as "9 or 10 feet long, or probably longer."

The defendant stated the following grounds

of demurrer, which will be considered in connection with the evidence:

I. The evidence fails to show that the defendant was guilty of any negligence which was the proximate cause of the injury complained of.

II. The evidence shows that the plaintiff's decedent, John M. Sparks, was guilty of negligence, and that such negligence was the sole cause of, or contributed to the injury complained of.

III. The evidence shows that the plaintiff's decedent had knowledge of the danger complained of, and assumed the risk thereof.

IV. The evidence shows that the injury complained of resulted from danger ordinarily incident to mining, and from a danger which was open and obvious, and therefore one which the plaintiff's decedent in accepting the employment, and remaining in the employment, assumed.

V. The evidence shows that the injury complained of happened in the working place of plaintiff's decedent, at the face of the coal, and further shows that it was the duty of plaintiff's decedent to protect himself against such dangers in his working place.

VI. The evidence shows that plaintiff's decedent violated the law of the commonwealth of Virginia, after discovering the danger overhead in his working place from loose slate, in not staying from under said slate, in the roof of said mine in his working place, until after he had propped same, or otherwise made same safe.

VII. The evidence shows that plaintiff's decedent was reasonably experienced in mines, and in coal mining and loading; that he knew of, and had been warned of, the danger of loose draw slate hanging overhead, in the roof of his working place where he was working; shows that he had at hand sufficient props with which to protect himself against danger from such loose slate; shows that there was no compulsion upon him to remain under such loose slate in his working place, and shows that it was his duty either to protect and prop such loose slate in his working place, or else to remain from under same, and that, nevertheless, he continued to work thereunder, assuming the risk of such danger, and that as a result of such negligence, and such contributory negligence on his part, he received the injury complained of, from the falling of such loose slate from the roof in his working place.

One of the allegations of the declaration is that the decedent was not an experienced miner, and that his knowledge and understanding of mining was not such as to enable him to know, understand, or appreciate, the very great dangers that surrounded him on account of the dangerous condition of the roof of the room in which he was at work.

This allegation raises an issue of fact, and testimony is not lacking to establish the extent of the decedent's intelligence and experience, and the sufficiency of both to enable him to apprehend that a cracked stratum of slate in no wise attached to the upper sandstone would be likely to fall when the support of the underlying coal was removed.

T. L. Flanary, a witness who had been mining coal "off and on for something like 18 years," testifies in part as follows:

Examination in Chief.

"Q. Did you know John M. Sparks?

"A. I had known him ever since he was a kid.

"Q. Do you know whether he was an experienced miner, or not?

"A. I would not think John was an experienced coal miner from what I know about him.

"Q. Knowing him as you do, and having seen the place, and judging from your experience, would you, as a mine superintendent, or foreman, have put him in this place to work?

"A. Knowing what I do about John's coal digging. He came to me while I was foreman on Whiteoak, two or three times, for a job. I had bad top, and did not give him any work. I did not think he was a man who could run a place safe, and did not give him any work to do.

"Q. Would you have given him work in this place by himself?

"A. No, sir; he nor any other man I knew as well as I knew him.

"Q. Do you know the character of that roof there where he was killed generally, whether it was good or bad?

"A. Well, I never done any work in this mine that John was killed in, but it was the same seam of coal that Campbe worked and Bruce worked at Greeno, and it is all bad top."

It will be noted that this witness does not state when decedent came to him for a job, or how much experience as a miner decedent had acquired after that time, nor does he testify as to any association with him as a miner, or any opportunities that he had had to form a personal judgment from association and observation. His statement as to the character of the top in Guests River Company's mine is based upon observation of top elsewhere in other mines on the same seam of coal.

Cross-Examination.

"Q. You had known of him doing work in the mines, for how many years back before he was killed?

"A. I never worked in the mines with John, but I had heard him talk about working in the mines a right smart bit.

"Q. Running back over a period of several years?

"A. Yes, sir.

"Q. You had never worked with him?

"A. I do not remember that I ever worked a day with him in the mines. I knew of him doing work; he had told me and others would

tell me that he was working in the mines at Greeno, backhanding for some fellows down there, but I never worked any with him.
* * *

"Q. About how old was Mr. Sparks?

"A. Well I would guess John must have been about 35."

A. G. P. Corder—Cross-Examination.

"Q. How long have you known John Sparks?

"A. I have known him well since 1903, when I moved to Tacoma.

"Q. This happened in 1918?

"A. Yes, sir.

"Q. About 15 years?

"A. Yes, known him well—I have known him off and on all my life.

"Q. What did he do during that time that you knew him?

"A. Well, I reckon he worked around the mines the most of the time.

"Q. He had been a miner ever since you have known him this 15 years?

"A. Well, I believe that I have known him working around Greeno mines, about 1904 he was working there.

"Q. Do you know what he was doing there?

"A. No, sir, he was working around the mines. * * *

"Q. You lived close to him and knew that he worked in the mines during that time?

"A. Yes, sir.

"Q. Was he a man of reasonable intelligence?

"A. Yes, sir.

"Q. A man of pretty fair intelligence?

"A. Yes, sir.

"Q. Knowing him as you did, if you had had work for him in the mines you were running, would you have hesitated to employ him to work in the mines?

"A. No, sir, I don't know that I would.

"Q. Do you know of any reason why you should not have done so?

"A. No, sir; I don't know that I would object to his working.

"Q. You thought that he was a man of reasonable experience?

"A. Yes; I guess so. * * *

Re-Examination.

"Q. You never observed Mr. Sparks working in the mines yourself?

"A. No, sir, I don't know anything about his work in the mines. I don't really know much about that, only he worked around the mines. I never was in the mines where he was at work, as I remember of.

"Q. And never observed him in the manner of his work, and you could not positively say whether you would have felt that you were doing right to put him to work by himself, or not?

"A. Well, I suppose if he had come and wanted to work, I would have let him work. Of course, as I say, I am not an experienced miner myself. I do not think that I would have hesitated to let him work."

A. J. Sexton.

"Q. What experience have you had mining?

"A. I have had 40 years, went into the mines when I was 11 years old. * * *

"Q. In pillar work as a mine superintendent, would you put a man to work by himself, or would you require some one with him?"

"A. I would not put a man to work by himself, unless he was an experienced hand."

"Q. Did you know John Sparks?"

"A. Yes; I have known him ever since he was a little boy."

"Q. Did you regard him as an experienced miner?"

"A. No, sir; I did not."

"Q. Did you regard him sufficiently experienced to work without some experienced hand with him?"

"A. No, sir; I did not."

"Q. Would you, or not, have put him to work there?"

"A. No, sir; not in a place like that by himself."

Cross-Examination.

"Q. How much has John Sparks ever worked in the mines with you?"

"A. He never worked but two days to the best of my recollection. First work he ever done, I hired him to back hand for me at Greeno. He worked two days, and little pieces of slate commenced falling, and he said, 'I ain't going to work here; I will get killed;' and I told him it would not hurt him—I would watch the top—but he says, 'No, I won't do it.'"

"Q. How long ago was that?"

"A. About 10 years ago."

"Q. They were the only two days you ever worked him in the mines?"

"A. Yes, sir."

"Q. You never saw him work in the mines any since that?"

"A. No, sir; but I knew of his working. I knew of his whereabouts."

"Q. You knew he was working?"

"A. Yes, sir; he worked outside a good deal."

"Q. You know he has worked in the mines since that?"

"A. I know that he worked some few days at a time, off and on."

"Q. Do you know the month or so he worked at Greeno was all the work he ever done?"

"A. He worked at Mr. Weeks a while, that was all I ever heard of him."

"Q. If he ever worked any more, you do not know it?"

"A. No, sir."

"Q. If he just worked with you two days 10 years ago, how do you say that he was not an experienced miner?"

"A. Well, I knew his whereabouts all the time, and would say he has not been in the mines over a year since that. * * *

"Q. You haven't the slightest idea of how much experience he has acquired since 20 years ago?"

"A. I don't believe he has worked in the mines over a year."

"Q. You do not know how well he did his work?"

"A. No, sir."

"Q. Or how much he learned?"

"A. No, sir."

"Q. Or how much he had opportunity to learn?"

"A. No, sir."

"Q. Isn't the top in the Greeno mines and the Weeks mines about the same?"

"A. No, sir; the Weeks mine [i. e., the mine in which the decedent was working] has fairly good top for that seam of coal. * * *

"Q. Was Mr. Sparks a regular sort of worker?"

"A. Sometimes he would work, sometimes take a notion to lay off a week. * * *

"Q. He was one of those men who worked now and then?"

"A. Yes; he worked a week or two; he was a man who liked to be out in the woods and hunt. * * *

"Q. He was a man of pretty good sense?"

"A. Yes; he was a man of pretty good sense."

"Q. Good, sound horse sense?"

"A. Yes; good sense."

"Q. He was not a fool, or idiot, or anything of that sort?"

"A. No fool by any means, plenty of sense. * * *

"Q. I say in slate you can tell pretty well [i. e., test it readily]?"

"A. Yes; you can tell about slate."

"Q. When you have draw slate and there is a crack between it and the standstone top that you can put your finger in, what does that indicate?"

"A. It is pretty loose."

"Q. Is it dangerous?"

"A. Yes, if it is not propped. * * *

"Q. What kind of slate was this?"

"A. Blue slate, tough slate."

"Q. Would that indicate it was coming down?"

"A. If it was cracked, and drawn down, I would consider it dangerous."

"Q. What would be a man's duty to do?"

"A. Duty to take it down, if he could see it was dangerous."

"Q. If he could see a crack in there, what was it his duty to do?"

"A. It was his duty to prop it, or take it down."

"Q. *It was his duty to prop it, or take it down as a miner?* (Italics supplied.)"

"A. Yes, or get out from under it."

"Q. You would not say that John Sparks was not a man of enough intelligence, if he saw a place like that, cracked and drawn down, to prop it, or take it down, or get out from under it?"

"A. It was like myself. I have worked under top like that, see it that way and work on."

"Q. But you knew you were taking a risk?"

"A. Yes; I took the risk."

"Q. And you knew you were taking a risk, and if it fell on you that was the end of it?"

"A. Yes, I have worked under it, still I would think it would hang there. I have worked in places, and the foreman would come in and say, 'Don't you know that top there is bad,' and I says, 'Yes,' and he says, 'Prop it,' and I would say, 'I will prop it directly,' and he says, 'You will prop it now, or you will quit,' and I would prop it, or he would prop it himself. Some places the miner sets the timbers, and some places the company sets them."

"Q. It was the miner's duty there at this place to set the timbers?"

"A. Yes; *they set the timbers*, the straight timbers. (Italics supplied.)"

"Q. A straight timber back of the car was all that was needed there?"

(103 S.E.)

"A. Yes, sir.

"Q. And you would work on, and load the car, finish the car, or finish the day?

"A. Yes, sir.

"Q. But you knew you were doing it at your risk?

"A. Yes; I have done that many times.

"Q. Yet you knew you ought to get out?

"A. Yes; I ought to get out.

"Q. Did you do that during the first 20 years, or after that?

"A. It was after I learned something about the top.

"Q. That was after you knew something about mining?

"A. Yes, sir; the first 8 or 10 years I kept the timbers up close, and then I thought I knew all about it, and then—

"Q. You got careless. You were a good, careful miner, until you got to be an experienced miner?

"A. Yes, sir.

"Q. And after you got to be an experienced miner, you became a careless miner?

"A. Yes; that is what causes men to get killed most of the time.

"Q. That was what happens the most of the time?

"A. Yes, sir.

Re-Examination.

"Q. I believe you told Mr. Chalkley that if these two props had been set, and one back in the roadway, the rock could not have fallen?

"A. If the one had been set back in the roadway, I do not think the work would have fell.

"Q. Wasn't one set there?

"A. No, sir."

The testimony of this witness has been extracted freely, because it contains a substantial proportion of the plaintiff's case. Most of the features relied upon to support the verdict are found therein, and the citations from other witnesses are mainly corroborative.

The father of the decedent states that his son did not understand mining very well, but could make more money by taking a place, and digging by himself; that he didn't think that he had worked as much as a year and a half in the coal mines; that when the weather was bad he would work in the coal mines a while. On cross-examination he made the following statements in part:

Cross-Examination.

"Q. You knew that your son had been working there in the place by himself for some little while?

"A. Yes, a while, a few weeks maybe. I would go out when he would pass in front of my door, and ask him if he did not think it was dangerous, and he said it was.

"Q. But he was making good money?

"A. Yes, sir; he said he was. * * *

"Q. You knew then he was working by himself?

"A. Yes, sir.

"Q. He told you he was?

"A. Yes, sir; he said he was afraid he could

not keep the props up, and I asked him several times to quit, and he said he would try it a little longer."

The defendants took the testimony of one witness, a colored man named Hinton, who was hauling coal for decedent. His testimony affords an intimate account of the circumstances immediately preceding the fatal accident:

William Hinton—Examination in Chief.

"Q. How long before he was hurt was it that you were in his room?

"A. I guess 12 or 15 minutes. * * *

"Q. Did you notice his roof, or anything about the condition of his room at that time?

"A. Yes, sir.

"Q. What was the condition of the slate where he was working and over and immediately behind the car that he had there?

"A. Well, he had a rock up over the car that had given down, I guess near half an inch.

"Q. What do you mean by rock?

"A. Draw slate.

"Q. How big a piece?

"A. I don't exactly know, but it was a big one; I guess, 9 or 10 feet long, probably longer.

"Q. State whether you regarded that rock, or draw slate, dangerous the way it was hanging up in the roof?

"A. Yes; when I went up there, the time before I went up there, I was scared of the rock. I would not go under it, told him I would pull at the front, and he could push at the other end of the car, if he wanted to, that I would not go under that rock. He said that he did not think there was very much danger in it; he would get out another car that day, and probably it would come down in the night.

"Q. Did he see the rock you were talking about?

"A. Yes, sir.

"Q. How close were you to it?

"A. Three feet.

"Q. How close was he?

"A. Under it.

"Q. You refused to go under it, to go to the back end of the car and push it out?

"A. Yes, sir.

"Q. Did he have any talk there about the rock at that time?

"A. No, sir; he didn't say anything more about it, any more then. I only had three timbers there at that time, no, four timbers, and I went and got another one, me and the mine boss (Taylor). We had carried him one that day, and I went and got and carried him another.

"Q. What sort of prop?

"A. We got a 4½-foot prop.

"Q. How many props had you hauled earlier?

"A. I had hauled him one, and we carried him up one, and I took him one by myself, and then I got the bank boss, and we carried him another one. * * *

"Q. Why did you use shorter props in the roadway?

"A. Generally set them on top of the ties.

"Q. Did you carry him a short prop that day?

"A. Yes; one 4-foot prop.

"Q. Why?

"A. He asked me to bring him a timber.

"Q. Mr. Sparks?

"A. Yes, after I spoke to him about the rock. He said he wanted a 4-foot timber. * * *

"Q. About how long had Mr. Sparks been working there?

"A. About three months, I suppose, as far as I remember, all the time I was there.

Cross-Examination.

"Q. You say you regarded the rock that fell as dangerous?

"A. Yes. * * *

"Q. What was exactly what you said to Sparks?

"A. Why, when I went in after the car, I saw the rock had given down; he said, 'Let's push it out,' and I says, 'No; that rock up there is going to fall.' He says, 'Oh, ain't no danger in that rock,' and he went to push behind, and I says: 'I wouldn't go back there; we can pull it here.'

"Q. Sparks said there was no danger in the rock?

"A. Yes, sir.

"Q. I thought you said a while ago he thought it would fall that night?

"A. He did.

"Q. He thought it was going to fall that night; it would not be dangerous then; would not fall then?

"A. Yes, sir. * * *

There is a good deal of evidence to the effect that the place where Sparks was working was not, as a whole, properly timbered. But, conceding this to be true as to the rest of the room, it is unimportant in this connection. The rock that killed decedent was one immediately over the car that he was loading. It is shown that the erection of a single prop would have prevented the fall of the rock.

Flanary.

"To the best of my recollection, the piece of slate went back over the rear of the car, I guess, 5 feet. If a jack prop had been set at the rear of the car under the slate, the slate would have been safe at the present time."

Sexton.

"Q. If there had been a timber set there [i. e., at the car], would it have held the rock?

"A. Yes.

"Q. Good mining would have required a timber to have been set there?

"A. Yes, sir. * * *

"Q. But a prop set behind the car would have held it [i. e., the rock that finally fell]?

"A. Yes."

Further, it was the duty of the miner to set the props where he was working.

Sexton.

"Q. It was the miner's duty at this place [i. e., defendant's mine] to set the timbers?

"A. Yes; they set the timbers, the straight timbers. * * *

"Q. If he [i. e., Sparks] could see a crack in there, what was it his duty to do?

"A. It was his duty to prop it, or take it down."

The evidence establishes that the necessary props were afforded decedent, and while one or two of them were too short to reach from the floor to the roof, it is shown that these short timbers were intended to be set upon the ties. When this was done they were long enough.

The witness Hinton testifies that before the rock fell, he carried the decedent a short prop at the latter's request.

The evidence of plaintiff's witnesses as to the extent of decedent's experience is conflicting, but the aggregate of that experience was considerable, certainly sufficient to enable him to know the danger of draw slate. One of the witnesses for the plaintiff (Corder) testifies that he had known decedent off and on all his life, and when asked what he did during "all that time that he knew him," replied that he "reckoned he worked around the mines the most of the time." Other witnesses limit his aggregate time of actual work in the coal mines during his life period to a year, or a year and a half.

Decedent is described as "no fool, by any means; plenty of sense, good sense."

A part of the plaintiff's case is a statement made after the fatal injury by Weeks, the superintendent of the mine. This statement was made in the presence of several witnesses, and in the language of one of them is as follows:

"Mr. Weeks said there was a piece of rock fell while he was in there—I don't remember whether he said it was a small piece of rock; I believe he said a small piece of rock fell—he said the rock give down until he could about put his finger over it, and he said to John, he said he warned John; said to John, 'We must watch, or notice, these little things.' He said to John, 'We must watch, or notice these little things.'"

This warning was 10 or 15 minutes before the rock fell. Weeks' statement is proven by several witnesses, and the forms in which it is repeated are variant, but substantially the same. For instance, another witness, Corder, states that Weeks said that he was in John's place a few minutes, or a little while before he was killed, and noticed the rock had given down, so that he could put his finger over the rock, and he said to John: "You will have to watch these little things."

Plaintiff in error insists that Weeks' statement and the testimony of Hinton are conflicting, and therefore the jury would be justified in rejecting all of Hinton's testimony. This conflict is supposed to be found in that portion of Hinton's testimony in which he says that "he was in decedent's room he guessed 12 or 15 minutes before he was hurt," and that "Mr. Weeks was not up in his [i. e. Sparks'] room; he was coming down from up in the heading."

This statement of Hinton's is not in neces-

sary conflict with the statement imputed to Weeks. The latter was with Sparks a "few minutes before he was killed," or "a little while before he was killed," or "10 or 15 minutes before he was killed," or "about 15 minutes before he was killed," using the language of the witnesses who repeat Weeks' statement. Hinton guessed that he was in Sparks' room 12 or 15 minutes before his death.

These statements of time are flexible estimates, that can be no more given a precise and definite interpretation than the word "several," as ordinarily used. But even as made, one party might readily have been with Sparks shortly before his death, and left before the other arrived. Hinton was pulling coal for Sparks, and regularly coming and going. He was undoubtedly in the latter's room at various times in the course of the day, and his statement that when last there he did not see Weeks does not cast doubt upon his assertion that he saw decedent in his room 12 or 15 minutes before his death. A jury dealing with these statements of Weeks and Hinton would not be justified in concluding that they were in necessary opposition, and unless they were in such opposition credence is to be given to both witnesses. The alleged contradiction between the respective statements furnishes no ground upon which this court, under accepted rules, should reject the entire testimony of Hinton.

[1] The rule of consideration on demurrer to the evidence is succinctly stated in *Milton v. N. & W. Ry. Co.*, 106 Va. 768, 62 S. E. 961:

"If upon demurrer to the evidence the evidence is such that the jury might have found a verdict for demurree, the court must so find, and grant judgment in his favor. * * * And, further, where reasonably fair-minded men might differ upon a question, such question must be decided against the demurrant."

The evidence in the instant case and the effect of same will be considered in the light of these as well as of other principles of recognized authority, now to be cited.

[2] A servant must "provide for his own safety from such dangers as are known to him, or which are discernible by ordinary care on his part, and * * * this duty is as obligatory upon him as the duty of the master is upon the master to provide for him." *Iron, Coal & Coke Co. v. Munsey*, 110 Va. 163, 164, 65 S. E. 479, 481.

[3] "The rule that it is the master's duty to inform his servant of dangers ordinarily incident to the service * * * only applies where there is a danger known, or which ought to be known, to the master, of which the servant, on account of his youth or inexperience, is ignorant, and which he cannot reasonably be expected to discover by the

exercise of ordinary care." *Jacoby Co. v. Williams*, 110 Va. 6, 65 S. E. 493.

[4] "Unquestionably where a servant is employed to engage in a dangerous work * * * the master, as a general rule, owes him the duty to use ordinary and reasonable care and diligence to make his place of work as reasonably safe as the nature of the work admits of, but this general rule does not apply when the work which the servants are employed to do consists * * * in constantly changing the character of the place for safety as the work progresses." *Jacoby v. Williams*, supra, 110 Va. 63, 65 S. E. 494.

"Where the dangers of the employment are visible so that any man of ordinary intelligence, though not an expert, could not fail to see and comprehend them, an employer is under no * * * obligation to warn the servant of their existence." *Id.*, 110 Va. 62, 65 S. E. 493.

There is also the rule of assumed risk.

[5] "A servant, when he enters the service of the master, assumes all the ordinary risks of such service, and also as a general rule assumes all risks from causes which are known to him, or should be readily discernible by a person of his age or capacity, in the exercise of ordinary care." *Clinchfield Coal Co. v. Wheeler*, 111 Va. 265, 68 S. E. 1001.

In the case of *Crane's Nest Coal & Coke Co. v. Mace*, 105 Va. 624, 54 S. E. 479, it appears that the miner, in order to make more runs, that is, a larger daily output, failed, before undercutting, to test the overhanging coal which had been improperly left in position by other employees. The miner knew that the coal might fall, and could have made a test by tapping this coal with a pick. When the coal bulged, it was the duty of the undercutter to report the fact to the foreman, and stay out of danger until the coal was properly faced. The plaintiff said that he knew it was dangerous to cut under bulging coal, but thought it was solid, and did not think that it was his duty to test it before cutting. The court held in that case that the plaintiff was confronted with an open and obvious danger, which he could and should have avoided, and that the facts showed an assumption of risk on his part, which precluded recovery. *Crane's Nest Coal & Coke Co. v. Mace*, 105 Va. 626, 54 S. E. 480.

In *Mason & Perkins v. Post*, 105 Va. 500, 54 S. E. 313, 11 L. R. A. (N. S.) 1038, the court said that when the plaintiff entered the service of the defendants, he assumed, "not only the usual ordinary risks and perils of the service, but also such other risks as became apparent by ordinary observation." His performance was optional, and he took the chance of such perils.

A ruling case in Virginia on the subject of perils obvious to a man of ordinary intelli-

gence is that of *Fields v. Virginian Ry. Co.*, 114 Va. 558, 77 S. E. 501. In that case the method of doing the particular work in progress was to cut into the bottom of an embankment under and along the front, and then make a trench along the top of the embankment, parallel with the face of the same. This work completed, the next step was to break off the front of the embankment which had been cut under, by the use of crowbars. While the trench was being cut, and the holes bored, preliminary to prizing off the face of the embankment, the face gave way, carrying down the foreman and an employee who was helping him. A laborer who was at work on the embankment at this time, engaged in undercutting, was injured. Said the court, in passing on his claim for damages:

The injured party was "of mature years and of ordinary intelligence and capacity. He knew how the work * * * was being done, and that there was some risk in doing it in that manner. The risk was open and obvious and incident to the work as it was being done."

A verdict for the railway company was sustained.

Generally speaking, it is the duty of the servant to provide for his own safety from such dangers as are known to him, or are discernible by ordinary care on his part, and this duty is as obligatory on him as the duty of the master is upon the master to provide for him.

[6] A plaintiff seeking recovery for injuries on the ground of negligence of the master, and alleging such negligence as the proximate cause of said injuries, must not be guilty of negligence that either solely causes, or proximately contributes to, the injuries complained of.

Negligence has been authoritatively defined as follows:

"Negligence is the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing what such a person under the existing circumstances would not have done. The duty is dictated and measured by the exigencies of the situation." *B. & P. Ry. Co. v. Jones*, 95 U. S. 442, 24 L. Ed. 506.

Decedent was a man 35 years old, in complete possession of his faculties, and naturally endowed with "plenty of sense," "good sense." The witnesses do not seem to think that he was an "experienced miner," though they do not advise us in any clear and definite fashion as to what is necessary to constitute such a miner. However, one of these witnesses, a miner, "guessed he [i. e. Sparks] was a man of reasonable experience," and, speaking for himself, said that he "didn't know that he would have hesitated to let him work," if he "had come and wanted to

work." At any rate, decedent had secured the experience that would come from working off and on about coal mines for a large portion of his life. In the aggregate he had done much actual work, and at the time of his death he was working in a place where, as his work progressed, he constantly changed the character of the place for safety. The danger to be apprehended was an open and obvious one and the perception of this danger called for no acute powers of observation. When a man first enters a mine, and observes props in position, the necessity and purpose of their use is obvious. Decedent had not only observed these props in position during many years of actual observation which had acquainted him with their use, but at the time he received his fatal injuries was engaged in work in which it was his duty, as that work progressed, to place his own props, and thereby assure his own safety. (See statement of Sexton, supra.) His obligation in that respect was definitely imposed, and he had been supplied with the props necessary to support the very rock that ultimately fell and killed him. When he called for a prop of specified length, that prop was promptly furnished, and was in his room at the time of his death.

As touching on decedent's knowledge of the danger ever present when a miner is working under partially detached, or rotten, roof, it will be recalled that the witness Sexton states that over 10 years ago, when Sparks was working for him in a coal mine, little pieces of slate commenced to fall. At once decedent said: "I ain't going to work here; I will get killed." In response to Sexton's suggestion that "it would not hurt him, that he (Sexton) would watch the top," decedent replied: "No; I won't do it." It is possible that as decedent increased in experience, and acquired greater knowledge of top, he took greater chances, but this would not furnish ground for a recovery. According to Sexton, after he (i. e., Sexton) "got to be an experienced miner, he became a careless miner," and would work under "cracked and drawn down" top, observing it all the while, and knowing that it was his duty to prop it, or take it down, or get out from under it, but not doing any one of these things, simply "taking the risk."

Sparks' father states that his son told him that he was afraid he could not keep up the props, and when he asked him several times to quit, he replied that he would try it a little while longer. This was certainly an assumption of risk, since he was under no compulsion to continue to work.

Decedent's colaborer, the witness Hinton, noticed the draw slate shortly before it fell, and called Sparks' attention to the fact that it had given down "near half an inch." He was "scared of the rock," and "refused to

go under it," telling Sparks that "he could push at the other end of the car, if he wanted to," but that "he would not go under that rock." If Hinton was an experienced miner, this suggestion on his part was certainly a warning to be regarded; if he was not an experienced miner, his perception of danger should not have been more acute than that of decedent. Hence, what was obvious to him should have been obvious to Sparks. In response to Hinton's warning of danger, and expression of personal apprehension, decedent responded:

"That he did not think there was very much danger in it [i. e., the rock], that he would get out another car that day, and probably it would come down in the night."

In addition to the warning of danger conveyed by the condition of the roof, and the freely expressed alarm of Hinton over the threatening aspect of the piece of draw slate immediately over the decedent's car, it appears that Weeks, the superintendent of the mine, was in decedent's room shortly before his death, and, noticing that the rock in question had given down to such an extent that he could put his fingers in the crack, warned him that this was a portent of danger, saying that these little things must be watched. Having in mind that the danger of falling draw slate is an open and obvious one to a man accustomed to work in mines; that decedent saw the crack between the sandstone and the rock that ultimately fell; that his attention was particularly called to the meaning of this crack, and the specific warning that it conveyed; that his fellow laborer, mindful of danger to his own life, refused to go under this rock; that the necessary prop to support this rock was furnished, and ready to hand; that it was the duty of the miner to set this prop; that this prop once set would have supported the rock—what was the duty of a reasonable and prudent person under the circumstances; what would such a person have done?

If negligence is doing what a reasonable and prudent person would not have done under the circumstances, then in the situation reviewed the decedent was guilty of negligence.

[7] Ordinary prudence and natural good sense brought to bear upon such a situation imperatively indicate that the miner should have removed, or propped, the rock, or withdrawn himself from danger. It may be that the superintendent did not think that the

rock would fall at once, it may be that decedent concurred in that view, but he did think that it was likely that it would fall that night. With that thought in mind, he took the risk of its falling sooner, and of the danger to his life when he continued to work under a loose and unpropped slab of draw-slate. He cannot be relieved from the charge of contributory negligence proximately contributing to his death. If the warning of Weeks might have been more emphatic than it was, still there was nothing in what he said to create a situation in which the miner's continuance in his work was at the risk of the company. With respect to the general danger of falling draw slate, the miner in the instant case assumed the risk.

Plaintiff in error cites us to the cases of *Riddley v. Clinchfield Coal Corporation*, 119 Va. 711, 89 S. E. 926, and *Va. I. C. & C. Co. v. Munsey*, supra, in support of plaintiff's right to recover. The facts of these cases are very different from the facts of the case in judgment. In *Riddley's Case* the master assured the servant that if he would act as brakeman for a reckless motorman, the latter would operate the motor slowly during the period of their joint service. The court held that under this assurance, notwithstanding the brakeman's antecedent knowledge of the recklessness of the motorman, he did not assume the risk of the injury that resulted therefrom, as a matter of law. It was further held by the court that the brakeman had the right to rely upon the company's assurance that if he worked with the motorman, "the motorman would operate the motor slowly." Hence his subsequent association with the motorman was at the company's risk.

In *Munsey's Case*, the miner abandoned the room where he was working because he considered it dangerous. He did not return to work until the mine boss assured him that the room had been made safe. This miner was inexperienced, and positively stated that he did not understand the danger of working in his room on his return. Moreover, in this case it was the duty of the company to prop the rock that ultimately fell on the plaintiff. Held, that under the circumstances the miner did not assume the risk.

After a careful review of the facts of this case, and of the authorities cited, we find no error in the action of the trial court sustaining the demurrer to the evidence, and its judgment is affirmed.

Affirmed.

(130 Va. 698)

CLINCHFIELD COAL CORPORATION v. HAWKINS.

(Supreme Court of Appeals of Virginia. Sept. 22, 1921.)

1. Master and servant \S 153(2)—Mine operator required by statute to give inexperienced employees immediate personal direction.

Under Code 1919, \S 1840, providing that an inexperienced coal miner shall work under direction of a foreman, or other experienced worker, until he has had reasonable opportunity to become familiar with ordinary dangers, furnishing an inexperienced miner with competent foreman and experienced workmen is not sufficient, but he must be given such immediate personal direction as to afford him a reasonable opportunity to become familiar with the ordinary dangers incident to the work.

2. Master and servant \S 289(11)—Contributory negligence of inexperienced coal miner held for jury.

In an action for injuries to an inexperienced coal miner 21 years old, who had worked with an experienced miner about nine days before he was hurt by falling slate about and after a shot, *held* on the evidence that it was a question for the jury whether he had been instructed as to the dangers as required under Code 1919, \S 1840, so as to be guilty of working in a place known to be unsafe in violation of section 1863, and of failure to use props in violation of section 1867.

3. Master and servant \S 243(12)—Inexperienced miner injured by falling slate held not precluded from recovering by employer's rule.

Coal mine operator's rule posted under Code 1919, \S 1878, directing miners not to go to work after a shot until sure roof of mine was safe, merely required miner to use diligence not to work under unsafe roof and did not preclude inexperienced miner, who resumed work after a shot, from recovering for injuries by a fall of slate an hour after a shot, where the condition of the roof was not glaringly dangerous.

4. Master and servant \S 243(1)—Employee must obey reasonable rules.

The employee is required to obey reasonable rules of employer.

5. Master and servant \S 204(2)—Risk of employer's breach of statutory duties not assumed.

Employee does not assume risk of employer's breach of statutory duties.

6. Master and servant \S 288(11)—Coal miner's assumption of risk of falling slate held for jury.

Whether an inexperienced coal miner, 21 years old, who had worked in the mine about nine days before he was hurt by falling slate about an hour after a shot, assumed the risk under the common-law doctrine *held* for the jury.

7. Master and servant \S 190(14) — Fellow servant doctrine inapplicable to inexperienced miner directed by superior.

Where a miner injured by falling slate after a shot was inexperienced and did not work under such direction of an experienced miner as Code 1919, \S 1840, requires, the negligence the latter in not examining the roof was not that of a fellow servant.

Error to Circuit Court, Dickenson County.

Action by Edgar Hawkins against the Clinchfield Coal Corporation. Judgment for plaintiff, and defendant brings error. Affirmed.

Morison, Morison & Robertson, of Bristol, John W. Flannagan, Jr., of Clintwood, and W. H. Rouse, of Bristol, for appellant.

A. A. Skeen and J. C. Smith, both of Clintwood, for appellee.

KELLY, P. This action was brought by Edgar Hawkins against the Clinchfield Coal Corporation to recover damages for personal injuries received by him when he was caught under a piece of falling slate in a mine owned and operated by that corporation. At the trial of the case the defendant interposed a demurrer to the evidence which the court overruled, and a judgment followed in favor of the plaintiff for the amount of the damages fixed by the jury in their conditional verdict. Thereupon the defendant obtained this writ of error.

There were three counts in the declaration, but the charge upon which the plaintiff's recovery depends is that he was an inexperienced miner, and that the defendant negligently failed to properly instruct him as to the dangers incident to the work.

The plaintiff was a bright, intelligent young man nearly 21 years of age, but prior to entering the service of the defendant as a miner his principal experience at manual labor had been obtained on a farm. He had, however, done some work cutting timber in the woods, and had also been employed a short time on the railroad grade outside of but near the mine in which he was subsequently injured. While engaged at this last-named work he boarded at a house where some of the miners also boarded, and heard them talk in a general way about their work.

He had been employed by the defendant as a miner for about two weeks before he was hurt, and during that period had actually worked in the mine eight or nine days. This was his first and only experience in that capacity, and he was not instructed by any one as to the dangers attending the work. This is his unqualified statement on the subject, and while there are some general and rather indefinite statements to the contrary by the witness Bob Dickenson, whose evidence is hereinafter more fully considered,

the plaintiff's statement on the demurrer to the evidence must prevail.

He was put to work with Bob Dickenson, an experienced miner, who seems to have assigned his work to him; and it appears that two other miners of experience worked with him during a part of the time. His duty was to load coal into the mine cars, and so far as the record discloses or indicates he was never at any time while in the mines directed to do any other work. On the morning of the accident he went into a place in the mine known as room 15 with Dickenson, who "shot the coal" for him by placing a charge of dynamite in holes drilled on top of the coal seam next to the roof of the mine so as to spring the coal loose from the top. The plaintiff stood by and saw Dickenson prepare the shot, and they both withdrew to a place of safety until the shot went off. Dickenson did not go back to investigate the result of the explosion, and the plaintiff, to whom Dickenson had assigned the task of loading into the mine cars the coal thus shot down, returned and had been working an hour or two when a piece of "draw slate" fell from the roof and injured him. The plaintiff very frankly admits that he did not look at the roof, but says he would not have been able to tell by looking whether it was going to fall or not.

The remaining facts, so far as material to a decision of the case, will appear in the discussion of the various grounds which the defendant urges upon us in support of its demurrer to the evidence.

It is insisted that any recovery by the plaintiff is barred because he violated section 1863 of the Code of 1919, a part of the Virginia mining statute, which says that—

"No minor shall continue to work in any working place known by him to be unsafe, or which might have been so known to him in the exercise of ordinary care."

This point would be conclusive of the case if we were able to say as a matter of law upon the evidence certified that the plaintiff was a miner of sufficient experience to have known, or to have been able to ascertain by the exercise of ordinary care, that the roof was unsafe. The case depends, in our opinion, entirely upon whether he had been sufficiently instructed and whether he was an "inexperienced person" within the meaning of section 1840 of the Code. That section, so far as material here, is as follows:

"It shall be the duty of the mine foreman or assistant mine foreman of every coal mine in this state to see that every person employed to work in such mine shall, before beginning work therein, be instructed as to any unusual or extraordinary danger incident to his work in such mine which may be known to or could reasonably be foreseen by the mine foreman or assistant mine foreman. * * *

"Every inexperienced person so employed shall work under the direction of the mine foreman, his assistant, or such other experienced worker as may be designated by the mine foreman or assistant until he has had reasonable opportunity to become familiar with the ordinary danger incident to his work."

The foregoing section of the mining law imposes two nonassignable duties upon employers engaged in mining operations: First, to instruct every employee, whether experienced or not, as to the unusual and extraordinary dangers incident to his work in the mine which may be known to or could reasonably be foreseen by the mine foreman or assistant mine foreman; and, second, to see that every inexperienced employee works with a man of experience until he has had an opportunity to become familiar with the ordinary dangers incident to the work. The former requirement of the statute is merely declaratory of the common law, and the latter was intended by the lawmakers to provide a practical and effective method for giving to inexperienced miners the instructions which at common law it was the duty of the employer to provide.

If, as contended by counsel for defendant, the danger that draw slate would under the circumstances fall on the plaintiff was not "an unusual or extraordinary danger," then the defendant did not violate the first branch of section 1840 above quoted, and we may go further and say that while the difference between "draw slate" and the sandstone or permanent roof is not very fully brought out in the record, we think it sufficiently appears that the accident which happened to the plaintiff was one which any experienced miner would have as a matter of law been bound to anticipate and protect himself against.

[1] Upon the other branch of the statute, however, we are of opinion that on the evidence demurred to a jury might reasonably have found that the plaintiff was an "inexperienced person," and as such entitled to the protection plainly intended by the statute for such person. Underground mining is in itself a hazardous business, and the ordinary and usual risks and dangers incident thereto may be quite extraordinary and unusual to one not experienced in that line of work. For example, it is stated in the petition upon which this writ of error was granted that "the draw slate is a shaly, loosely formed layer of slate, lying on top of the coal seam immediately under the sandstone or permanent slate roof, and always must be taken down." If this statement be amplified by saying that draw slate must always be either taken down or propped, it embodies a proposition which is doubtless familiar to all experienced miners, and which, furthermore, may fairly be implied from the evidence in this case as a whole,

and yet that proposition is by no means a matter of common knowledge to men of even very wide experience in other fields of labor. It seems very clear from the record before us that certain very common roof conditions in the mines are treacherous and dangerous, and yet an inexperienced miner might not know how to safely guard against such conditions. In so far as the conditions are usual and ordinarily found in mines, the statute requires no more than the common law did with reference to instructing experienced men; but as to inexperienced miners the statute provides a specific practical method designed to effectively acquaint them with such dangers by requiring that they shall work under the direction of a mine foreman or his assistant, or such other experienced worker as may be designated by the mine foreman or assistant, until they have "had reasonable opportunity to become familiar with the ordinary dangers incident to the work." The plain meaning of this requirement is that the inexperienced miner shall receive such direction as will insure either a familiarity with the dangers of the work or a reasonable opportunity to acquire such familiarity. Now, it is contended in this case that the plaintiff did work under the direction of a competent foreman who visited the place every day and an experienced miner who assigned his tasks, and in a sense this contention is true. The foreman was a competent man, and he did visit the plant every day, and Dickenson, the miner with and under whom the plaintiff worked, was a man of long practical experience in mining operations. But the difficulty with the defendant's case is that neither of these men, and no other coemployee can, upon the demurrer to the evidence, be said to have given the plaintiff any demonstrations, directions, or instructions as to the danger of the roof, or the means of securing himself against such danger. He had never worked in a mine before, and we cannot say, from the proof before us, that his eight or nine days' experience in this mine, had unquestionably afforded him a sufficient opportunity, from his observation of the work by others, to understand and guard against the danger. The manifest purpose of the statute, as we construe it, is not complied with by merely furnishing inexperienced miners with competent foremen and experienced co-workmen. Its purpose was to impose upon the employer the legal duty of giving inexperienced persons such immediate personal "direction" as to afford them "a reasonable opportunity to become familiar with the ordinary dangers incident to the work." And if there be a fair doubt under the evidence as to whether this duty has been performed, the question must be settled by the jury.

It is true that the plaintiff himself, on be-

ing asked by his counsel the following question, gave the following answer:

"Q. When the coal is removed, do they do anything to keep the rock from falling?"

"A. Yes, they are supposed to take it down or prop it up one."

And it is also true that on cross-examination he was asked, "You know what draw slate is, don't you?" and answered, "Yes, I think so."

But it must be remembered that he was testifying long after he received the injury, and after it is entirely reasonable to suppose that the circumstances and cause of the accident had been the subject of much discussion by others with him or in his presence, and his answers at that time do not necessarily mean that he knew before he was injured what draw slate was or how to deal with it. It is quite easy to see from reading this record that some mine roofs require props and some do not; that draw slate is dangerous and treacherous, and that experienced miners have no trouble in distinguishing between draw slate and permanent roof; but it is by no means clear that an inexperienced man would possess such knowledge, or that the plaintiff had acquired it prior to the accident. The miner, Bob Dickenson, says he regarded him as an inexperienced man, and treated him as such, and the plaintiff testified that he had nothing to do with shooting the coal or setting the props, and that he had never been given any instructions in regard thereto by anybody. And while it is true that Dickenson, after saying that the plaintiff had nothing to do with shooting the coal or setting the props, added that, "In case the slate had to come down he [plaintiff] was supposed to set a jack prop"—a jack prop being the first or temporary prop to secure the slate while the coal last shot down and immediately over it is being removed—the force of this statement is lost when taken with the testimony as a whole. Dickenson does claim in general terms that he cautioned the men, including the plaintiff, about the draw slate, but he admits that he said nothing to him about setting a jack prop after the coal had been shot, and, as we have seen, the plaintiff testified that he had received no instructions whatever with respect to the roof, and would not have known by looking at it whether or not it was liable to fall.

[2] We conclude, therefore, that the plaintiff cannot be denied a recovery as a matter of law on the ground of having violated section 1863 of the mining law as found in the Code of 1919.

And for like reasons we reach a like conclusion as to the contention that plaintiff violated section 1867 of the Code. That section, after providing for daily visits by the mine foreman or assistant foreman, and

for direction as to securing their working place in the mine by props, directs that such props "shall be placed and used by the miners working therein, as in this chapter provided, to the end that such working places be made safe." The mining law must be read as a whole, and the section here under consideration of course has no effect upon the right of the plaintiff to recover if he did not know and had not had a reasonable opportunity to understand when and how to render his place safe by the use of props.

[3] And, for similar reasons, we are unable to sustain the defense based upon the alleged violation by the plaintiff of the rule that miners were not to go to work, especially after a shot, until sure the roof was safe. The defendant had complied with section 1878 of the Code, requiring the adoption and posting of rules for the government and operation of the mine, and under the terms of that section the plaintiff was charged with notice of such rules. Among them was a rule which said:

"Don't start to work, especially after a shot, until you are sure your roof is safe."

[4] Obviously all that this rule requires is that the miner must use due diligence to see that he does not work under an unsafe roof, and due diligence in every case depends upon the attending circumstances. The plaintiff admits that he did not look at the roof at all after the shot was fired, but states without qualification that he would not, with his limited knowledge and experience, have been able to tell whether it was liable to fall. There is nothing in the evidence to show that the condition of the roof over him was glaringly dangerous. He was permitted by Dickenson to go back after the shot with no instructions except to load the coal into cars. As a matter of fact the roof remained in place for an hour or so before it fell. The ruling purpose of the statute, which is the safety and protection of the miners, would be to a large extent frustrated if the employer could, by making and publishing such a rule as is here relied upon, relieve himself of the duty of seeing that inexperienced employees were given the opportunity of becoming acquainted with the dangers of the work. It is of course well-settled law that the employee is under as imperative obligation to obey reasonable rules as the employer is to make them. *Shumaker's Administrator v. Atlantic Coast Line R. Co.*, 125 Va. 393, 401, 99 S. E. 739, and cases cited. But the employee must have an adequate opportunity to understand the pur-

pose and meaning of the rules before he is bound by them. Under the facts of this case, as they are presented by the demurrer to the evidence, we are unable to say that a jury must have found that the plaintiff negligently violated the rules in question.

[5,6] The doctrine of assumed risk cannot avail the defendant. It does not apply as to breaches of the statutory duties of the master (*Carter Coal Co. v. Bates*, 127 Va. 586, 105 S. E. 76); and, independent of that proposition, we are not prepared to hold as a matter of law from the facts of the case that under the common-law doctrine unaffected by statute, the danger was so patent and obvious as to bar the plaintiff's recovery.

[7] It is claimed that Dickenson, who was neither a foreman nor assistant foreman, was a fellow servant with the plaintiff, and that if he was guilty of any negligence in not examining the roof and propping or taking it down, the risk of that negligence was assumed by the plaintiff. But it must be remembered that if the plaintiff was an inexperienced miner, the statute imposed upon the defendant the nonassignable duty of seeing that he worked under such direction of a foreman, assistant foreman, or experienced miner as to give him a reasonable opportunity to become familiar with the dangers incident to the work. Under the evidence the jury might have found as a fact that he was an inexperienced miner, and that he did not work under such direction as the statute plainly contemplated. The fellow-servant doctrine does not apply to such a situation.

We do not mean to say that the case is plainly one for a recovery, but merely that in our opinion reasonable men might fairly differ upon what we have endeavored to point out as being the controlling facts, and that therefore the court was right in holding for the plaintiff upon the demurrer to the evidence.

It may be added that the case of *Addington, Adm'r, v. Guests River Coal Co.*, decided to-day, 108 S. E. 695, is clearly distinguishable from this case, for the reason that in the former the plaintiff's decedent had, as shown by the evidence therein fully recited, worked in and around the mines to such an extent as to have necessarily become entirely familiar with the nature of draw slate and the danger of working under it without props, and, furthermore, had actual knowledge of the particular danger which resulted in his death.

Affirmed.

BURKS, J., absent.

(130 Va. 655)

CARTER v. KEESLING et al.

(Supreme Court of Appeals of Virginia. Sept. 22, 1921.)

1. Trusts \S 191(1)—Life tenant on whom "and" daughter, if she survived him, was conferred power to sell, had exclusive power during his lifetime.

Under a will bequeathing to testator's son all the residue of his estate, to revert to testator's other children if he and his daughter died without issue, but providing that he "and" his daughter, if she became 21, survived her father and became his heir, or devisee, should have the power to sell and convey in absolute right, such power could be completely executed during such son's lifetime, so as to enable him to pass good title to the purchaser, the word "and" meaning "and also."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, And.]

2. Trusts \S 202—Purchaser from trustee with power to sell and invest proceeds need not look to application of purchase money.

Under a will bequeathing to testator's son the residue of his property, to revert to testator's other children if such son and his daughter died without issue, but conferring on him and his daughter, if she survived him, the power to sell the property and invest the proceeds in other property, to be held subject to the same provisions as to reversion, there was no obligation on a bona fide purchaser for full value from such son, without actual or constructive notice of any breach of trust committed or intended to be committed by him, to look to the application of the purchase money, the property being held in trust by the son during his lifetime with a general power of sale and unlimited discretion as to the time and terms thereof.

3. Trusts \S 202—Purchaser from trustee with power to sell and invest proceeds in other property, on discovering his intention to divert proceeds to personal use, should pay money into court.

Where a purchaser of land from a trustee, with power to sell and invest the proceeds in other property, to be held subject to the provisions of the will as to the reversion, discovered, after a decree adjudging him under no obligation to look to the application of the purchase money, that the trustee intended to use it to pay his own personal obligations, it was his duty, by interpleader, to convene all those interested, and pay the money into court, to avoid liability as particeps criminis in such devastavit.

4. Equity \S 456—No error in requiring petitioner to pay into court moneys due opposite party.

Where a purchaser from a trustee under a will with power to sell and invest the proceeds in other property, after a decree adjudging that he need not look to the application of the purchase money, sought leave to file a bill of review on the ground of his discovery that such trustee intended to use the money to pay his personal obligations, the court did not err in requiring that he pay into court the portion of the pur-

chase money past due at the time of such decree, the granting of leave, which is necessary when the bill is founded on newly discovered evidence, and there is no error of law on the face of the record, resting in the sound discretion of the court, which may impose terms.

5. Equity \S 456—No error in requiring that petitioner pay into court money due opposite party, where decree could be changed only to allow payment into court instead of to opposite party.

Since a bill of review on the ground of newly discovered evidence entitles complainant to relief only to the extent that such evidence would have changed the character of the former decree, the court did not err in requiring a purchaser from a trustee under a will with power to sell and invest the proceeds in other property, before being granted leave to file a bill of review on the ground of his discovery that such trustee intended to use the purchase money to pay his personal obligations, to pay into court the amount due under the contract at the time of the entry of the former decree, the only possible change in such decree being to allow payment of the money into court instead of to such trustee, and the relief asked, assurance of a clear title, being afforded by paying the money into court.

Appeal from Circuit Court, Smyth County.

Suit by Oreed F. Carter against James B. Keesling and others. Bill dismissed, and complainant filed a bill of review, which was also dismissed. From the decrees, complainant appeals. Affirmed.

On September 1, 1919, the appellant bought of the appellees James B. Keesling and Edith Keesling Cole a tract of 509 acres of land and considerable personal property, which constituted portions of a larger amount of land and personal property which were devised and bequeathed to James B. Keesling and Edith Keesling Cole by the residuary clause of the will of the father of the former and grandfather of the latter, one Emory S. Keesling, deceased, duly probated in the year 1915.

The appellant agreed to pay for said property, purchased as aforesaid, the sum of \$65,000, to be paid as follows: \$17,000 on the 1st day of January, 1920, and the residue in eight equal installments of \$6,000 each, to be evidenced by eight negotiable notes dated September 1, 1919, for such amount each, bearing interest from date, and payable respectively September 1, 1920, September 1, 1921, September 1, 1922, September 1, 1923, September 1, 1924, September 1, 1925, September 1, 1926, and September 1, 1927. Deeds were to be made by the vendors to the vendee on January 1, 1920, upon the payment of the first payment of \$17,000 aforesaid, which deed was to reserve a vendor's lien to secure the payment of the said residue of the purchase money.

On September 1, 1919, the vendee executed

a deed of trust on certain property belonging to him to secure the payment of said \$17,000, the first payment aforesaid.

On September 23, 1919, the appellant wrote the attorney for J. B. Keesling the following letter:

"Dear Sir: In the matter of my purchase from James B. Keesling and others, I have discovered that the title of the vendors is not good. I have requested my attorneys to look into it and advise me as to the condition thereof. They have reported to me that the title, in their judgment, is defective and dependent on contingencies which could defeat the title entirely. They have further advised me to say to Mr. Keesling, and I make this statement to you as his attorney, that I shall be ready and willing to make my first payment on the farm as soon as Mr. Keesling can make me good title, provided this can be done within reasonable time.

"I had made all my plans to complete the purchase of this property, and I regret to find the title in the condition it is.

"Very truly yours, C. F. Carter."

The said \$17,000 payment was not made on January 1, 1920, and upon request of James B. Keesling, the trustee in said deed of trust advertised for sale the property thereby conveyed.

Thereupon the appellant instituted this suit.

The material portions of the bill are as follows:

"Your complainant would further state that the vendors received their title as devisees (under the will) of Emory S. Keesling, deceased. That under said will, by the 5th clause thereof, there is this provision:

"But should my son James B. Keesling, and his daughter Edith, both die without lawful issue living, then my will is that the property, both real and personal, which by this clause I have devised to my son James B. Keesling, should revert to my other children, or their descendants," thereby depriving the vendors of your complainant from having the right at the present time of conveying said property, their title to said property being wholly dependent upon the contingency as to whether James B. Keesling and his daughter Edith should die with or without issue.

"Your complainant would further state that there is a further provision in said will that if Edith Cole, the daughter of James B. Keesling, should survive her father and become 21 years of age, and become his sole heir or devisee, she should have the power to convey said property, but that the purchase money received from such sale should be invested in other property to be held and owned in the same way, and subject to the like provisions that, if they should both die without issue living at the time of their death, the property hereby devised should revert to the testator's other children. All of which will fully appear from a copy of the will marked Exhibit B and prayed to be considered as a part of this bill.

"Your complainant would further state upon receiving the opinion of his attorneys that ven-

dors had no right to make a conveyance, that he immediately notified his vendors of the opinion he had received, through a letter dated December 23, 1919, to W. R. D. Moncure, the attorney of vendors, in which letter your complainant stated that he was ready and willing to comply with the terms of his contract provided his vendors could make a good title to the land; all of which will fully appear from a copy of letter herewith filed marked Exhibit C.

"Your complainant would further state that his vendors did nothing to perfect the title, but proceeded to advertise a sale of all the property embraced in the deed of trust, to take place at Marion, as to the real estate on February 14, 1920, and of the personal property embraced in said trust to take place at Cedar Springs, Va., on Tuesday, the 17th day of February, 1920; all of which will fully appear from a copy of the advertisement herewith filed, marked Exhibit D. * * *

"Your complainant is advised that a court of equity will not compel him to take this property with the title in the condition it is; that, while he is willing and ready and able to comply with his contract, provided the title were good, he ought not to be compelled to pay for property when, if certain contingencies occur that might occur, he would have no title at all to said real estate so contracted for as aforesaid.

"Being without remedy at law, and only relievable in equity, the prayer of your complainant is that J. B. Keesling, Edith Cole, and W. R. D. Moncure, trustee, may be made parties defendant to this bill, and they be required to answer the same, but not under oath, an answer under oath being waived; that your honor will enjoin the said W. R. D. Moncure from making the sales as aforesaid, and that your honor will construe the will of Emory S. Keesling as to whether or not the said J. B. Keesling and Edith Cole have the power to convey the said real estate, and to relieve your complainant from being compelled to carry out his contract under the circumstances, and will protect the right of your complainant in the premises; that all proper accounts may be ordered; and that your honor will grant unto your complainant such other, further, and more general relief as to equity seems meet and the nature of his case may require; and your complainant will ever pray, etc."

The residuary clause of the will, filed as Exhibit B with the bill, the construction of which clause is involved in this suit as aforesaid, is as follows:

"Fifth. I devise and bequeath (subject to my wife's interest in same) to my said son, James B. Keesling all the remainder of my property real and personal, including my farm on which I now reside situated partly in Smyth county and partly in Wythe county, Virginia, but he is to pay my funeral expenses, including suitable monument to my grave and all the debts, which I owe at the time of my death and he shall also pay the legacies of six thousand dollars (\$6,000) each to my two daughters as above set forth. But should my said son James B. Keesling and his daughter Edith both die without lawful issue living, then my will is, that the property both real and personal which by this clause, I have devised to my said son

James B. Keesling shall revert to my other children or their descendants. But my will is, that notwithstanding the provisions in this clause of my will, that the property shall revert to my other children in the event that my said son, James B. Keesling and his said daughter, Edith, shall die without issue living at the time of their death, the said James B. Keesling and his said daughter, if she shall survive her father and becomes twenty-one year of age, and becomes the heir or devisee of her father, shall have the full power and authority to sell and convey in absolute right the property I have hereby devised and bequeathed to my said son James B. Keesling and to invest the proceeds of such sale in other property, to be held and owned in the same way, and subject to the like provisions that if they should both die without issue living at the time of their death, the property hereby devised by this clause shall revert to my other children, or their descendants."

A preliminary injunction was awarded in accordance with the prayer of the bill on February 13, 1920, and by order entered February 23, 1920, this injunction was enlarged until the further order of court on condition that the complainant execute a bond conditioned according to law, etc., within three days from that date, in the penalty of \$6,000, and the cause was continued.

On October 26, 1920, the appellee James B. Keesling filed his demurrer in writing to the bill, setting forth certain grounds of demurrer, of which only the following need be stated, namely:

"Fourth. The bill and exhibits show that this defendant can convey good title to the lands in the bill and exhibits mentioned.

"Fifth. The plaintiff, as vendee of the lands in the bill mentioned, is under no duty to see to the reinvestment of the purchase money, and therefore has no interest entitling him to ask the court to supervise such reinvestment."

At the same time the appellee, Edith Keesling Cole, demurred in writing to the bill on the following single ground set forth therein namely:

"Because it appears from the bill and exhibits that she has no interest in the subject-matter of the suit, and is neither entitled to nor subject to any decree in the premises."

On the same day, October 26, 1920, the court entered the first decree which is under review on this appeal, in which it was decreed that the said demurrer of James B. Keesling to the bill, "upon the fourth and fifth grounds, as set forth in the written demurrer this day filed, is well taken"; and that the court "is of opinion that the defendants, J. B. Keesling and Edith Keesling Cole, under the will of E. S. Keesling, deceased, can convey good title to the land sold to the plaintiff without any obligation on the part of the plaintiff to see to the application of the purchase money." And by this decree the in-

junction theretofore awarded was dissolved and the bill dismissed.

Thereafter, on November 22, 1920, the appellant tendered to the judge of the court below, in vacation, a bill of review, and asked leave to file the same, and that it might be taken as a bill of review to rehear the final decree entered at the October term of the court, which was the decree of October 26, 1920, aforesaid. And thereupon the defendants James B. Keesling and Edith Keesling Cole appeared by counsel and objected to the filing of the bill of review, and the matters arising upon the motion of appellant to file such bill and the objections of the appellees to the filing of the same were argued by counsel. Whereupon the following decree was entered, which is also under review on this appeal, namely:

"Upon consideration whereof, the court doth sustain the objection of the said defendants to the filing of said bill unless and until the complainants shall pay to H. L. Kent, clerk of the circuit court of Smyth county, the sum of \$23,000, representing the principal of the purchase-money notes of the complainants due on the 1st day of January, 1920, and the 1st day of September, 1920, with interest on the said sum of \$23,000 from September 1, 1919, until so paid, and with interest from September 1, 1919, on \$42,000, balance of purchase money, to September 1, 1920.

"And the said complainants are given until the 20th day of December, 1920, to pay said sums to H. L. Kent, clerk, as aforesaid.

"It is agreed by counsel for complainants that the amount of purchase money and interest hereinbefore decreed to be paid is now due."

The bill of review just referred to, so far as material to be stated, contained the following allegations:

"(1) That heretofore, your orator has exhibited in your honor's court a bill of complaint against J. B. Keesling, Edith Cole, and W. R. D. Moncure, trustee; that process was duly executed on the said defendants, and that they filed their demurrer thereto, and issue was joined thereon; that upon argument of counsel, your honor entered a decree on the 26th day of October, 1920, sustaining the fourth and fifth grounds of demurrer, and dismissing the bill of your orator.

"(2) That the object of the bill of your orator was to construe the will of Emory S. Keesling, deceased, and determine whether or not, under the provisions of the said will, the said James B. Keesling had the right to convey certain land to your orator; that the only evidence adduced before your honor was the will of Emory S. Keesling, and that, by sustaining the fourth and fifth clauses of the demurrer, your honor decreed that J. B. Keesling had the right and power to sell the said land under the will.

"(3) That your orator has discovered new matter of consequence and material in said cause, which new matter your orator did not know, and could not, by reasonable diligence, have known, so as to make use thereof in this cause. * * *

"(5) That, by the fourth clause of said will

the said Emory S. Keesling bequeathed to his two daughters, Carrie K. Lantz and Minnie Cornett, the sum of \$8,000 each, with interest from the time of his death, to be paid by James B. Keesling.

"(6) That, after the death of Emory S. Keesling, the said James B. Keesling filed a bill in your honor's court, under the name and style of Jas. B. Keesling et al. v. Theresa A. Keesling and others, asking, among other things, that the will of Emory S. Keesling be so construed as to permit him, the said James B. Keesling, to sell the property devised him, or so much thereof as may be necessary, for the purpose of paying off the legacies to Mrs. Carrie K. Lantz and Minnie K. Cornett, and also to pay \$8,000 agreed upon between Theresa A. Keesling and James B. Keesling as the value of the dower interest of Theresa A. Keesling in the property devised to J. B. Keesling, the said Theresa Keesling being the widow of Emory S. Keesling, deceased.

"(7) That your honor, by decree entered in said cause on the 17th day of December, 1917, and herewith filed as Exhibit Decree, expressly held and decreed that the legacies of Carrie K. Lantz and Minnie K. Cornett were personal obligations of J. B. Keesling, and that the prayer of the said bill that the said J. B. Keesling be permitted to sell the real estate devised to him for the purpose of paying those legacies of \$8,000 each, and the amount due the widow, Theresa Keesling, be denied.

"(8) That, therefore, by the said decree, your honor expressly denied to J. B. Keesling the right to sell said property for the purpose of paying the debts and legacies, but did not deny him the right to sell for the purpose of reinvestment, and that your honor's decree in the last-named respect, viz. granting him the right to sell, or rather construing the will to the effect that he could sell and convey for the purpose of reinvestment, as provided by the will, was upheld and affirmed by your honor in the last decree in this cause.

"(9) Your honor has decreed that James B. Keesling has no right under the will to sell the said real estate for the purpose of paying the legacies, and the amount due Theresa A. Keesling.

"Your orator alleges that James B. Keesling has sold a large amount of the said real estate, and in direct defiance of the terms of the will of his father, Emory S. Keesling, and of your honor's court, has applied the proceeds to the payment of said legacies.

"That your orator alleges that, in contravention of the terms of the will of Emory S. Keesling, the said James B. Keesling has sold a large amount of said property, and has appropriated the proceeds to his own personal use, and paid his own personal debts therewith.

"That your orator is advised that it is not the intention of the said James B. Keesling to invest the proceeds of the sale to your orator as provided by the will, but on the contrary, to appropriate the same to his own personal use.

"(10) That the said James B. Keesling has advertised and sold a large amount of acreage of the farm devised to him by his father, under the power of sale conferred upon him, and that he has not invested the proceeds as required by the will; on the contrary, has paid his personal obligations therewith, * * * to wit, the legacies, etc.

"(11) That your orator, purchaser of the property in the bill and proceedings mentioned knows these facts. That he has learned since the institution of this suit that they exist. That he could not have learned them by using ordinary diligence before he did, and he, knowing personally the wrongful use which has been made of the proceeds of the sale of this property, and knowing that the proceeds of sale have been and will be diverted from the channel in which they are legally required to be placed, to the possible detriment of the contingent legatees and devisees under said will, does not know whether he can safely pay the purchase money for said property to James B. Keesling.

"(12) That James B. Keesling is the executor of the will of his father, with power of sale, under the decision of your honor's court. That the property devised to him, upon the happening of a contingency, viz. that both he and his daughter die without issue living, reverts to the other children of Emory S. Keesling, and their descendants, and that it is his duty, known to your orator, if he exercises the power to sell, to reinvest the proceeds as commanded by the will under which he acts, and since your orator knows that that duty has not been complied with, he asks that the money which he pays be required to be invested under the terms of the will, or that the said James G. Keesling, executor with power to sell, execute sufficient bond to properly execute his executorship.

"(13) Your orator is willing, ready, and anxious to carry out his contract, in the bill and proceedings set out. All he asks is that he be given a clear title, against the claims of all persons on account of any action of executor, of which he has knowledge.

"(14) Your orator is advised that Carrie Keesling Lantz, Minnie Keesling Cornett, and P. P. Keesling are the living children of Emory S. Keesling, other than James B. Keesling; that L. N. Keesling and E. B. Keesling and E. G. Keesling are sons of P. P. Keesling, and grandchildren of Emory S. Keesling; that Margaret Keesling, Jessie Keesling, and E. G. Keesling, Jr., are great-grandchildren of Emory Keesling, and children of W. G. Keesling, and are infants, and that — Cole is the great-grandchild of Emory Keesling, the infant child of Edith Keesling Cole.

"(15) Your orator is advised that the above parties would be entitled to all the property, real and personal, devised and bequeathed to James B. Keesling, on the happening of the contingency mentioned in the will.

"(16) Your orator understands that the decree entered in this cause provides that he, as purchaser, does not have to look to the investment of the purchase money, but alleges that by this after-discovered evidence, actual knowledge of the diversion of the fund arising from the sale of the property is brought home to him, and, infants being involved, and persons not in being, he asks the court to direct, under a proper construction of the will, what is the legal effect of the will under such circumstances.

"(17) The premises considered, therefore, the prayer of your orator is that James B. Keesling, Edith Keesling Cole, and W. R. D. Moncure be made parties defendant to this bill, and be required to answer the same, but not under oath; that the decree entered in this cause be reviewed and reversed; that, pending the de-

cision of the court an order be entered suspending the operation of said decree; that this bill be considered a bill of review, or as a petition for a rehearing; that the said Carrie Keesling Lantz, Minnie Keesling Cornett, L. N. Keesling, E. B. Keesling, E. G. Keesling, Margaret Keesling, Jessie Keesling, E. G. Keesling, Jr., and ——— Cole, infant child of Edith Keesling Cole, be made parties defendant to this suit, and be required to answer the same, the adults not under oath; that a guardian ad litem be appointed for the said infants, who shall answer the same under oath, and the infants answer by their guardian ad litem, also under oath; that, upon a rehearing of this cause, your honor will direct that the purchase money to be paid by him be invested under the terms of the will of Emory S. Keesling, with power to sell, and that your honor further construe the will of Emory S. Keesling, and determine whether or not your orator shall, under the circumstances, pay to James B. Keesling the balance of the purchase money, and your honor will enjoin the said James B. Keesling, Edith Keesling Cole, and W. R. D. Moncure from collecting said purchase money unless and until the will of Emory S. Keesling be complied with, and that your honor will grant all such other, further, and more general relief shall demand, and your honor think proper; and your orator will ever pray," etc.

The decree in the collateral suit referred to in the bill of review, a copy of which is filed therewith as Exhibit Decree, is as follows:

"James B. Keesling, in His Own Right, and as Executor and Trustee under the Will of Emory S. Keesling, Deceased, v. Theresa Keesling, J. W. Lantz, Trustees, Edith Keesling, Jessie B. Keesling, Carrie Keesling Lantz and J. W. Lantz, Her Husband, Minnie Keesling Cornett and Lon C. Cornett, Her Husband, P. P. Keesling and Margaret Neff Keesling, His Wife, E. G. Keesling and Bessie W. Keesling, His Wife, L. N. Keesling, E. B. Keesling, Margaret Keesling, Jessie Keesling, and E. G. Keesling, Jr., the Last Three Infants, and John P. Buchanan, Guardian Ad Litem for Said Infants. In Chancery.

"This cause having been by an order entered on the third day of March, 1917, made a vacation cause, but not having been heard and determined in vacation, this day came on to be heard in term upon process duly executed as to the adult defendants, upon the bill of complaint and exhibits therewith duly matured for hearing at first November rules, 1916, as to the adult defendants, and taken for confessed as to said adult defendants, and upon the answer of the infant defendants Margaret Keesling, Jessie Keesling, and E. G. Keesling, Jr., by John P. Buchanan their guardian ad litem appointed to defend them in this suit, and the answer of the said guardian ad litem, duly sworn to, and upon replication to said answer, upon the depositions of witnesses duly taken and filed on the 3d day of February, 1917, and upon the exhibits therewith, upon orders heretofore entered, and upon the argument of counsel; and the court, having maturely considered the matters presented by the complainants' bill,

is of the opinion and doth adjudge, order and decree:

"(1) That the complainant James B. Keesling, under the will of Emory S. Keesling, deceased, in his own right, takes a fee-simple estate in the real estate of Emory S. Keesling, deceased, embraced in the fifth clause of the will of the said Emory S. Keesling, and an absolute estate in the personal property bequeathed by said clause, both estates defeasible in the event of, and upon the death of the said James B. Keesling and his daughter, Edith Keesling, without lawful issue of the said James B. Keesling living at the death of the survivor of the said James B. Keesling and Edith Keesling, in which event, that is to say, in the event of the death of the survivor of the said James B. Keesling and Edith Keesling without lawful issue of the said James B. Keesling living at the death of such survivor, the estate, real and personal, devised to the said James B. Keesling, shall pass to the other children of the said Emory S. Keesling, or their descendants.

"(2) That the said James B. Keesling, during his lifetime, has full and complete power and authority to sell, convey, and dispose of the real and personal estate devised and bequeathed to him by the fifth clause of the testator's will, and to pass to the purchaser or purchasers thereof absolute and fee-simple title thereto, free and discharged from the defeasance in the testator's will set forth, and without any responsibility on the part of the purchaser or purchasers to follow or see to the reinvestment of the purchase money, and that the defendant, Edith Keesling, daughter of the said James B. Keesling, in the event she shall survive her father and become his heir or devisee, upon the death of her said father shall be vested with like authority and power to sell, convey, and dispose of the said estate, or any part thereof. Upon such sale, the proceeds thereof must be reinvested in other property, to be held subject to the same defeasance and trust, with like power of sale and reinvestment.

"(3) The court is further of opinion that, under the will of the said Emory S. Keesling, the said James B. Keesling takes the estate, real and personal, devised and bequeathed to him by the fifth clause of said will, subject to a personal obligation on the part of the said James B. Keesling to provide for and discharge the claims of the widow in and against the said estate, and pay off and discharge legacies bequeathed by the said will to Carrie (or Clara) Keesling Lantz, wife of J. W. Lantz, and Minnie Keesling Cornett, wife of L. C. Cornett, of \$6,000 each, with interest from the death of the testator, to be paid in three equal annual installments from the date of such death, as provided in the fourth clause of the testator's will, and also subject to personal obligation to pay the debts of the testator, and that the provisions in said will in favor of the widow, Theresa A. Keesling, and of Carrie (or Clara) Keesling Lantz and Minnie Keesling Cornett are not intended to be and are not made charges upon the real and personal estate devised to the said James B. Keesling by the fifth clause of the testator's will, but that only the estate devised to the said James B. Keesling in said real and personal estate is subject to such charge.

"It is therefore adjudged, ordered, and decreed that the prayer of the complainant's bill that he be allowed to sell so much of the real estate of Emory S. Keesling, deceased, as may be necessary to pay off and discharge the legacies to Clara Keesling Lantz and Minnie Keesling Cornett, with interest, and any other unpaid indebtedness against the estate, or that he be authorized out of the proceeds of sale of all or any greater part of said real estate to pay off and discharge such legacies and obligations, be, and the same is hereby, denied, but the denial of the prayer of complainant's bill to be allowed to appropriate sufficient of the proceeds of sale to pay off said legacies and obligations shall not in any way abridge or impair his right to dispose of the said estate or any part thereof for the purposes of reinvestment, as hereinbefore provided for.

"It is further adjudged, ordered, and decreed, the object of this suit having been accomplished, that the same be stricken from the docket. * * *

Hutton & Hutton and J. J. Stuart, both of Abingdon, and J. P. Buchanan, of Marion, for appellant.

W. R. D. Moncure, of Marion, and W. B. Kegley and E. Lee Trinkle, both of Wytheville, for appellees.

SIMS, J. (after stating the facts as above). We will first dispose of the questions presented in argument which arise upon the assignments of error before us to the action of the court below in sustaining the demurrer to the original bill by the decree entered October 26, 1920.

There is no controversy over the conclusion that the estate vested in James B. Keesling by the clause of the will in question is a defeasible fee in the real estate and a defeasible absolute estate in the personal property, devised and bequeathed thereby, subject to be defeated by the happening of the event of the death of the survivor of the said James B. Keesling and his daughter, Edith Keesling Cole, without leaving any descendant of the said James B. Keesling living at the death of such survivor; and that upon the happening of that event the estate, real and personal, devised and bequeathed by such clause of the will, shall pass to the children of the testator other than James B. Keesling or to their descendants. And we hold that such is the proper construction of such clause of such will.

The controverted questions before us which arise upon the assignments of error to the action of the court below in sustaining the demurrer to the original bill are only two. They will be disposed of in their order as stated below.

[1] 1. Was and is the power to sell and convey given by said clause of the will a power which cannot be completely executed during the lifetime of James B. Keesling?

This question must be answered in the negative.

It is contended on behalf of the appellant that the language of the will on the subject under consideration at least leaves this question in doubt, the language being:

"The said James B. Keesling and his said daughter, if she shall survive her father and become twenty-one years of age and become the heir or devisee of her father, shall have the full power and authority to sell and convey * * * and to invest the proceeds of such sale in other property, to be held and owned in the same way, subject to the like provisions that if they should both die without issue living at the time of their death," etc. (Italics supplied.)

The use of the particle "and" where it first occurs in the quotation is, however, plainly with the meaning of "and also," when construed with reference to the exercise of the power, as it is manifest from a reading of the whole sentence that the power is conferred, indeed, upon the father and daughter, but that it may be exercised by the father in his lifetime, and also by the daughter, "if she shall survive her father and become twenty-one years of age and become the heir or devisee of her father."

[2] 2. Upon the case made by the original bill, was there any obligation on the appellant as purchaser to look to the application of the purchase money?

This question must be answered in the negative.

It was a purchase of property which in equity will be regarded as held in trust by James B. Keesling during his lifetime, but with general power of sale and conveyance given him, with discretion as to time and terms of sale, with express provision that the property in absolute right should pass to the purchaser; and also, along with the duty to reinvest the proceeds of sale in other property to be held upon the same trust, the trustee is given unlimited discretion as to the kind of property and as to the time in which reinvestment shall be made. And, according to the original bill, the appellant was a bona fide purchaser for full value of such property from such a trustee, without actual or constructive notice of any breach of trust committed or intended to be committed by the trustee.

It is well settled that in such case there was no obligation on the purchaser to look to the application of the purchase money. *Redford v. Clarke*, 100 Va. 115, 40 S. E. 630; *Hughes v. Tabb*, 78 Va. 313; *Claiborne v. Holland*, 88 Va. 1046, 14 S. E. 915; *Potter v. Gardner*, 12 Wheat. 498, 6 L. Ed. 706; *Elliott v. Merryman*, 1 Lead. Cas. in Eq. pt. 1, 109, 119, and notes.

As said in *Claiborne v. Holland*, supra, 88 Va. 1046, 1049, 14 S. E. 915, 916:

"* * * It is well settled in Virginia, and the prevailing doctrine in this country is, that where a sale is made by a trustee under a power to sell and reinvest upon the same trusts, a bona fide purchaser who pays the trustee will

be protected"—citing *Hughes v. Tabb* and *Elliott v. Merryman*, and notes to latter case, *supra*.

As said in *Hughes v. Tabb*, *supra*, 78 Va. 313, 325:

"The rule is, that wherever the trust is of a defined and limited nature, the purchaser must himself see that the purchase money is applied to the proper discharge of the trust; but wherever the trust is general, and of an unlimited nature, he need not see to it. 2 Story Eq. Jur. § 1131; 1 Lom. Dig. 302, 304; *Potter v. Gardner*, 12 Wheaton, 498.

"There is much reason in the doctrine that, where the trust is defined in its object, and the purchase money is to be reinvested upon trusts which require time and discretion, or the acts of sale and reinvestment are manifestly contemplated to be at a distance from each other, the purchaser shall not be bound to look to the application of the purchase money, for the trustee is clothed with a discretion in the management of the trust fund, and if any persons are to suffer by his misconduct, it should rather be those who reposed confidence than those who have bought under an apparently authorized act. Opinion of Justice Story in *Wormley v. Wormley*, 8 Wheaton, 442; *Sugden on Vendors*, c. 11, § 1. So, when a sale is made by trustees under a power to sell and reinvest upon the same trust, it has been held in America that the purchaser is not bound to see to the application of the purchase money. 2 Story's Equity, § 1184, and authorities there cited."

In *Redford v. Clarke*, *supra*, 100 Va. 115, p. 119, 40 S. E. 630, 631, this is said:

"In this case, there was a discretion vested in the trustee to determine in what particular property he would reinvest the fund, a discretion over which the purchaser had no control, and for the due exercise of which, if he acted in good faith, he was not responsible."

[3] We come now to the questions which arise upon the assignments of error to the action of the court below in refusing to allow the bill of review to be filed except upon the condition imposed by the decree of November 22, 1920, which is also under review on this appeal; or, what is the same thing, the action of the court in imposing the condition aforesaid upon the leave to file such pleading.

These questions are also but two in number, and they will be disposed of in their order as stated below.

3. Upon the case made by the allegations of the bill of review, what was the situation and duty of the appellant and of the court?

According to the case made by the allegations of the bill of review, the appellant, at the time of his purchase, was under no obligation to look to the application of the purchase money. But after his purchase, and, indeed, after the decree upon the original bill, it is alleged by the new pleading that the appellant discovered, and, in substance,

became possessed of actual knowledge, that the sale to appellant by the trustee was for the purpose of enabling the trustee to commit a devastavit by the diversion and use by the trustee of the purchase money to pay his own personal obligations, and that, if the purchase money was paid by appellant to the trustee, the latter would so use such money, and thus be enabled to commit and would commit the devastavit.

This plainly presents a situation in which the purchaser occupies the position of a stakeholder with respect to the unpaid purchase money, and, in equity and good conscience, it was his duty, by interpleader, to convene all of the persons in being who might have an interest in such money before the court having jurisdiction of the subject-matter, and pay the money which was due and to become due and payable into the hands of the court, so that it might be reinvested by the trustee under the terms of the trust, subject to the supervision of the court. And this, in substance, was precisely what the appellant conceived to be his duty under the circumstances set forth in his new pleading, and was the relief he himself prayed, if not by the specific prayers of his new pleading, certainly by his submitting the matter to the jurisdiction of the court, and by his prayer for general relief.

The situation presented by the new pleading is not one in which, accurately speaking, the purchaser has the right to look to the application of the purchase money. The discretionary powers vested in the trustee by the terms of the will, with respect to the undesignated character of property and unlimited time within which the reinvestment is to be made, prevent this. The purchaser has no right of control of the action of the trustee in these matters. Nor, indeed, would the court. But the court could prevent the devastavit and yet permit the trustee to exercise the discretion vested in him by the will.

The sole right which the purchaser has under such circumstances is to take such action as will enable him to avoid becoming liable as *particeps criminis* with the trustee in the commission of the devastavit aforesaid.

As said in the note to *Elliott v. Merryman*, 1 Lead. Cas. Eq. Pt. 1, p. 119:

"* * * The purchaser will unquestionably be liable to the *cestui que trust*, if he knows that the trustee is acting in violation of his trust, or even that he entertains such a design and sells as a means of accomplishing it"

—citing, among other cases, *Jackson v. Updegraffe*, 1 Rob. (40 Va.) 107; *Graff v. Castleman*, 5 Rand. (28 Va.) 195, 16 Am. Dec. 741; *Pinckard v. Woods*, 8 Grat. (49 Va.) 140.

As stated in the note to *Pinckard v. Woods*,

8 Grat. (49 Va.) in Va. Rep. Ann., at bottom pages 471, 472:

"It is a well settled doctrine that all who participate in a breach of trust are jointly and severally liable; thus a party knowingly dealing with the executor in such a way as to enable him to commit a devastavit will be held liable therefor."

The Virginia cases there cited to sustain this proposition undoubtedly do so.

It is true, as appears from the above-cited authorities, and numerous others on the same subject which might be cited, that, when the purchaser of trust property from a fiduciary derives a peculiar personal benefit, such as the payment of an existing personal debt of the fiduciary to him, or the payment of less than full value, or other fruit of the collusion, it is a plain case of liability on the part of the purchaser, upon the principle that he is particeps criminis with the defaulting fiduciary. It is also true, as stated in *Graff v. Castleman*, supra, 5 Rand. (26 Va.) 195, at page 201 (16 Am. Dec. 741):

"In the cases of *Nugent v. Giffard*, 2 Ves. 289, and 1 Atk. 463, *Meade v. Ld. Orrery*, 3 Atk. 235, and *Tanner v. Ivis*, 2 Ves. 466, Lord Hardwicke would not suffer creditors or legatees to follow assets into the hands of a purchaser from the executor or administrator, unless there was evidence of fraud or collusion between them. Nor did he consider it evidence of such fraud and collusion that the executor was applying the assets to the payment of his own individual debt, and this with the knowledge of the purchaser."

And as stated in the same opinion in *Graff v. Castleman*, 5 Rand. (26 Va.) pp. 201, 202, 16 Am. Dec. 741:

"In *Whale v. Booth*, cited 4 Term Rep. 625, note, Lord Mansfield went quite as far. He said [however]: 'There is one exception * * * where a contrivance appears between the purchaser and the executor to make a devastavit.'"

But, as appears from the opinion in this Virginia case and in others of the Virginia cases on the subject above cited and referred to, it would seem to be now settled that a party knowingly dealing with a trustee or other fiduciary in such a way as to enable him to commit a devastavit will be held liable therefor, although such party himself may pay present money and full value and derive no peculiar benefit as the fruit of the transaction. And this conclusion seems to us to be sound in principle certainly where the party himself not merely suspects, but affirmatively states that he knows as an actual fact, that the trustee will commit the devastavit if he deals with the trustee by paying money belonging to the trust fund into the hands of the trustee.

We are therefore of opinion that there was no error in the decree of October 26, 1920, in so far as it treated the case presented by

the bill of review as one of which it was proper for the court to take jurisdiction.

[4] 4. Is the decree of November 22, 1920, erroneous in that, in granting leave to file the bill of review, it imposed the condition or terms upon the appellant that he should pay into court that portion of the purchase money which was owing by the appellant in accordance with his contract of purchase and past due at the time of the entry of the decree?

This question must be answered in the negative.

No authority is cited for appellant to sustain the contention that such action was erroneous, nor have we been able to find any.

On the contrary, we see that in 16 Cyc. 523, 524, cited for appellees, this is said:

"It is not necessary to obtain leave of the court to file a bill of review to correct an error of law apparent on the face of the record; but such leave is necessary where the bill is founded on new matter or newly discovered evidence. The granting of such leave is not a matter of right, but rests in the sound discretion of the court, subject to review; * * * and in granting leave terms may be imposed."

The bill of review in the case before us is founded on alleged newly discovered evidence, and must rest solely on that ground; because, as we have above held, there was no error of law apparent on the face of the record as it stood at the time of the entry of the former decree.

[5] Further, it is well settled that a bill of review filed on the ground of newly discovered evidence entitles the complainant to relief only to the extent that the newly discovered evidence, if it had been brought forward in time, should have changed the character of the former decree sought to be reviewed. And it is plain from what we have said above that, if the allegations of the bill of review are all taken to be true, the only change in the character of the former decree which the appellant would be entitled to ask would be that the decree allow him to pay the purchase money into court instead of to the said trustee. The alleged newly discovered evidence in no way gives the appellant any right to decline payment into court of the part of the purchase money which is past due, nor, indeed, of the residue as it falls due, under his contract of purchase. Indeed the bill of review itself states that appellant "is willing, ready, and anxious to carry out his contract in the bill and proceedings set out. All he asks is that he be given a clear title against the claims of all persons on account of any action of executor of which he has knowledge." This relief will be undoubtedly afforded to the appellant if he pays the money into court. The condition or terms imposed upon the appellant by the decree under consideration violates no

right of the appellant, grants him the full relief to which he was entitled at the time such decree was entered, and was, indeed, in entire accord with his rights as a stakeholder, which was the position he himself took before the court by his bill of review. For the court to allow the appellant to use the action of the court, in allowing the bill of review to be filed as a ground for withholding the payment of the purchase money past due and payable, would be to allow the appellant to impugn his own good faith in seeking to file the bill of review.

Without passing upon the sufficiency of the bill of review with respect to the well-understood essential requisites of such a bill, since no objection as to such particulars is urged before us, and confining our holding to the points aforesaid raised by the assignments of error before us, we are of opinion that there was no error in the decree of November 22, 1920.

As to both decrees under review, therefore, the case will be
Affirmed.

BURKS, J., absent.

(89 W. Va. 132)

OLD NAT. BANK OF WAUPACA v. PEOPLE'S BANK OF HARRISVILLE.
(No. 4267.)

(Supreme Court of Appeals of West Virginia.
Sept. 27, 1921.)

(*Syllabus by the Court.*)

1. Carriers \S 58—One discounting sight draft and receiving therewith bill of lading acquires special property in the goods to secure the draft.

A party discounting a sight draft and receiving therewith a bill of lading for the goods, against the purchase price of which the draft is drawn, acquires a special property in such goods, and has a complete right to have them held as security for the payment of the draft.

2. Carriers \S 58—Bank discounting draft with bill of lading is not answerable for consignor's performance, in absence of bad faith.

A bank which discounts a draft with bill of lading attached is not, in the absence of bad faith, answerable to the drawee for the performance of the consignor's contract.

3. Carriers \S 59—Buyer waiving inspection, upon later rejecting goods, may not recover from assignee of draft with bill of lading attached.

A consignee of goods, who is required to pay for the same before delivery, is entitled to inspect the goods before receiving the same and paying therefor. He may waive this right, however, by paying for the goods and receiving them before such inspection, and in case he does so he cannot, upon later deciding to reject the goods, require repayment of his money to

him from a bank who is the assignee in good faith of a draft for the purchase money with bill of lading attached. His remedy, after paying the draft and receiving the goods, is an action against the seller for damages.

4. Banks and banking \S 169—Correspondent bank may not deliver bill of lading to consignee on payment of attached draft on condition of repayment on rejection unless so authorized by assignee bank.

A bank which discounts a sight draft for the purchase price of goods, with a bill of lading attached, is entitled to recover the amount of such draft from a correspondent bank to which it is sent for collection, where it is shown that such correspondent bank delivers such draft and bill of lading to the consignee upon deposit with it of the amount of the draft, who, in turn, surrenders such bill of lading to the carrier and receives the goods, even though it appear that the correspondent bank delivered the bill of lading with the understanding that the consignee might have his money back if he determined to reject the goods. Such correspondent bank has no authority to deliver such bill of lading upon such conditions, unless it is specifically authorized to do so by the assignee bank.

Error to Circuit Court, Ritchie County.

Action by the Old National Bank of Waupaca against the People's Bank of Harrisville. Directed verdict for defendant, and judgment of nil capiat, and plaintiff brings error. Reversed, verdict set aside, and cause remanded for new trial.

Merrick & Smith, of Parkersburg, for plaintiff in error.

Adams & Cooper and S. O. Prunty, both of Harrisville, for defendant in error.

RITZ, P. The plaintiff brought this suit for the purpose of recovering the amount of a draft drawn by Leonard, Crossett & Riley upon R. C. Marshall, to which was attached a bill of lading for a carload of potatoes, which draft had been indorsed, together with the bill of lading, to the plaintiff, and by it sent to the defendant for collection. A trial in the court below resulted in a directed verdict in favor of the defendant, and a judgment of nil capiat thereon, to review which this writ of error is prosecuted.

The facts out of which this controversy grew are that, on the 4th day of October, 1918, Leonard, Crossett & Riley, pursuant to an order received by them from R. C. Marshall, shipped from Waupaca, Wis., a carload of potatoes to Cairo, W. Va., consigned to their own order, with instructions to notify R. C. Marshall, and at the time of shipment of this carload of potatoes received from the carrier a bill of lading showing the consignment aforesaid. On the 7th of October Leonard, Crossett & Riley drew a sight draft on the said R. C. Marshall for the sum of \$856.64, the purchase price of the potatoes,

and attached to this draft the said bill of lading. This draft, with the bill of lading attached, was transferred or assigned to the plaintiff bank upon full payment therefor, and it forwarded the same, with the bill of lading attached, through the Marine Bank of Milwaukee, Wis., to the defendant bank at Harrisville for collection. Not having received a remittance from the defendant bank to cover this draft, the plaintiff bank, on the 24th day of October, telegraphed to the defendant stating that it was advised that the draft had been paid, and requested that the amount be remitted. To this telegram the defendant replied by a letter dated the 24th day of October, in which it made a statement at some length as to the facts as represented to it. It advised the plaintiff bank that, upon the arrival of the carload of potatoes at Cairo, Mr. Marshall telephoned to it that the railroad agent would not permit inspection except upon production of the bill of lading, and that he, Marshall, accordingly remitted to it the amount of the draft, and had the bill of lading forwarded to him by mail, together with the draft, in order that he might inspect the potatoes; that after inspecting them he returned the draft with a letter dated October 15th, stating that the potatoes were refused for the reason that the same were not satisfactory. The railroad agent declined to return the bill of lading, it having been surrendered to the carrier by Marshall, so that he was unable to return it to the bank. The defendant advised that, under the circumstances, it had decided to keep the money which was in its possession until the rights of the parties thereto were determined by a court of competent jurisdiction, and this suit resulted. What became of the carload of potatoes does not appear. As to whether or not the potatoes were of inferior quality, and were for that reason rejected, does not appear in the record, except from statements contained in the letter from the cashier of the defendant to the plaintiff, and these statements purport to be made by him upon information derived from the purchaser and the county food administrator, and the rejection of the potatoes appears only in the same way. The court below, however, evidently treated this as proof, and the parties upon this hearing likewise considered these facts as sufficiently proven by the introduction of the aforesaid letter by the plaintiff. The question thus presented is purely one of law.

[1] It is very well established that, where the consignee of goods discounts a sight draft representing the purchase price thereof, to which draft is attached a bill of lading, the holder of this draft has a property in the goods, and is entitled to have the same held by the carrier until he surrenders the bill of lading. *Neill & Ellingham v. Produce Co.*, 41 W. Va. 37, 23 S. E. 702. The

bill of lading is in the nature of a muniment of title, the holder of it being entitled to demand possession of the goods shipped when they reach their destination, and the carrier being relieved of liability on account of the carriage of said goods when it delivers the same to the holder of such bill of lading.

[3] That Marshall had a right to inspect these goods before receiving them is true. The bill of lading provided for this inspection, and whether it did or not he would be entitled to make it before receiving the goods. 10 C. J. 253. The railroad company did not have the right to require the surrender of this bill of lading before permitting inspection of the goods. It might be proper for the carrier's agent to require that the bank holding the bill of lading direct him to permit inspection simply for the purpose of knowing that the party making such inspection was authorized thereto by the holder of the bill of lading. The defendant bank, when it received this draft, was acting as an agent of the plaintiff. Its authority in the premises was limited to collecting the draft and delivering it with the bill of lading attached to Marshall, or returning it with the bill of lading attached upon refusal of the purchaser to pay the same. It could not deliver the bill of lading to him upon any conditions or under any agreement that it should be returned and the money repaid should he thereafter be dissatisfied with the goods. To hold that Marshall could pay this draft as he did, and upon discovering that the goods did not comply with the seller's warranty, demand his money back, would be in effect holding that the assignee of the draft with the bill of lading attached was liable to answer for the quality of the goods, while it is held with practical uniformity in this country that under such circumstances the purchaser's remedy is against the seller, and the assignee of the draft with the bill of lading attached cannot be held for a failure in quality or a breach of warranty. *Cosmos Cotton Co. v. First Nat. Bank of Birmingham*, 171 Ala. 392, 54 So. 621, 32 L. R. A. (N. S.) 1173, Ann. Cas. 1913B, 42; *Central Mercantile Co. v. Oklahoma State Bank*, 83 Kan. 504, 112 Pac. 114, 33 L. R. A. (N. S.) 954; *Hawkins v. Alfalfa Products Co.*, 152 Ky. 152, 153 S. W. 201, 44 L. R. A. (N. S.) 600; *Springs v. Hanover Nat. Bank*, 209 N. Y. 224, 103 N. E. 156, 52 L. R. A. (N. S.) 241.

[2, 4] These authorities clearly establish the doctrine in this country that the bank which discounts a draft with a bill of lading attached is not, in the absence of bad faith on its part, answerable to the drawee for the performance by the assignor of the contract. It is quite true, as before stated, that Marshall was entitled to inspect these goods before receiving them. This is a right, however, that he was not required to exer-

cise. He could pay the draft and take up the bill of lading if he desired, and rely upon the seller's warranty to protect him. This right of inspection he must exercise seasonably. He could not pay off the draft and deliver the bill of lading to the carrier, and then demand his money back upon finding that the goods did not meet his expectations. When the defendant bank delivered the bill of lading to him, it passed the title to the goods, and the title to the money passed to the plaintiff bank, and when Marshall delivered this draft to the carrier's agent, and accepted the carload of goods, he cannot be said to have accepted it for any qualified purpose, for, by delivering the bill of lading to the carrier, he discharged the carrier of liability in connection with the carriage of the shipment, and received to himself not only the title, but the possession of the property. When a bank receives a draft with a bill of lading attached, as did the defendant bank in this case, it makes itself liable to the owner of the draft if it delivers the bill of lading to the assignee without requiring payment of the draft; and likewise if it does require such payment before delivery of the bill of lading, it cannot withhold the money it thus collects from the party for whom it undertook to collect it.

The stability of commercial transactions of this character requires that the rights of the parties thereto be definitely and certainly fixed at each stage of the proceeding, and not dependent on any whim or caprice of

either party. Every act done must have attached to it a definite and certain meaning and effect, regardless of what may have been the intention of either party. When Marshall, upon the refusal of the railway company's agent to permit him to examine the goods, paid this draft and surrendered the bill of lading to the carrier's agent, he became vested with the full title in the property. He waived his right to have an inspection of the goods before acceptance, and he cannot, after having waived the same, subsequently rely upon it. The doctrine of the liability of a bank, standing in the position of the defendant in this case, to the holder of a draft, for an unauthorized delivery of a bill of lading attached thereto, is fully recognized by the authorities. *Michie on Banks and Banking*, § 161, p. 1401; *Gulf, Colorado & Santa Fé Ry. Co. v. North Texas Grain Co.*, 32 Tex. Civ. App. 93, 74 S. W. 567; *Bank v. Cummings*, 89 Tenn. 609, 18 S. W. 115, 24 Am. St. Rep. 618; *Hobbs & Tucker v. Chicago Packing & Provision Co.*, 98 Ga. 576, 25 S. E. 584, 58 Am. St. Rep. 320. We are of opinion that the money now in the possession of the defendant bank is the property of the plaintiff, and that it had the right to maintain this suit to recover the same upon refusal of the defendant to pay it over.

The judgment of the circuit court is therefore reversed, the verdict of the jury set aside, and the cause remanded for a new trial.

(89 W. Va. 151)

HATFIELD v. HATFIELD et al. (No. 4140.)(Supreme Court of Appeals of West Virginia.
Oct. 4, 1921.)*(Syllabus by the Court.)***Fraudulent conveyances ¶259(1)—Bill to annul fraudulent deed, made to defeat judgment lien, held sufficient.**

A bill to set aside and annul a voluntary and fraudulent deed, which charges with reasonable certainty a live judgment, in favor of plaintiff and against the grantor, rendered prior to such deed, and that in order to defeat the collection thereof the grantor and grantee and those holding under him combined and conspired together, and executed and recorded such deed, without any consideration therefor deemed valuable in law, and which bill prays that such deed be annulled in so far as plaintiff's judgment is concerned, and the real estate sold in satisfaction thereof, and for general relief, is sufficient, and a demurrer thereto should be overruled.

Appeal from Circuit Court, Mingo County.

Action by Evaline Hatfield against Boyd Hatfield and others. Demurrer to bill sustained, and decree entered dismissing bill. Plaintiff appeals. Decree reversed, demurrer overruled, and cause remanded.

Stafford & Rhodes, of Williamson, for appellant.

LIVELY, J. The circuit court sustained a demurrer to, and dismissed, the plaintiff's bill, and she prosecutes this appeal.

The only question here is upon the sufficiency of the bill. The bill avers that plaintiff, in a suit for divorce which she instituted against defendant Boyd Hatfield in the year 1917, obtained a decretal judgment against him for alimony and suit money amounting to the sum of \$386, which has not been paid; that while she and defendant Boyd Hatfield were living together as husband and wife they jointly purchased three lots, Nos. 56, 57, and 58, in what is known as West Williamson, and that she and her husband paid for and owned the same jointly, each having paid one-half the purchase money therefor, and each owning a one-half undivided interest therein; and that the deeds for lots 56 and 57 were made to them jointly by the owner of the property from whom they purchased, but, without the knowledge or consent of plaintiff, her husband procured a deed or contract for lot 58 to be made to himself, and had the same duly recorded in the clerk's office of the county court of Mingo county, a copy of which deed is offered as an exhibit therewith. The amount paid by them for lot 58 was \$250, and on these lots they built a dwelling house, which was insured, and afterwards destroyed by fire, together with all the household and

kitchen furniture therein. The bill further charges that, soon after the decree for alimony and suit money was entered against the defendant, her husband, he left the state of West Virginia and became a nonresident thereof; that after the divorce decree was entered, and after her decretal judgments were obtained, Boyd Hatfield, her former husband, conveyed the house and lots to defendant, Isom Blackburn, and transferred to him the insurance policy thereon, in both of which, the real property and the insurance, plaintiff had a one-half undivided interest, and that Isom Blackburn very soon thereafter conveyed the interest he had obtained from Boyd Hatfield to defendant York Hatfield; and the deeds are offered as exhibits. It is charged that York Hatfield, is a brother of defendant Boyd Hatfield, her former husband, and that defendant Isom Blackburn is an uncle of Boyd Hatfield, and the bill avers and charges that the conveyance from Boyd Hatfield to Isom Blackburn was voluntary and without any consideration valuable in law, as was also the conveyance from Blackburn to York Hatfield, and that each of said conveyances was fraudulent, and was made for the purpose of defrauding and preventing her in the collection of her said debt against Boyd Hatfield, and that defendants Isom Blackburn and York Hatfield, at the time the conveyances to them were made, knew that they were made for the sole and exclusive purpose of preventing the plaintiff from collecting her debt, and to put the property described beyond her reach, and that all of the defendants had full knowledge of the existence of plaintiff's debt. It is also charged that the transfer of the insurance was voluntary and fraudulent, and was for the purpose of preventing her from collecting her debt; that Isom Blackburn collected the insurance, amounting to \$275, and that Boyd Hatfield collected the insurance on the household and kitchen furniture, amounting to \$200, in which he was interested to the amount of one-half thereof. The amount of indebtedness which plaintiff claimed against defendant Boyd Hatfield, composed of her judgment for alimony and suit money in the divorce suit, and the one-half interest which she claims in the insurance money, amounts to \$623.50. The prayer is that a decree may be entered setting aside, vacating, and holding for naught the conveyances which were executed by Boyd Hatfield to Isom Blackburn, and from Isom Blackburn to York Hatfield, as to the plaintiff's debt, and that the assignment of the insurance policy be set aside and held for naught as to plaintiff's debt, and that the one-half undivided interest in the real estate described, being the amount owned by Boyd Hatfield, be made subject to her debt and sold in satisfaction thereof, and for general relief.

While the bill is inaptly drawn, and the allegations therein are somewhat indefinite, it is reasonably clearly alleged therein that the plaintiff has a judgment against defendant Boyd Hatfield, and that at the time the judgment was rendered Boyd Hatfield was the owner of a one-half undivided interest in lots 56 and 57, and had the legal title to lot No. 58, in West Williamson, in Mingo county, at least a one-half interest in lot 58, and that, in order to hinder, delay, and defraud the plaintiff in the collection of her said debt, he conveyed his interest in said lots to his uncle, who, in his turn, conveyed the same to defendant York Hatfield, who is a brother of defendant Boyd Hatfield, her former husband; that such conveyances were made with the intent aforesaid, and with full knowledge of the other defendants, and that they participated therein; that the consideration moving in these conveyances was not valuable; and that all of these three defendants combined and conspired together to hinder, delay, and defraud her in the collection of her judgment. These allegations, if they be true, and on demurrer we must consider them to be true, are sufficient to justify a decree setting aside these fraudulent conveyances and subjecting the subject-matter thereof to the payment of the judgment. For the purposes of this appeal it is not necessary to pass upon the question whether or

not the plaintiff is entitled to any of the insurance on the house and furniture. It is not perceived on what theory the circuit court sustained the demurrer. None is suggested in the record; and no appearance is made on behalf of the appellees. It may be that Boyd Hatfield has other property subject to the jurisdiction of the court, and which would be ample to pay the claim of plaintiff, and which is unincumbered and readily accessible to her demands, and that the court perceived no necessity in proceeding against the lots in question for that reason; but we cannot go out of the record. The conveyance is charged to be without consideration and fraudulent. Under the statute such conveyances are fraudulent per se. It reads:

"Every gift, conveyance, assignment, transfer or charge which is not upon consideration deemed valuable in law, shall be void, as to creditors whose debts shall have been contracted at the time it was made," etc.

Plaintiff's right to maintain this suit under the allegations of her bill is so well settled by our decisions that we do not deem it necessary to refer to any of them.

We reverse the decree, overrule the demurrer, and remand the cause.

Decree reversed, demurrer overruled, and cause remanded.

(183 N. C. 249)

WILBON v. BARNES et al. (No. 249.)

(Supreme Court of North Carolina. Oct. 26, 1921.)

Appeal and error ⇨ 1002—**Finding of jury held conclusive on question of agency.**

In action for personal injuries against partners, defended by one partner on the ground that the other partner was an independent contractor for the work in which the injury occurred, a finding of the jury, on conflicting evidence, that driver of a motor truck was the agent of both partners, is conclusive.

Appeal from Superior Court, Wake County; Connor, Judge.

Action by J. W. Wilbon against George W. Howard and J. B. Barnes. From a judgment for plaintiff, defendant Barnes appeals. No error.

Civil action instituted by J. W. Wilbon against George W. Howard and J. B. Barnes to recover damages for injuries sustained by plaintiff in a collision between a buggy in which he was riding and an automobile truck driven at the time by one Bill Lawrence.

The defendant J. B. Barnes alone appeals from the judgment below, and the sole question presented is whether or not the driver of the truck, admittedly the agent of Howard, was also the agent of the appellant at the time of the injury. Howard & Barnes were partners in the business of buying and selling tobacco, but it is contended that Howard alone was responsible for the hauling of the tobacco, and that, with respect to this work, he was an independent contractor in his relations to the partnership firm.

Upon the single or dual agency of the driver, the evidence was conflicting, and the question was therefore submitted to the jury, with the following result:

"(1) Was the plaintiff injured by the negligence of the defendants, or of either of them, as alleged in the complaint? Answer: Yes.

"(2) If so, did plaintiff by his own negligence contribute to his injury as alleged in the answer? Answer: No.

"(3) Was the driver of the truck the agent of both defendants, as partners, at the time plaintiff received the injuries, as alleged in the complaint? Answer: Yes.

"(4) What sum, if any, is plaintiff entitled to recover of defendants, or either of them, as damages? Answer: \$4,500."

From a judgment on the verdict in favor of plaintiff and against both defendants, the defendant J. B. Barnes appealed.

J. R. Baggett, of Lillington, and Manning, Bickett & Ferguson, of Raleigh, for appellant.

Douglass & Douglass, of Raleigh, for appellee.

STACY, J. Counsel for appellant in this case have filed an interesting and elaborate brief, with citation of authorities, in support of the position that a member of a co-partnership may become an independent contractor, with respect to a given piece of work, in his relation to the partnership firm of which he is a member. Chicago Hydraulic Press Brick Co. v. Campbell, 116 Ill. App. 322, and Burns v. Michigan Paint Co., 152 Mich. 618, 116 N. W. 182, 18 L. R. A. (N. S.) 818, and note. It is contended that such was the position of Howard in hauling the tobacco, the partnership extending only to the buying and selling of the tobacco; and that he alone should be held liable for the negligence of the truck driver who was engaged in this work at the time of the plaintiff's injury. There was evidence pro and con on this point, but we think it is settled by the jury's answer to the third issue. The crucial fact has been found against the appellant's contention. Hence the legal questions debated before us do not seem to be presented on the record.

We have found no error, and the judgment below will be upheld.

No error.

(182 N. C. 321)

STATE v. BYNUM. (No. 323.)

(Supreme Court of North Carolina. Oct. 26, 1921.)

Criminal law ⇨ 1156(2)—**Refusal to set aside verdict as contrary to weight of evidence not disturbed.**

Lower court's refusal to set aside verdict as contrary to the weight of the evidence will not be disturbed by Supreme Court on appeal; such matter being within the sound discretion of the court.

Appeal from Superior Court, Orange County; Daniels, Judge.

Hilliard Bynum was convicted of perjury, and he appeals assigning for error:

(1) For that his honor declined to set aside the verdict as contrary to the weight of the evidence.

(2) For that his honor entered judgment on the verdict. No error.

R. O. Everett, of Durham, for appellant. James S. Manning, Atty. Gen., and Frank Nash, Asst. Atty. Gen., for the State.

HOKE, J. The bill of indictment, the verdict, and judgment are formally correct, and, the only exception to the validity of the trial being on a matter in the sound discretion of the court we must affirm the judgment. The defendant was without the benefit of counsel in the court below, and for the reasons stated we are not at liberty

to consider the positions so forcibly urged in his behalf in the argument here.

On the record, while it was entirely proper to submit the case to the jury, we find very little in the testimony to justify a conviction of willful and corrupt perjury, and we deem it no impropriety to suggest that the facts as now presented to us would seem to justify a petition for executive clemency. We are confirmed in the view by the further fact that the careful, considerate, and able judge who tried the cause has imposed the minimum punishment allowed by the law for an offense of this kind.

No error.

(182 N. C. 769)

STATE v. BRADSHAW. (No. 321.)

(Supreme Court of North Carolina. Oct. 26, 1921.)

Prostitution ¶4—Evidence held insufficient to prove guilt.

In a prosecution for prostitution, evidence held insufficient to bring defendant within the definition of prostitution or assignation in C. S. § 4357 et seq.

Appeal from Superior Court, Alamance County; Horton, Judge.

Clem Bradshaw was convicted of prostitution, and he appeals. Reversed.

Criminal prosecution tried upon an indictment charging the defendant with having engaged in immoral prostitution and unlawfully using a building for like purpose in violation of the statute. The defendant offered no evidence, but moved to dismiss the action or for judgment as of nonsuit under the Mason Act (chapter 73, Public Laws 1913). Motion overruled, and defendant excepted. From a verdict of guilty, and judgment of nine months on the roads, pronounced thereon, the defendant appealed.

The evidence was that defendant and another man, with two women, hired an automobile, in which they were driven to another town, where they arrived about 8 p. m., that the sheriff went to the back of the office of a tire company in such town about 10 p. m., found the building dark, knocked, pulled back the window curtain, and threw the light from his flashlight into the room, where he saw defendant and one of the women sitting four or five feet apart on separate chairs, fully dressed; that defendant stated he had entered the office to use the telephone with the permission of the owner, who, he said, would soon return; and that the character of the woman was good.

James S. Manning, Atty. Gen., and Frank Nash, Asst. Atty. Gen., for the State.

PER CURIAM. The following is the whole of the state's brief:

"The defendant was tried and convicted at the June term, 1921, of the Alamance superior court, Hon. J. Lloyd Horton, presiding, of prostitution as defined in section 4357 et seq. of the Consolidated Statutes.

"Without analyzing the evidence, we think it is not sufficient to justify the verdict. It does not, we submit, bring defendant within the plain definition of prostitution or of assignation as contained in section 4357."

For the reasons assigned by the Attorney General, we think the defendant's motion for judgment as of nonsuit should have been allowed.

Reversed.

(183 N. C. 260)

THOMPSON et al. v. TOWN OF LUMBERTON. (No. 291.)

(Supreme Court of North Carolina. Oct. 26, 1921.)

1. **Injunction** ¶85(2)—Enforcement of ordinance cannot be restrained.

Injunction does not lie to restrain the enforcement of an alleged invalid town ordinance.

2. **Municipal corporations** ¶120—Intention in enacting ordinance to be ascertained only from the ordinance itself.

That the intention of the board of commissioners of a town in enacting an ordinance licensing and regulating automobiles was to levy a tax, and not to provide a police regulation, cannot be shown by extrinsic evidence, but the intention can be ascertained only from the face of the ordinance.

3. **Licenses** ¶30—Injunction not granted against automobile licensing ordinance enforcement, although ordinance partly a tax measure.

Even though automobile licensing ordinance was enacted for the purpose both of regulating automobiles and to lay a license tax upon those not used for hire, an injunction will not lie against the levy of the tax, since the ordinance is at least in part a police regulation.

4. **Licenses** ¶7(9)—Automobile licensing ordinance held valid.

Under municipal charter re-enacted and amended by Laws 1907, c. 343, §§ 45, 46, authorizing ordinances to secure peace and good order and prevent disturbances and disorderly conduct, held that a town could validly enact an automobile licensing ordinance providing for a fee of \$5; such ordinance not being in conflict with any statute, and being reasonable, under Revenue Act of 1919 (Pub. Laws 1919, c. 189, § 5), as amended by Pub. Laws 1921, c. 2, § 29.

Appeal from Superior Court, Robeson County; Kerr, Judge.

Suit by W. O. Thompson and others against the Town of Lumberton. From judgment

for plaintiffs granting a temporary injunction, defendant appeals. Judgment reversed, and action dismissed.

The commissioners of the town of Lumberton adopted the following ordinance:

"Section 1. No person or persons residing within the corporate limits of the town of Lumberton shall be allowed to operate a motor vehicle within said town until he shall have been granted license as a chauffeur or driver, as provided by this ordinance.

"Sec. 2. Every person desiring to operate a motor vehicle within the town of Lumberton shall file written application with the town clerk and treasurer, accompanied by a certificate signed by two reputable, disinterested citizens, certifying that said applicant is of good moral character, and that in their opinion has sufficient knowledge of motor vehicles and sufficient experience and training as a chauffeur or driver to enable said applicant to safely operate the same, and that applicant is at least sixteen years of age. If said certificate is sufficient to satisfy said town clerk and treasurer that the applicant is qualified he shall, upon payment of the fees as hereinafter provided, issue a license, authorizing the applicant to operate motor vehicles within said town of Lumberton. If the certificate or other accompanying evidence does not satisfy said town clerk or treasurer that said applicant is qualified and entitled to a chauffeur's or driver's license, he may decline to grant the same, and it shall be his duty in such cases to file the said application and present it at the next meeting of the board of commissioners of said town, at which time the said board may either grant or refuse said license, as they may deem proper; provided that until the meeting of the town board applicant shall be allowed to operate his motor vehicle in the same manner as if said license had been granted.

"Sec. 3. A fee of \$5.00 shall be paid by each applicant to cover the costs and fees of investigating the qualifications of the applicant for driver's or chauffeur's license and the expense of granting the same. The said license shall expire on June 30, 1922, but the same may be renewed from year to year by complying with the provisions of this ordinance. If as much as half of the fiscal year has expired at the time of application for license, then only one-half of the foregoing license fees shall be charged.

"Sec. 4. That every person violating the provisions of this ordinance shall be guilty of a misdemeanor and shall be fined the sum of \$25 for each and every offense.

"Sec. 5. That this ordinance shall become effective on June 30, 1921."

At the instance of the plaintiffs, taxpayers, a temporary injunction was issued and continued to the hearing.

Johnson & Johnson, of Lumberton, for appellant.

McIntyre, Lawrence & Proctor, of Lumberton, for appellees.

CLARK, C. J. [1] An injunction does not lie to restrain the enforcement of an alleged invalid town ordinance. It has been uniformly held that equitable relief will not

be granted in cases where there is an adequate and effectual remedy at law. *Busbee v. Macey*, 85 N. C. 329. It has also been uniformly held that an injunction will not be granted to restrain the enforcement of the criminal law except when it is necessary to prevent irrevocable injury or destruction of property or to protect the defendant from oppressive and vexatious litigation. In the latter case the courts will grant an injunction only after the controverted right has been determined in favor of the defendant in a previous action.

Every violation of a town ordinance is by statute a misdemeanor, and if the courts should issue an injunction against the enforcement of an ordinance, it would be an interference with the administration of the criminal law. When the defendant is put on trial for violation of the ordinance, he has full opportunity to test its validity. This has been often presented to the court, and the decisions are so clear and uniform as to leave the matter no longer debatable.

In *Cohen v. Goldsboro*, 77 N. C. 3, that town had adopted an ordinance forbidding the sale of fresh meat except under restrictions prescribed in the ordinance. The defendants were arrested and fined for its violation and as a result were forced to suspend their business. They sought to restrain the enforcement of the ordinance, and *Reade, J.*, said:

"If the defendants have an unlawful ordinance, and have arrested and fined the plaintiffs, as they allege, the plaintiffs have complete redress in an action for damages. And as often as the arrest may be repeated they have the like redress; but we are aware of no principle or precedent for the interposition of a court of equity in such cases. The injunction is dissolved, and the case dismissed."

To this we might add that the defendant could set up the defense of the invalidity of the ordinance when arrested and put on trial and has the right of appeal should the matter be decided against him.

In *Wardens v. Washington*, 109 N. C. 21, 13 S. E. 700, an injunction was sought against the enforcement of an ordinance prohibiting the burial of the dead within the corporate limits of that town, except upon a permit from the town clerk, which could be given only upon a prescribed certificate from the attendant physician, and violation of the ordinance was made punishable by a fine of \$50. The court refused to pass upon the validity of the ordinance, or restrain its enforcement, saying:

"It is unnecessary, however, that we pass upon the question * * * as to the power of the Legislature to authorize or to validate the ordinance in the exercise of the police power inherent in the state, for we have an express authority, if one were needed, that an injunction does not lie to prevent the enforcement of an alleged unlawful town ordinance"

—adding that the plaintiff had his remedy by an action for damages, and saying further:

"If the plaintiffs, or any one else, should violate the ordinance, upon a criminal prosecution for such violation the validity of the ordinance, and of the acts of the Legislature authorizing and validating it, would come directly and properly before the courts."

The same question was again presented in *Scott v. Smith*, 121 N. C. 94, 28 S. E. 64, where the ordinance sought to be enjoined made it unlawful to play baseball in town without the mayor's permission. The court said:

"If the ordinance is lawful and valid, as insisted by the defendants, the plaintiff has no cause of complaint and can maintain no form of civil action. If it is void, as insisted by the plaintiff, then he has misconceived his remedy, for a court of equity will not interpose when the plaintiff has a remedy at law by civil action for damages, in which, and in a criminal action also, the validity of the ordinance would be presented."

In *Vickers v. Durham*, 132 N. C. 890, 44 S. E. 686, the ordinance was attacked upon the ground that the statute under which the city proposed to condemn the plaintiff's land was unconstitutional. The court refused to sustain the injunction for the reason that the plaintiff had his remedy at law.

In *Paul v. Washington*, 134 N. C. 369, 47 S. E. 793, 65 L. R. A. 902, the plaintiff undertook to distinguish his case from the principles above cited upon the ground that he had no adequate remedy at law because of the well-settled doctrine that municipal corporations are not liable for torts committed by their officers when undertaking to enforce unconstitutional and void ordinances enacted in the attempted exercise of the police power, and also because the policeman who arrested the plaintiff was insolvent, and contended that, since neither the town nor its policemen could be held responsible in damages, the plaintiffs had no remedy except by injunction. On this the court ruled that the law had been correctly laid down in the above cases, and that an injunction was not the remedy to test the validity of a municipal ordinance.

In *State v. Railroad*, 145 N. C. 521, 59 S. E. 570, 13 L. R. A. (N. S.) 966, in which the whole matter was fully considered, the court held that it is well settled, both in England and in America, that a court of equity has no jurisdiction to interfere with by injunction or to restrain a criminal prosecution whether the prosecution be for the violation of a statute, or for an infraction of a municipal ordinance, and that this rule applies whether the prosecution is by indictment or by summary process and whether it has been merely threatened or has already been commenced.

[2] The plaintiff contends, however, that the intention of the board of commissioners in enacting said ordinance was to levy a tax, and not to provide a police regulation, but the intention can be ascertained only from the face of the ordinance itself. It has been uniformly held, without a dissent, that evidence cannot be received to explain or qualify an act of the General Assembly, and even a member of that body will not be permitted to aid the court by testifying as to the purpose of the governing body in enacting the statute. This would seem to apply equally to the passage of an ordinance by the law-making body of a town.

[3] The court found as a fact that this ordinance was enacted both for the purpose of regulating automobiles and to lay a license tax upon those not used for hire, and the plaintiffs contend, therefore, that an injunction will lie against the levy of the tax. But, if this finding of fact were adopted by us, still, the ordinance being in part a police regulation, the injunction would not lie.

[4] In view of the vast number of automobiles and the great danger from lack of adequate supervision in cities and towns, both from the danger of collisions and to pedestrians and to the morals of the community, there is hardly any subject which more imperatively demands the exercise of the police power. Last year in this country there were 92,000 injuries and deaths sustained in the operation of automobiles. This is an aggregate of casualties in a year nearly double that sustained by this country during the entire duration of the World War.

The ordinance in this case is not in conflict with any statute, and is authorized under the general provisions of the defendant's charter and is reasonable. The charter of defendant's town as re-enacted and amended by chapter 343, Laws 1907, contains sections 45 and 46, as follows:

"Sec. 45. Said mayor and board of commissioners shall have power to enact such rules, regulations, ordinances and by-laws as they may deem necessary to secure the peace and good government of said town, and to enforce the same by imprisonment, fine or penalty, and the ordinances enacted by said board, with the pains and penalties pertaining thereto, may be enforced within the corporate limits of the said town and for one mile beyond and around said corporate limits.

"Sec. 46. Said mayor and board of commissioners, in addition to the powers which they possess by law and which are conferred upon them by this charter, shall particularly have power to enact ordinances and to enforce same by imprisonment, fine or penalty, as follows: "To prevent vice and immorality; to preserve public peace and good order; to prevent and quell riots, disturbances * * * and disorderly conduct."

Without elaborating the instances in which the uncontrolled and unrestrained operation of automobiles would violate the public

peace and good order and might tend to promote vice and immorality and increase disorderly conduct, it is clear that the defendant is authorized by its charter to pass this ordinance.

The plaintiff was doubtless relying upon the decision in *State v. Fink*, 179 N. C. 714, 103 S. E. 16, which held that under the Revenue Act of 1919 (Pub. Laws 1919, c. 189, § 5) the provision prohibiting cities and towns from charging any license fee for driving or operating automobiles greater than such tax was void. That decision was correct and compelled by the language of the Revenue Act of 1919, but the General Assembly in 1921 (Pub. Laws 1921, c. 2, § 29) added the following provisos to the section construed in *State v. Fink*:

"Provided, nothing herein shall prevent the governing authorities of any city from regulating, licensing, controlling of chauffeurs and drivers of any such car or vehicle, and charging a reasonable fee," and "Provided further, that any city or town may charge a license not to exceed \$50 for any motor vehicle used in transporting persons or property for hire in lieu of all other charges, fees, and licenses now charged."

The effect of this amendment was to authorize the city to regulate and control the conduct of chauffeurs of automobiles and the drivers of all other vehicles and to impose a reasonable license fee, which we deem was not exceeded by the requirements of the payment of a license tax of \$5. Even if this ordinance were enacted solely as a revenue measure, \$5 is not an unreasonable amount to be levied as a tax and license fee on pleasure or other motor vehicles when \$50 is authorized as a tax upon those motors engaged in transportation for hire.

Inasmuch as an injunction does not lie to test the validity of a town ordinance, we not only reverse the judgment, but must dismiss the action.

Action dismissed.

(182 N. C. 268)

BROOKS v. ORANGE RICE MILL CO.
(No. 290.)

(Supreme Court of North Carolina. Oct. 26, 1921.)

1. Garnishment \S 220—Trial \S 234(3)—In proceeding to subject the proceeds of a draft to a debt, intervener's ownership held a question for the jury.

In an action in which the proceeds of a draft were attached, an intervener, claiming the proceeds as purchaser for value, evidence of intervener held sufficiently equivocal, if not contradictory, to require a finding by the jury, and an instruction that, if the jury believed the evidence, they should find for intervener, prac-

tically amounted to a direction of verdict, and was erroneous.

2. Bills and notes \S 363—Payer of draft purchased for value holds absolute right in proceeds.

Where one holds a draft as a purchaser for value, the proceeds therefrom cannot be attached, in the hands of a garnishee trust company, for debt of the drawer.

3. Trial \S 234(3)—An instruction that if the jury believe the evidence is inexact.

An instruction "if you believe the evidence testified to by the witness in the case" to find for claimant is inexact.

Appeal from Superior Court, New Hanover County; Kerr, Judge.

Action by J. W. Brooks against the Orange Rice Mill Company, in which the Orange National Bank intervened as claimant of the attached property. Judgment for intervener, and plaintiff appeals. Reversed, and new trial ordered.

Plaintiff, a citizen of this state, having a cause of action against Orange Rice Mill Company, a foreign resident corporation, instituted this suit in the superior court of New Hanover county, and sought to obtain service upon the defendant by attaching the proceeds of a certain draft in the hands of the American Bank & Trust Company of Wilmington, N. C.; it being alleged that said funds belong to the defendant. Thereafter, on March 29, 1920, the Orange National Bank, of Orange, Tex., was allowed to intervene and set up its claim of title to the proceeds of said draft. The cause then came on for trial upon the issue of ownership raised by the interpleader. There was evidence tending to show that the draft in question had been purchased by the Orange National Bank and that it alone was interested in its collection. But on cross-examination the cashier of the intervening bank testified as follows:

"We accepted this draft at the rate of 6 per cent. discount. No notation was made on the face of the draft to that effect. It was not the policy of our bank at this time to accept this draft with bill of lading attached at 6 per cent. discount, and treat the paper as cash, and become the absolute purchaser of it, releasing the Rice Mill from liability for nonpayment, with the possibility of losing the amount, or even the discount; if for any reason the goods were refused and the draft returned, the Rice Mill would take it up. We did not unconditionally release the Rice Mill when the draft was cashed. As I stated, in case of goods refused or draft returned, the Rice Mill Company would reimburse us. We bought it outright with that exception. The bank was to accept and discount drafts with bill of lading attached on parties against whom they were drawn, and to charge 6 per cent. interest on such drafts until paid and the funds placed in the bank's hands. The discount and the interest were the obliga-

tions of the Orange Rice Mill Company. In the event the American Bank & Trust Company does not pay this draft, we would not look to the Rice Mill Company to reimburse us to the extent it was not paid."

Witness was then asked, "Would you release the Rice Mill Company from all obligations in connection with Heyer Bros. transaction?" to which the witness answered, "Yes, legally."

At the close of the evidence, his honor charged the jury that "if they believed the evidence, testified to by the witness in the case," they would answer the issue in favor of the intervenor. Plaintiff appealed.

Robert Ruark and Wm. B. Campbell, both of Wilmington, for appellant.

Rountree & Davis, of Wilmington, for appellee.

STACY, J. [1] We think the evidence upon the issue as to whether the intervening bank was an agent for collecting the draft in question, or a purchaser thereof for value, was sufficiently equivocal, if not contradictory, to require a finding by the jury, and that his honor's charge, which practically amounted to a direction of the verdict, was erroneous.

[2] Of course, if the intervenor held the draft as a purchaser for value, the proceeds derived therefrom could not be attached in the hands of the American Bank & Trust Company as the property of the Orange Rice Mill Company; but, on the other hand, if the intervenor acted merely as a collecting agent, the proceeds would belong to the defendant, and consequently they would be subject to attachment in the hands of the garnishee trust company. *Worth Co. v. Feed Co.*, 172 N. C. 336, 90 S. E. 295; *Markham-Stephens Co. v. Richmond Co.*, 177 N. C. 364, 99 S. E. 17.

[3] The plaintiff also excepts to the form of expression, "if you believe the evidence, testified to by the witness in the case," employed by his honor in charging the jury. This language is inexact, and while, in proper instances, it will not be held for reversible error, and should not be, unless the objecting party has in some way been prejudiced thereby, yet this court has taken occasion, in a number of cases, to say that a different form of expression is more desirable. *Holt v. Wellons*, 163 N. C. 124, 79 S. E. 450; *State v. Railroad*, 149 N. C. 508, 62 S. E. 1088; *State v. Godwin*, 145 N. C. 461, 59 S. E. 132, 122 Am. St. Rep. 467, and cases there cited; *State v. Simmons*, 143 N. C. 613, 56 S. E. 701; *Merrell v. Dudley*, 139 N. C. 59, 51 S. E. 777, and cases there cited; *Soesamon v. Cruse*, 133 N. C. 470, 45 S. E. 757.

For the error, as indicated, in directing a verdict on evidence from which different in-

ferences may be drawn, we are of opinion that the cause must be submitted to another jury; and it is so ordered.

New trial.

(182 N. C. 815)

STATE v. HAYWOOD. (No. 275.)

(Supreme Court of North Carolina. Oct. 19, 1921.)

1. Criminal law §369(6)—Evidence of sales to others than person charged admissible.

Where defendant was charged in one count with unlawfully selling liquor, and in another with keeping liquor for sale, evidence of sales to others than the person named as purchaser in the first count held admissible under the second count.

2. Witnesses §414(2)—Evidence in corroboration of witness held competent.

In a prosecution for selling and keeping liquor for sale, statements of witnesses of prior declarations of another witness while on the stand and in corroboration of that witness held competent.

3. Witnesses §37(4)—Knowledge of general reputation essential qualification of witness as to good character.

In a prosecution for selling and keeping liquor for sale, evidence as to the good character of a witness for defendant could not be given by one who did not know the general reputation of the witness.

4. Intoxicating liquors §168—Both direct and indirect sales prohibited.

In a prosecution for unlawfully selling intoxicating liquor, it is immaterial whether defendant sold the liquor directly to the person named as the purchaser, or indirectly through an agent.

5. Criminal law §1043(3)—Appellant confined to grounds of objection stated below.

An appellant must abide in the court of appeal by the ground of objection which was assigned at the trial, and cannot shift his ground or change his theory of the case.

Appeal from Superior Court, Cumberland County; Kerr, Judge.

John Haywood was convicted of unlawfully selling and having liquor for sale, and he appeals. No error.

This is a criminal action, in which the defendant was charged in two counts of the indictment with, first, unlawfully selling liquor to A. T. Cooper, and, second, with unlawfully keeping liquor for sale, contrary to the statutes in such cases made and provided. He was convicted on the first two counts for selling and for having liquor for sale, and from the judgment he appealed.

E. G. Davis of Fayetteville, and Murray Allen, of Raleigh, for appellant.

James S. Manning, Atty. Gen., and Frank Nash, Asst. Atty. Gen., for the State.

WALKER, J. (after stating the facts as above). There was ample evidence to support the conviction of the defendant, who reserved several exceptions to the rulings of the court upon the evidence.

[1] The first four exceptions were directed to sales made to other persons than A. T. Cooper, the person named in the first count of the indictment, as the particular one to whom the sale was made. This testimony was competent and relevant as applicable to the second count, which charges the keeping of liquor for sale. The allegation therein could hardly be proven in any other way. Sales indiscriminately to any and every person who would buy is evidence, of course, of keeping liquor for sale. The defendant was thereby doing just what any man who is engaged in the forbidden act of keeping liquor for sale would do. He was the proprietor of a "grogshop," one of the great evils intended to be prohibited by the statute as demoralizing to the community and the prolific source of crime and many other evils.

The testimony offered by defendant, and the subject of his exceptions Nos. 5 and 6, was clearly irrelevant. The verdict of the jury could have no possible relation to the credibility of the witness, but, if so, the defendant got the benefit of it, as the witness testified that the verdict was contrary to his testimony in the case.

[2] Exceptions 8, 9, 10, 11, 13, 14, 15, 16, 17, 18, and 19 were to statements by witnesses of prior declarations of another witness, while on the stand, which were corroborative of that witness, and was so restricted by the court, or concerning sales of liquor to one Godwin, and this evidence was confined in its application to the second count as to keeping liquor for sale. It was manifestly competent and very relevant for that purpose.

[3] The exception No. 20 is entirely untenable. Irvin Simmons, a witness for the defendant, had testified substantially in contradiction of the state's witness A. T. Cooper as to the purchase of liquor by him from the defendant, and the latter attempted to support him by proving his good character, but this he failed in law to do, as the witness H. M. McKethan, whom he offered for this purpose did not know Simmons' general reputation, and his honor correctly held that he had not, therefore, been qualified to testify about it. State v. Perkins, 66 N. C. 126; State v. Gee, 92 N. C. 756.

[4, 5] It can make no difference whether the defendant sold the liquor directly to Cooper, or indirectly through an agent, or "go-between." The one act is just as bad as the other morally and legally. It comes most certainly within the prohibition of the statute. When Cooper stated, "I had another man to go and get it," he was testifying apparently to a fact within his own knowledge—a thing done by himself, and it was competent for him to do so. It was just as illegal for the defendant to sell to the witness' agent for him, as to sell directly to the witness. State v. Burchfield, 149 N. C. 537, 63 S. E. 89. But the specified ground of objection, upon his motion to strike out the answer above quoted, was that testimony of other sales of liquor by defendant was incompetent, but this, as we have said, is not the law so far as the second count of the indictment is concerned. It is contended by the defendant that this was evidence of a distinct substantive offense, and he cites State v. Shuford, 69 N. C. 486, as an authority directly in point, but it does not apply, as the evidence was not offered on the first count for the sale, but on the second count, charging that he kept liquor for sale and as to that count it was competent and admissible. An appellant is confined to the ground of objection to evidence which he first stated. He must abide in the court of appeal by the ground of objection which was assigned below at the trial, and not shift his ground or change his theory of the case. M. N. Nat. Bank v. Pack, 178 N. C. 388, and cases cited at page 390, 100 S. E. 615. This point of law decided in that case is not stated in the official headnote.

The testimony of Lacy Godwin was competent beyond any question. He was testifying that his father had sent him to defendant to buy liquor for him, and that he went and actually bought the liquor for his father. One of his answers was: "I went for the liquor twice at my father's request. I never bought it for myself, but for my father." He then stated: "It worked out that I paid him for it, and I did give him money—\$5—and I got a quart of whisky." Learned counsel for the defendant contended in his brief that this testimony was prejudicial, and it was, but nevertheless was competent.

This is a case where the statute was palpably violated in any view of the facts, and, notwithstanding the very able and ingenious argument of the defendant's counsel, Mr. Davis, we are compelled to declare that no error was committed at the trial.

No error.

(182 N. C. 770)

McGINNIS et al. v. RALEIGH TYPOGRAPHICAL UNION NO. 54 et al.
(No. 252.)

(Supreme Court of North Carolina. Oct. 26, 1921.)

Injunction §174—Continuance against labor unions till final hearing unauthorized.

Evidence, in action by employees and employers against labor unions and members, claiming interference with their work and business held not to warrant a continuance of temporary injunction till final hearing.

Appeal from Superior Court, Wake County; Bond, Judge.

Action by Marguerite McGinnis and others against the Raleigh Typographical Union No. 54 and others. Temporary restraining order was continued till final hearing, and defendants appeal. Error.

Civil action to enjoin the defendants from certain alleged unlawful and wrongful practices.

The material allegations upon which the plaintiffs have come into equity and asked for injunctive relief are contained in the following paragraphs of the complaint:

"First. That the individual complainants above named are residents and citizens of the state of North Carolina, and are all engaged in doing work for the printing houses above named in the city of Raleigh, N. C.

"Second. That the printing houses above named are all corporations organized under the laws of the state of North Carolina, with their principal places of business in the city of Raleigh, N. C., with the exception of M. J. Carroll & Son, which is a copartnership, engaged in the printing business in the city of Raleigh, N. C.

"Third. That the Raleigh Typographical Union, the Raleigh Printing Pressmen's Union, and Raleigh Bookbinders Union are labor unions, with headquarters in the city of Raleigh, N. C., and the individual defendants above named are officers and members of said unions.

"Fourth. The individual complainants above named, in behalf of themselves and all other employees of the several printing houses above named, respectfully show unto the court:

"(1) That the labor unions above named and their officers, members and associates above named have entered into a conspiracy to drive these individual complainants from their positions as employees of the several printing houses above named, and to make it impossible for these complainants to work and live in peace in the city of Raleigh while they are engaged in their present employment.

"(2) That these individual complainants have done the defendants no wrong, and the said defendants have no grievance of any kind against these complainants. Some time in May, 1921, the unions above named demanded of the printing houses above named (which were then running as closed shops) that the number of hours for a week's work be reduced from 48 to 44. Upon the refusal of the printing companies to

accede to this demand, the members of the several labor unions above named quit work and went on what is popularly known as a 'strike.' The printing companies offered in writing to submit all differences between themselves and their employees and the unions to an impartial board of arbitration, but this proposition was summarily rejected by the unions. Thereupon the printing companies gave notice that they would be compelled to run their shops with whatever labor they might be able to obtain, whether the laborers belonged to a printers' union or not, but also gave notice that the jobs of all former employees would be open to them if they returned within a given time. The defendants above named refused to return to work and have since then been making war on the printing houses and their employees.

"(3) That in pursuance of the plan, purpose, and conspiracy mentioned in subsection 1 above, the defendants have devised and are executing a systematic course of espionage, annoyance, intimidation, threats, abuse, and insults, which are intended to make, are calculated to make, and are making, the lives of these complainants and all other employees of the several printing houses above mentioned miserable, intolerable, and unendurable, and unless the defendants are compelled to desist from such conduct these complainants will be forced to give up their jobs and become objects of charity or else leave the city of Raleigh and seek employment elsewhere, and these complainants allege that they are informed and believe that it is well-nigh impossible for one who loses his job to obtain another in the present economic condition of the country.

"(4) In pursuance of said plan, purpose, and conspiracy, the said defendants (a) gather in large numbers around the places of business where complainants are employed, and when complainants finish their day's work and emerge from their places of employment, the defendants indulge in threatening gestures, insulting jeers and hisses, and in many ways annoy, disturb, humiliate and put in fear these complainants. (b) After complainants leave their several places of employment, the defendants constantly 'shadow' them. As soon as complainants leave their work, two or more of the defendants will trail them wherever they go. On the streets, in the stores, to their homes, to their work, in the day, in the night, always and everywhere they are pursued and persecuted by these defendants, sometimes with abusive language, sometimes with threats, sometimes in such numbers as to cause complainants to fear for their lives. (c) The defendants whenever and wherever they can find one or more of these complainants surround them and by words and gestures humiliate them and put them in fear. (d) The said defendants constantly and systematically call these complainants insulting names, such as rats, scabs, runts, Bowery bums, and other epithets calculated to humiliate and distress, and which do humiliate and distress, these complainants, and have a tendency to bring on breaches of the peace, and but for the forbearance of these complainants bloodshed and probable loss of life would result. (e) Said defendants are constantly and systematically threatening these complainants by saying in their presence: 'We'll get them yet.'

(193 S.E.)

'There are plenty of us to do it.' 'They had better not let us catch them walking home.' 'We will break his damn neck.' 'If this thing goes on, I will be in the penitentiary soon,' meaning that they would perpetrate some crime against these complainants. (f) The young girls above mentioned as complainants are not free from the insult and abuse above set forth, but have been subjected by the defendants to all sorts of embarrassment and humiliation. As they pass along the streets they are jeered and hissed and scraped at and called 'kitty-cat.' In the drug stores they are sneered at and called cats. In the picture shows they are disturbed and annoyed. They are yelled at by defendants when they are a block away. They are shadowed and pursued as they pass along the streets, and unless they are afforded protection they will be compelled to leave the city of Raleigh.

"Fifth. This course of conduct has been so persistently and relentlessly pursued by the defendants that already more than 100 employees of the printing houses above named have been literally driven from their work and been forced to leave the city.

"Sixth. These individual complainants have no object or purpose in bringing this action other than to secure for themselves and all their associates the right to work and live in peace, as free American citizens, desirous of the privilege of doing an honest day's work for a fair day's pay, and to this end they invoke the protection of the law.

"Seventh. The printing houses above named complain and allege:

"(1) That they have read the complaint of their employees, and from observation and reliable information they know the same to be true.

"(2) That the defendants above named have planned and conspired to destroy the business of these printing companies for no other reason than that they decline to accede to the unreasonable and unrighteous demands of the labor unions, and are now exercising the right of every American citizen to run their business on the American plan, and to give employment to any man who applies for the same; this right being odious to and utterly denied by the defendants herein.

"(3) In furtherance of their said plan, purpose, and conspiracy to utterly destroy the business of these complainants, the defendants have gathered in large numbers in front of and near the places of business of these complainants, have used threatening words and gestures, have threatened to kill the officers and relatives and employees of these complainants, have pursued and taunted and hissed and jeered the employees of these complainants, and have endeavored to render burdensome and intolerable the life of every man and woman who dares to work in the employ of these complainants.

"(4) In further pursuance of said plan, purpose, and conspiracy to utterly destroy the business of these complainants, the said de-

fendants have induced and bribed many of the employees of complainants to break their contracts that they have made to work for these complainants.

"(5) In further pursuance of said plan, purpose, and conspiracy to destroy the business of these complainants, the defendants have literally driven, by threats, annoyances, pursuits, and a relentless policy of 'hell-hackling' more than 100 employees of these complainants from their jobs and away from the city of Raleigh.

"The complainants have this day commenced a civil action against the defendants in the superior court of Wake county for the purpose of obtaining a perpetual injunction, and summons has been issued therein.

"Wherefore, these complainants pray the court that an injunction be issued against the labor unions above named, and against all their officers, members, aiders, abettors, and associates, compelling them to desist from indulging in any of the conduct above set forth, and to leave these complainants free to work and to carry on their business without molestation or annoyance of any kind."

The foregoing having been duly verified and used as an affidavit in the cause, his honor, E. H. Cranmer, issued a temporary restraining order, returnable before his honor, W. M. Bond, in the city of Raleigh on the 3d day of September, 1921. Upon the hearing the defendants filed several motions to dismiss and demurred upon the ground of a misjoinder of both parties and causes, and, further, that the complaint did not state facts sufficient to constitute a cause of action. All motions to dismiss and the demurrer were overruled, whereupon a large number of affidavits were filed by both sides; and, after a full consideration of the evidence, his honor continued the temporary restraining order until the final hearing. From this ruling, the defendants excepted and appealed.

Evans & Eason, R. N. Simms, Charles U. Harris, and Douglass & Douglass, all of Raleigh, for appellants.

William B. Umstead, of Durham, and Murray Allen and T. W. Bickett, both of Raleigh, for appellees.

PER CURIAM. Some serious and weighty questions of law are presented by the demurrer and the several motions filed in the cause; but we deem it unnecessary to pass upon them now, as we are convinced, from a perusal of the record, that the evidence adduced and offered on the hearing was not sufficient to warrant a continuance of the injunction. It will therefore be dissolved without prejudice to the rights of any of the parties.

Error.

(182 N. C. 205)

COOK v. CAMP MFG. CO. et al. (No. 219.)

(Supreme Court of North Carolina. Oct. 19, 1921.)

1. Master and servant ☞286(28)—Negligence in failing to provide for signals on starting machinery for jury.

Where plaintiff was injured while repairing a dust chain in a sawmill, by the sudden starting of the machinery, evidence held to make the question of negligence of the employer in failing to provide for warning signals when starting the machinery one for the jury.

2. Master and servant ☞185(7)—Servant with duty of providing safe place to work is master's representative.

The duty of the master to provide and maintain a reasonably safe place to work is implied in the contract of hiring, and, if he commits such duty to any other servant, such servant is pro hac vice the representative of the master, who is liable to the same extent as if he had personally performed the negligent act.

3. Master and servant ☞185(23)—Failure to give warning on starting machinery imputed to master.

Where a repair man was injured by the sudden starting of the machinery, and a rule of the employer provided that machinery shut down for repairs should not be started without notice from the repair man that it was ready, such rule was equivalent to a promise that the employer would see that the machinery was not started while being repaired, the execution of which could not be shifted to another employee.

4. Master and servant ☞105(1)—Master's duty as to furnishing machinery and tools stated.

The duty of the master is not fully performed by simply doing that which is usually done, or furnishing machinery and tools known, proved, and in general use, but he must take such precautions in addition thereto as an ordinarily prudent person charged with a like duty ought to have foreseen were necessary and proper under the circumstances.

Walker, J., dissenting.

Appeal from Superior Court, Duplin County; Bond, Judge.

Action by Leon Cook against the Camp Manufacturing Company and another for personal injuries. From a judgment of nonsuit, plaintiff appeals. Nonsuit set aside, and new trial granted.

B. K. Bryan, of Wilmington, and George R. Ward, of Wallace, for appellant.

Rountree & Carr, of Wilmington, and Stevens, Beasley & Stevens, of Warsaw, for appellees.

CLARK, C. J. It appears that the Carolina Timber Company owned the sawmill at which the plaintiff was working at the time

of the alleged injury, and the mill was being operated by its codefendant, the Camp Manufacturing Company. The plaintiff was employed to repair the machinery and chains and equipment attached to the fire room and the big engine, but he was not operating any of the machinery. Whenever any part of the machinery which it was the plaintiff's duty to repair broke down or got out of order, the plaintiff had authority to stop the engine running it in order to make the repairs, and was also required to notify the operators of such machinery that it had been stopped for repairs, and it was the duty of those operating the machinery to see that it was not thereafter started until notice from the plaintiff. This was the rule of the company under which the plaintiff was required to do his work.

The machinery in the sawmill proper was run by a big engine connected with which there were whistles to notify employees when the machinery was going to be stopped, and, after being stopped, when it would be again started. There was a smaller engine in another room which ran the dust chain in which the plaintiff was caught and injured. There were no signals attached for starting or for stopping the machinery operated by the small engine. This dust chain carried fuel to the boilers which generated steam for running both engines. The plaintiff was compelled to rely upon the observance of the company's rule for his protection while repairing the engine and machinery.

On this occasion the plaintiff on going into the room of the little engine which ran the dust chain discovered that the pilot chain which in turn drove the dust chain had been caught at some point in the dust house by an obstruction which stopped its moving and thus had broken the pilot chain. He also went to the men who operated the engine pulling the dust chain and told them he had shut down the dust engine in order to go into the dust house to make the necessary repairs to the dust chain there, and in accordance with the rules of the company he notified them not to start the engine and machinery connected with the dust chain until he had advised them that the repairs were complete and everything was ready for operation. He then went into the dust house, and, finding a lightwood knot had been caught by the dust chain which stopped it, he, with the aid of another employee, began to remove the lightwood knot. He had just succeeded in doing this, and while in the act of stepping from astride the dust chain, the operators of the dust engine suddenly without warning started up the dust engine, which caused the dust chain to catch his foot, and, winding around his foot and leg, it was only by grasping two posts he prevented himself from being ground up. His helper ran into the engine

room and had the power turned off. The evidence further shows that shortly after the plaintiff had caused the engine to be shut down and notified the operators not to start the same, one of them went out of the engine room to a lumber pile, and, returning after a delay of some 20 or 30 minutes, was ordered by some one to turn on the power. He replied that the engine had been stopped for repairs to the dust chain, and asked if the plaintiff had come out of the dust house, and, being erroneously told that he had, the power was turned on, causing the injury to the plaintiff as above stated.

Upon this evidence the case should have been submitted to the jury.

[1] 1. It was the duty of the defendants, operating highly dangerous machinery, to have given the plaintiff a safe place in which to work. There was a system of signals for starting and stopping the machinery connected with the large engine, and if a similar system had been used in regard to starting and stopping the machinery connected with the dust chain by running a wire to the room in which the engine operating the dust chain was located, or a similar or a small whistle had been put on the steam pipe leading to the dust engine, notice would have been given to the plaintiff, which would have enabled him to escape this injury. The circumstances in evidence as to the manner of the injury are prima facie evidence of negligence in not equipping the smaller engine with a signal such as was placed upon the larger engine to give notice of its starting up. At least this was sufficient evidence of negligence to have been submitted to the jury.

2. In *American Car Co. v. Rocha*, 257 Fed. 297, 168 C. C. A. 381, it was held that, where a plaintiff was at work under a car which had been raised from its trucks and blocked up, his employer owed him a positive duty to warn him before the car was moved, which could not be delegated to another employee so as to relieve itself from liability for its negligence resulting in plaintiff's injury. This judgment by the United States Circuit Court reviewed and affirmed the judgment to that effect in the District Court. The appellant then moved in the United States Supreme Court for a certiorari, which was denied. 250 U. S. 663, 40 Sup. Ct. 11, 63 L. Ed. 1196.

In *Collins v. Barner* (App. D. C.) 268 Fed. 699, it was held that an employer under his duty to give the employee a safe place in which to work is negligent if the hoisting engineer in his employ starts an engine, regardless of conditions whereby an employee is injured.

In *Ondis v. Tea Co.*, 82 N. J. Law, 511, 81 Atl. 856, 46 L. R. A. (N. S.) 777, it was held:

"When the place assigned the employee to work is safe for him while the machinery with which he is obliged to come in contact, but

which he is not operating, is at rest, and which is liable to become of great peril to him when such machinery is put in motion, and a method of warning him of such starting by another employee who is in control of the engine has been the rule adopted by the company, the neglect of the latter to give the warning is to be imputed to the employer."

This is an elaborate opinion, concurred in by all the judges in that case, and is exactly on all fours with the case at bar.

[2] The duty of the master to provide and maintain a reasonably safe place for the servant to work is implied in the contract of hiring, and if he commits to any other employee or servant the duty of so maintaining and keeping a reasonably safe place for that purpose, then the agent to whom this duty is committed is pro hac vice the representative of the master, who is liable to the same extent as if he had personally performed the negligent act. *Buchanan v. Furnace Co.*, 178 N. C. 646, 101 S. E. 518. To the same purport are *Evans v. Lumber Co.*, 174 N. C. 31, 93 S. E. 430; *Odom Lumber Co.*, 178 N. C. 134, 91 S. E. 716; *Patton v. Lumber Co.*, 171 N. C. 837, 73 S. E. 167; *Wooten v. Holleman*, 171 N. C. 461, 88 S. E. 480; *Midgett v. Mfg. Co.*, 180 N. C. 24, 103 S. E. 895.

[3] The evidence shows that, under the rules under which the plaintiff was working when the machinery was shut down for repairs, the person to whom the master had committed the running of the engine should not start up until the plaintiff notified the operator that the machinery was ready for running. This rule was a representation to the employee that the employer would see to it that the machinery was not started while the plaintiff was repairing it. It was equivalent to a promise to that effect the execution of which could not be shifted off to some other employee, and for damages sustained from a breach of the same, if so found by the jury, the employer would be liable.

[4] 3. The duty of the master is not fully performed by simply doing that which is usually done, or furnishing machinery and tools known, proved, and in general use, but he must take such precautions in addition thereto as an ordinarily prudent person charged with a like duty should have and ought to have foreseen were necessary and proper under the circumstances. *Taylor v. Lumber Co.*, 173 N. C. 112, 91 S. E. 719; *Dunn v. Lumber Co.*, 172 N. C. 129, 90 S. E. 18; *Ainsley v. Lumber Co.*, 165 N. C. 122, 81 S. E. 4; *Kiger v. Scales Co.*, 162 N. C. 133, 78 S. E. 76.

It was also earnestly debated before us whether, the sawmill being highly dangerous machinery, the owner could relieve itself from liability for the negligence of its lessee, and also whether the lease by the owner to the lessee, both companies having the same identical stockholders and officers, was such a lease as would protect the owning company

from being liable for the negligence of the operating company. As the case must go back, anyway, it is not necessary to pass upon these propositions, as on another trial the evidence on these points may be more fully brought out, and possibly, if the parties are so advised, issues of fact may be submitted in regard thereto.

The judgment of nonsuit is set aside, and there will be a new trial.

STACY, J., concurs in result.

WALKER, J., stating the case for his dissent:

In dissenting from the opinion of the court and the order directing a new trial, I find it necessary to restate the testimony to some extent, so that the salient facts may appear as I find them in the record. They will be stated sufficiently to give plaintiff's case its full strength and the benefit of all material or relevant facts. (The italics below are mine.)

The plaintiff testified as follows:

"I went to the Camp Manufacturing Company, and Mr. Rose came over here and offered me a job and told me to go to Mr. Camp. Mr. Rowe had been down to see Mr. Camp. Mr. Camp wrote me, or the Camp Manufacturing Company did, and I was employed over there at the time. I then decided to accept the position with them and work for them. I had my conversation with Mr. John Camp about the employment. *I was employed by Mr. Camp, of the Camp Manufacturing Company.* I just had a letter from Mr. Camp, from him individually, about my employment. The letter wasn't signed individually, but it was signed Camp Manufacturing Company, and Mr. Camp dictated it. When I first went to work they paid me every two weeks, I believe. I got my pay envelope. It was marked on from the Camp Manufacturing Company. They just handed me the pay envelope. My time was kept. *I never did get one with the Carolina Timber Company on it.* * * * I was injured on the 13th of July, 1918. I was coming around the end of the dust house, between the dust house and the mill, and I noticed that the big chain that fed the cross-chain that went into the fire room and fed the chain that went to the boiler had stopped; in fact, the main chain that pulled the dust from the dust house; to make it short, I noticed that the pilot chain that drew the large chain was broken, and in order to fix this boiler chain I shut the little engine down, which was running. I did that because it pulls this dust chain, and the little pilot chain was broken. Before I went on to fix that little chain, I had the engine shut down. I would think it was a part of my duty to shut down the engine, if I wanted to repair the chain. It would not look advisable for it to run all the time when it was not doing anything. I had authority to shut it down to overhaul this chain; that is the little chain that pulls the big chain; and, being a practical man, I knew there was some trouble in the back end of the house, somewhere in the main big line of chain that little pilot chain dragged. And so I stepped to the boiler room door, and

John Southerland and Henry Peterson were there. Henry Peterson was fireman and John Southerland was his helper. John Southerland was looking right at me, and so was Peterson. They knew positively something was wrong there, as they always knew. I told them, I says, 'John, don't start this engine up, because I am going to the rear of the dust house to see what the trouble is, and don't start it until I notify you, or come myself.' Henry Peterson was standing right there and heard it all. I meant it for both. Of course, Henry was the fireman. John was the operator of this engine, and he is the one that generally stopped and started it. John was the operator. He operated it nearly all the time. So I went to the rear end of the dust house. Henry was fireman; John was his helper."

Witness further testified that after making the necessary repairs he started to step over the chain and was caught and injured, and on cross-examination he said:

"John Southerland was helper to the fireman, who was Henry Peterson, and who looked out for the furnaces. He just pulled little chips from the head in the draw and let the dust run down and kept it pushed down with a stick. He looked after the large boilers. Wallace was the belt maker and looked after the belts. John Southerland was helper to Henry Peterson, was not hired by me, and I don't know anything about him. John Southerland was dust cutter. He went in the dust house and cut the dust; started the engine and stopped the engine whenever Henry told him he wanted dust, and whenever he thought they needed any dust. He was just Henry Peterson's helper, just dust cutter. He would go in the house and start and stop the mill engine; he had to do that to cut his dust. When John wasn't there, Henry Peterson did that. John was helping Henry Peterson. He was assisting Henry Peterson in operating the engine. My duties were to go around and see that everything was kept in running order. I was notified when there was anything wrong. *It was my duty to keep things running, to keep them in good condition.* I was not foreman. Mr. Rowe was foreman. John Southerland had certain things to do. Richard Wallace had certain things to do. Peterson had a certain job to do. They were all doing certain jobs in and about operating and running the mill. *It was my duty to see that all these things were kept in fit, in good, order.* I was not working in the same department with them unless something happened and I was called in. *I was overseer of the same things they were doing, looking after the same machinery they were running.*"

John Southerland, witness for plaintiff, testified:

"I had been working there about two years off and on. Henry Peterson worked in the room with me. Henry Peterson's duties were—he was water carrier. My duties were to cut dust when he told me to, and every day or two when the big mill stopped I started up the dust engine and cut there; every morning piled up ashes out of the ash box, and did just anything he told me. Whatever Henry Peterson told me to do, I know Mr. Cook. I was right

there when Mr. Cook got hurt. Always when he stopped the engine he would come to us and tell us not to start it up until he notified us. He came in there and told us that day, says, 'I have stopped the engine.' He had to go back to the back end of the dust house, and says, 'Don't start it until I notify you.' Pretty soon after he went in there and went to work I went out to the green run (meaning the yard where the green lumber was piled). I stayed up there, I reckon, 25 minutes; when I come back the steam was getting kind of low in the furnace, had burned up pretty well, and Mr. Henry told me to start up the engine and cut him some dust. I asked him was Mr. Cook gone, and he says, 'Yes; he has gone out,' and so I went ahead and started up the engine, and it run about four or five yards, and the belt commenced slipping on it, and would not pull, and so I prized it back and started it again, and I heard somebody holler, and I looked back in there and saw Richard Wallace run back in there, and I went there to see what the trouble was, and Mr. Cook was hanging in the chain, holding up there with his hands."

WALKER, J., dissenting from the opinion of the court:

The foregoing substantial statement of all the material testimony will suffice to present the plaintiff's case in its entirety and at its best. I am thoroughly aware of the oft-repeated rule that, on a motion to nonsuit, evidence should be construed in the most favorable light for the plaintiff (Brittain v. Westhall, 135 N. C. 492, 47 S. E. 616; In re Will of Margeret Dayton, 177 N. C. 508, 99 S. E. 424; Angel v. Spruce Co., 178 N. C. 621, 101 S. E. 384; Spry v. Kiser, 179 N. C. 417, 102 S. E. 708), and I will so deal with it. After doing so, I can find no evidence in the case upon which the plaintiff can ask for a verdict, as, in my judgment, there is nothing that shows any negligence on the part of either defendant.

The first assignment of error is the nonsuiting of plaintiff as to the Carolina Timber Company; and defendants contend there is no evidence against the Carolina Timber Company. The plaintiff offered in evidence a deed for the mill plant to the Carolina Timber Company, but did not see fit to offer any further evidence from the records or from witnesses who knew the relations between the Carolina Timber Company and the Camp Manufacturing Company.

It is clear from the testimony that Henry Peterson and John Southerland, who started up the engine, were fellow servants of the plaintiff, and their act was the proximate cause of the injury.

The recognized rule in England, which generally prevails in this country, and affirmed by this court, is declared to be that the term "fellow servant" includes all who serve the same master, work under the same control, derive authority and compensation from the same source, and are engaged in the same general business, though it may

be in different grades and departments of it. Kirk v. Railway Co., 94 N. C. 625, 55 Am. Rep. 621; Ponton v. Railroad Co., 51 N. C. 245; Rittenhouse v. Railway Co., 120 N. C. 544, 26 S. E. 922; Olmstead v. Raleigh, 130 N. C. 243, 41 S. E. 292; Hobbs v. Railroad, 107 N. C. 1, 12 S. E. 124, 9 L. A. 838. There is no evidence showing that the place was unsafe, that the machinery was defective, that the employees were incompetent, or that there was any other failure in the duty which the defendants owed to the plaintiff.

The statute denying the fellow-servant rule as a defence to railroad companies cannot apply in any event in this case. Defendant asserts that the effort of the plaintiff to make the Carolina Timber Company a defendant grows out of plaintiff's purpose to show the ownership of the railroad and thereby forbid to the defendant, Carolina Timber Company, protection of the fellow-servant rule, and it is argued by defendants' counsel that the fact of the plaintiff being so persistent in his effort as to the timber company shows that he is convinced that the party causing the injury was a fellow servant. It may be conceded that a lumber company operating a logging road comes under the provisions of this act if the injury occurs in the railroad operations. Hemphill v. Lumber Co., 141 N. C. 487, 54 S. E. 420; Bissell v. Lumber Co., 152 N. C. 123, 67 S. E. 259; Wright v. Railroad, 151 N. C. 529, 66 S. E. 588, 19 Ann. Cas. 384; Bird v. Leather Co., 143 N. C. 283, 55 S. E. 727; Liles v. Lumber Co., 142 N. C. 39, 54 S. E. 795. The Fellow Servant Act (O. S. § 3465) applies to all employees of a railroad company, whether working in the transportation or other departments. Sigman v. Railroad, 135 N. C. 181, 47 S. E. 420. But, as to lumber companies and other companies operating railroads, the act only applies when the party injured is operating in the transportation department. Twiddy v. Lumber Co., 154 N. C. 237, 70 S. E. 282, 47 L. R. A. (N. S.) 135, approved in Buchanan v. Furnace Co., 178 N. C. 647, 101 S. E. 518.

The fourth assignment is based upon the assumption that it was negligent not to have a whistle on the dust engine, when there was one on the large mill; the defendants contending that there is no evidence whatever that a whistle was necessary on the dust engine. This assignment of error is so vague that it is difficult to discuss it with reference to the testimony. The only reference to this matter appears on pages 30 and 31 of the testimony, as follows:

"When the machinery connected up with the big engine was going to be started up, after being stopped, they had a system of blowing whistles before they started it. They had no such system of signals in regard to the dust engine and machinery connected with it. * * * They could have installed a system of whistles for the dust chain machinery. Just had a smaller whistle than the one that start-

ed the big engine, run a wire across and tack onto the boiler and pull it, or have a wire to the engine, either one, just small, the same way they had of starting the big engine up stairs."

All that this means is that the sawmill proper had a whistle and blew it when the mill was about to be started, and that the dust engine, which was a subsidiary piece of machinery or equipment for the purpose of regulating the sawdust by discharging it into the furnace, did not have such a whistle. It might have been said with equal truth that there was no such whistle attached to the pump engine or any other subsidiary machinery which was operated from time to time when needed. There was no evidence that such a whistle was in customary use or was necessary as a means of safety, and before the plaintiff can establish this as negligence he would have to show that such equipment was an up-to-date equipment in general use, and that the defendant had negligently failed to put it into use here.

But the important and vital question to be considered is whether there is any evidence when it is favorably construed for the plaintiff, which justifies us in reversing the studied and deliberate ruling of the court below and ordering that the case must be submitted to the jury.

This is not a case where the owner of the mill and its machinery had appointed some one as vice principal, or his representative, to supervise the operation of the same, who was guilty of negligence causing the injury, which will be implied to his principal. The facts, while there was very much evidence in the case, are few and simple.

The plaintiff, Leon Cook, himself either stopped the machinery or gave the order to stop, so that he might go in and repair the pilot chain and remove any obstruction which hindered the effective operation of the machinery, such as the lightwood knot in the chain at the lower sprocket. The plaintiff (as he himself alleges) "in the performance of his duty got astride of said chain, which, being idle at the time, was slack, and, with the assistance of a helper, removed the obstruction; and at the time the plaintiff was in the act of stepping clear of the dust chain the defendant negligently started the dust engine, and plaintiff was caught therein and injured." But who directly and negligently caused the injury? It was not the defendants, but the fellow servant of the plaintiff who received the request from him not to start the machinery until he came back, or, in other words, the fireman and his helper. We have shown that they were the plaintiff's fellow servants by the highest authority, *Kirk v. Railroad*, supra, a case decided 35 years ago and which has been frequently cited and approved since that time. That case is identical in principle with this one. The

engineer, Harris, was ordered not to move his switch engine until work or inspection required to be done underneath the cars was finished, and he was notified of the fact by the yardmaster. In spite of this order, the engineer did move the train before the work was completed, and the plaintiff's arm was cut off. The railroad company was acquitted of all liability by this court, and, owing to the contrary ruling below, there was a new trial. The yardmaster and the engineer represented the railroad company as much in that case as did the fireman and helper in this one, and yet it was held that there was no liability, because the plaintiff and those two men were fellow servants. The fellow-servant law as to railroad companies has been repealed since that case was decided, but the principle it established is as firmly entrenched as ever, and is applicable wherever the doctrine of fellow servant is still applicable.

The employer in this case could not have supplied anything, whistle or what not, which would have been more effective than the means then at hand to avert the injury. If there had been a whistle or the most approved contrivance in that respect, the result would have been the same if the fireman had been negligent, as he was here, and failed to blow it, and give the proper warning to Cook to get out. The question is not whether there was a whistle, but whether the means available at the time were sufficient to prevent the resultant injury. If the direction had not been given to start the engine, the plaintiff would have escaped without any harm being done to him, there being ample means at hand to prevent it. The parties at the mill were abundantly able to save the plaintiff from any injury, and he would not have been hurt if it had not been for the negligence of his fellow servant who started the machinery or caused it to be started. Leon Cook had finished his work and was in the act of leaving the place when the machinery was put in motion. The mistake was made by the fireman or his helper in supposing that Cook had already left and was in no danger, and this mistake would still have been made had every piece of machinery been supplied with a whistle. What caused the injury was not the want of a whistle, but the reliance of the fireman or helper upon his own mere supposition, to which he carelessly trusted, that Cook had left the place of danger, instead of having certain knowledge that he had left, before giving the order to start the machinery.

The fellow-servant doctrine has no force or effect if it does not apply to this case, and the fireman and his helper were surely fellow servants of Cook within the rule stated in *Kirk v. Railroad Co.*, supra.

Finally, the situation could not have been

saved by anything the employer could have done. There is no suggestion that the fireman or helper was of a careless habit and known by the employer to be so. It was just the false reliance of the fireman, or his helper, upon mere supposition as to where Cook was, instead of upon actual knowledge, and the result would have been the same if there had been a whistle on the smaller engine, as the fireman and his helper would still have acted upon the same supposition, for they were told not to start the machinery in any event until Cook returned or, to use his words, until he came back. In the Kirk Case the engine had not only a whistle, but also a bell to give signals, by a blast of the one or the ringing of the other, and the engineer used neither, but violated instructions by moving the train. That case and this one are clearly analogous, as there he moved the train without receiving notice from the yardmaster, while here the fireman and his helper started the machinery without notice from Cook, the plaintiff, and caused the injury.

No one questions the principle that the master must furnish a reasonably safe place for the servant to do his work (Marks v. Cotton Mill, 135 N. C. 287, 47 S. E. 432) and that this is a primary duty devolving upon the master which he cannot without liability therefor delegate to another. But that question does not arise here, as plaintiff himself undertook to do the work and to provide for his own safety in his own way. He trusted too much to the fireman and helper, and is himself solely responsible in law for the consequences. Of course, the timber company cannot be liable unless the Camp Manufacturing Company is liable. But there is nothing to charge it with liability, either upon the evidence or under the principle laid down in Logan v. Railroad Co., 116 N. C. 940, 21 S. E. 959, and cases citing it, which will be found in the annotated edition of 116 N. O. page 940, at pages 952, 953, 21 S. E. 959, and in Shepard's N. C. Citations (1st Ed.) at page 172, and issue of June, 1921, Advance Sheets, at page 46.

It further appears that the Logan Case, supra, does not apply here, as it was distinctly put upon the ground that the North Carolina Railroad Company was a quasi public corporation, and could not, therefore, lease its road and discharge itself from liability for neglect of the duties it owed to the public. It exercised, at least in a quasi sense, a public franchise, granted to it by the state in its sovereign capacity, and could not discharge itself to perform its public duties by a lease, without responsibility for injuries to others caused by the negligence of the lessor in operating the road.

My conclusion is that the nonsuit was proper, and that the judgment should be affirmed.

CROOM v. GOLDSBORO LUMBER CO. (No. 223.)

(Supreme Court of North Carolina. Oct. 19, 1921.)

1. Husband and wife ⇨221—Martin Act construed.

The practical effect of the Martin Act (C. S. § 2507) is to constitute a married woman a free trader as to all her ordinary dealings, and to invest her with the privileges of suing and being sued alone.

2. Husband and wife ⇨126(1)—Wife's earnings not part of husband's wages under employment contract.

In an action for wrongful discharge under an employment contract whereby plaintiff alleged he was to receive \$16 a week, where the evidence showed he was to receive \$15 and his wife \$1 per week, but not that both sums were to be paid plaintiff, held that the intentment of the law was in conflict with plaintiff's claim, in view of C. S. §§ 2507, 2513, relating to rights of married women, and it was not error to instruct that plaintiff's recovery could not exceed \$15 a week.

3. Trial ⇨365(1) — Finding of employment as alleged not conclusive as to rate of wages.

Where plaintiff in an action for wrongful discharge alleged he was to receive \$16 a week, and there was evidence that he was to be paid only \$15, his wife receiving \$1, a finding that he was employed "as alleged in the complaint" did not show he was so employed so as to make it error to limit recovery to \$15 a week; the finding being made with reference to such limitation.

4. Contracts ⇨10(1)—Mutuality essential.

One of the essential elements of every contract is mutuality; there must be neither doubt nor difference between the parties, and their minds must meet as to all the terms.

5. Master and servant ⇨3(1)—Essentials of contract for services enumerated.

A contract for services must be certain and definite as to the nature and extent of the services to be performed, the place where and the person to whom it is to be rendered, and the compensation to be paid.

6. Master and servant ⇨41(6)—Evidence of agreement to pay increased wages held insufficient.

Where plaintiff in an action for wrongful discharge alleged that he was to receive a raise in wages to be fixed at a future time, evidence as to the amount of increase held insufficient to show an enforceable agreement.

7. Master and servant ⇨41(1)—Measure of damages for wrongful discharge stated.

Where a servant wrongfully discharged was to receive a certain sum per week with house and fuel, and after the discharge and for the remainder of the term he earned a certain amount and paid out a certain amount for support of himself and his family, held, that, to ascertain damages, the additional expense

for support during the remainder of the term of employment should be deducted from the amount earned during such time, and the remainder should in turn be deducted from the value of the contract represented by the sum of the unpaid wages and the worth of the house and fuel, with interest from the termination of the period of employment.

Appeal from Superior Court, Lenoir County; Bond, Judge.

Action by Clay Croom against the Goldsboro Lumber Company. From a judgment for nominal damages only, plaintiff appeals. Modified and affirmed.

The plaintiff alleges that in December, 1917, he was employed by the defendant to do certain work during the year 1918, for which he was to receive \$16 a week, fuel and house rent free, together with an increase in wages to be fixed in the following April; that he entered upon and continued in the defendant's service until May, 1918, when he was wrongfully discharged, and that he has suffered damages in the sum of \$500. Denying the material allegations of the complaint, the defendant alleges that the plaintiff was employed by the day; that for stated periods he rendered no service; that, careless and neglectful of his duties, he caused the defendant financial loss, and thereby forced the defendant to discharge him from its service.

The issues were answered as follows:

"(1) Did the defendant employ the plaintiff under the agreement as alleged in the complaint? A. Yes.

"(2) If so, did the defendant wrongfully and in breach of its agreement discharge the plaintiff as alleged in the complaint? A. Yes.

"(3) What damage, if any, is the plaintiff entitled to recover of the defendant? A. \$1.

"(4) What was the unpaid part of the wages for the year as fixed by the contract? A. \$495.

"(5) What was the house and fuel fairly and reasonably worth that defendant was to furnish plaintiff for the balance of the year after plaintiff's discharge? A. \$60.

"(6) What amount of money did the plaintiff earn and receive for the service after his discharge to the end of the year? A. \$562.75.

"(7) What was the additional expense, if any, incurred by plaintiff, Croom, in necessary support of himself and family for balance of the year after his discharge? A. \$246."

After the jury had answered the remaining issues, his honor answered the third issue as an inference of law, each party reserving the right to except. His honor held that the plaintiff was entitled to judgment only for the difference between the amount of the unpaid wages for the year fixed by the contract and of the reasonable worth of the house rent and fuel, to wit, \$555 (the sum of the answers of the fourth and fifth issues), and the amount earned by the plaintiff after his discharge, to wit, \$562.75 (the answer to the sixth issue), and that, as the latter exceeds

the former, the plaintiff could recover nothing more than nominal damages for the defendant's breach of its contract. Accordingly judgment was entered in favor of the plaintiff for \$1 as nominal damages and the cost of the action. Having entered exceptions, the plaintiff appealed.

Rouse & Rouse, of Kinston, for appellant.
Thomas D. Warren, of New Bern, and Cowper, Whitaker & Allen, of Kinston, for appellee.

ADAMS, J. In his complaint the plaintiff alleges that by the terms of the contract he was to be paid \$16 a week in part compensation for his services. On the trial there was evidence for the plaintiff tending to show that he was to be paid \$15 a week for his personal services, and his wife \$1 a week for certain services to be rendered by her. His honor charged the jury that the plaintiff could not recover the amount claimed to be payable on account of the wife's services, and that the plaintiff's wages, if allowed by the jury, could not exceed the rate of \$15 a week. To this instruction the plaintiff excepted.

[1] Subject to definite restrictions, the right of a married woman to make an executory contract is governed chiefly by the provisions of chapter 51 of the Consolidated Statutes. It is not necessary, however, to discuss the meaning or purpose of the several statutes affecting the contractual rights of married women, inasmuch as the contract declared on was executed after the enactment of sections 2507 and 2513, which are controlling in the question under consideration. The practical effect of section 2507 (the Martin Act) is to constitute a married woman a free trader as to all her ordinary dealings, and to invest her with the privileges of suing and being sued alone. Price v. Electric Co., 160 N. C. 450, 76 S. E. 502; Lipinsky v. Revell, 167 N. C. 508, 83 S. E. 820; Royal v. Southerland, 168 N. C. 406, 84 S. E. 708, Ann. Cas. 1917B, 623; Kirkpatrick v. Crutchfield, 178 N. C. 348, 100 S. E. 602. Section 2513 is as follows:

"The earnings of a married woman by virtue of any contract for her personal service, and any damages for personal injuries, or other tort sustained by her, can be recovered by her suing alone, and such earnings or recovery shall be her sole and separate property as fully as if she had remained unmarried."

Counsel for the plaintiff, while advertent to these statutes, urge two objections against their application: First, that the contract was made with the plaintiff, and the agreement to pay \$1 to the wife merely enlarges the amount to be paid to the plaintiff, in view of the implied intention of the parties that the wife, during the plaintiff's temporary absence, should give personal attention to the performance of duties devolving upon

him; and, in the second place, that as the plaintiff has declared on the defendant's agreement to pay the plaintiff \$16 a week, the answer to the first issue indicates that the plaintiff was employed as alleged.

[2] We are of opinion that the first objection cannot prevail. The relevant statement in the case on appeal is this:

"The evidence of the plaintiff tended to establish the fact that he was to be paid \$15 per week and his wife was to be paid \$1 per week for certain services to be rendered by her."

Nowhere does it appear that the defendant agreed to pay both these amounts to the plaintiff, and in the absence of evidence to this effect the intendment of the law is in conflict with the plaintiff's contention.

[3] Nor is the second objection available to the plaintiff. His honor instructed the jury that the plaintiff, if allowed damages, should be allowed wages only at the rate of \$15 a week, and the answer to the first issue must be interpreted with reference to this instruction. *State v. Murphy*, 157 N. C. 615, 72 S. E. 1075; *Richardson v. Edwards*, 156 N. C. 590, 72 S. E. 482; *Donnell v. Greensboro*, 164 N. C. 332, 80 S. E. 377.

The first exception is therefore overruled.

The second exception also is untenable. It is directed to the question whether there was sufficient evidence of the defendant's agreement to pay the plaintiff increased wages. The allegation is that the plaintiff was to receive certain compensation "with a raise in wages, to be fixed in April following." There was evidence tending to show that his wages were to be increased in April, and that in May the wages of one employee who had continued in the defendant's service were increased from \$2 to \$3 a day, and the wages of another about 33½ per cent. But the quantum or measure of increase in the plaintiff's wages was neither alleged nor proved. The court held that the evidence was not sufficient to show an enforceable agreement by the defendant to increase the plaintiff's wages, and the plaintiff duly accepted.

[4, 5] One of the essential elements of every contract is mutuality of agreement. There must be neither doubt nor difference between the parties. They must assent to the same thing in the same sense, and their minds must meet as to all the terms. If any portion of the proposed terms is not settled, or no mode agreed on by which they may be settled, there is no agreement. 13 C. J. 264. A contract for service must be certain and definite as to the nature and extent of the service to be performed, the place where and the person to whom it is to be rendered, and the compensation to be paid, or it will not be enforced. 6 R. C. L. 644. The evidence as to the wages is equally indefinite if it be considered as tending to show an agreement to make a future contract.

"Unless an agreement to make a future contract is definite and certain upon the subjects to be embraced therein, it is nugatory. Consequently the acceptance of a proposition to make a contract the terms of which are to be subsequently fixed does not constitute a binding obligation. The reason for this rule is that there would be no way by which the court could determine what sort of a contract the negotiations would result in; no rule by which the court could ascertain what damages, if any, might follow a refusal to enter into such future contract on the arrival of the time specified. Therefore a contract to enter into a future contract must specify all its material and essential terms, and leave none to be agreed upon as a result of future negotiations." 1 Elliott on Contracts, § 175.

"If no breach of the contract can be assigned which can be measured by any test of damages from the contract, it has been said to be too indefinite to be enforceable." 1 Page on Contracts, § 28; *Elks v. Ins. Co.*, 169 N. C. 626, 75 S. E. 808.

[6] In the absence of allegation and proof as to what the increased wages should be there is no accurate test by which the plaintiff's damages could be measured.

Exceptions 3, 4, 5, and 6 present but one question and may be considered together. The court no doubt submitted to the jury the fifth issue and the seventh with the twofold purpose of presenting the conflicting views of the parties as to the measure of the plaintiff's damages, and of determining the entire controversy by one verdict. Upon the trial the plaintiff contended that in answering the third issue as a conclusion of law the court should deduct from the answer to the sixth issue the answer to the seventh, leaving the net amount of the plaintiff's earnings after his discharge to be deducted from the value of his contract as found in response to the fourth and fifth issues; and the defendant contended that the answer to the seventh issue was immaterial and should be disregarded. His honor held with the defendant, and these exceptions challenge the correctness of his honor's ruling.

In 20 A. & E. Ency. (2d Ed.) 37, it is said:

"Where the action is brought subsequent to the expiration of the term of employment, the decisions are practically unanimous to the effect that the measure of damages is prima facie the wages for the unexpired portion of the term, this amount to be diminished by such sums as the servant has earned, or might have earned, by a reasonable effort to obtain other employment in the same line of business."

This proposition is cited with approval in *Smith v. Lumber Co.*, 142 N. C. 26, 54 S. E. 788, 5 L. R. A. (N. S.) 439. In *Hendrickson v. Anderson*, 60 N. C. 247, an overseer, employed upon a special contract for a year, was discharged during the year, and brought suit to recover the entire stipulated sum. This court said:

"The question necessarily arises: What is the amount of the damages which he [the plaintiff] ought to be allowed to recover? The proper answer would seem to be the amount which he has actually sustained in consequence of the defendant's default. It would seem to be a dictate of reason that, if one party to a contract be injured by the breach of it by the other, he ought to be put into the same condition as if the contract had been fully performed on both sides. He certainly ought not to be a loser by the fault of the other; nor can he be a gainer without introducing into a broken contract the idea of something like vindictive damages. The true rule then is to give him neither more nor less than the damages which he has actually sustained."

This case has been approved in *Brinkley v. Swicegood*, 65 N. C. 628; *Oldham v. Kerchner*, 79 N. C. 112, 28 Am. Rep. 302; *Markham v. Markham*, 110 N. C. 356, 14 S. E. 963; *Smith v. Lumber Co.*, supra.

In several jurisdictions the doctrine of constructive service has been repudiated, and in its place has been adopted the method of suing for damages for breach of the contract of employment. But the trend of judicial opinion, in analogy to the constructive service idea, seems to be toward regarding the contract price as a material, if not the controlling, element for consideration in the estimation of damages, both in jurisdictions in which the doctrine of constructive service has been repudiated and in those in which it has been retained. *Howay v. Going-Northrup Co.*, 24 Wash. 88, 64 Pac. 135, 6 L. R. A. (N. S.) 82, 85 Am. St. Rep. 942. In *Smith v. Lumber Co.*, supra, Walker, J., says:

"If the doctrine of constructive service is illogical, in view of the right of the master to have the damages diminished by showing that the servant engaged in other business, and consequently was not ready to perform the service, it does not follow that the rule itself as to damages is not a sound one, for other cogent reasons may have been assigned in its support. The employee, by no fault of his own, loses his wages, which are fixed by the contract, and their amount should be the true measure of his damages under the ordinary rule obtaining in the case of other contracts." 142 N. C. 35, 36, 54 S. E. 788, 790 (5 L. R. A. [N. S.] 439).

In jurisdictions in which the contract is held to be the measure of damages for breach of a contract of employment it is only prima facie so, and where other employment, or the duty to seek other employment,

is taken into consideration, the measure of damages suffered by an employee because of a wrongful discharge is the actual injury sustained, or the loss of the value of the contract. *Perry v. Simpson*, 37 Conn. 520. Here, then, two questions arise: (1) What was the value of the plaintiff's contract with the defendant? (2) In what amount has the value of the contract been impaired by the defendant's breach?

[7] As shown by the answer to the fourth and fifth issues, the jury found the value of the contract to be \$555. To what extent has such value been impaired by the breach? Evidently to the extent of the plaintiff's actual loss. The measure of his loss is the difference between the value of the contract and the net amount earned after his discharge.

It has been suggested that the plaintiff, after his discharge, enjoyed advantages not provided in the original contract. He seems also to have received better wages; and, if this question was in fact raised upon the trial, we must assume that it was considered in connection with the issues submitted to the jury. It will be observed that the expenses incurred by the plaintiff after his discharge were not elective, but necessary as well as additional to those he would have incurred had the defendant performed the contract. Shall the plaintiff's loss, caused by his wrongful discharge, become the defendant's asset? It would be inequitable to say that the plaintiff shall not abate to the extent of additional and necessary expenses the amount earned by him after his wrongful discharge. *Van Winkle v. Satterfield*, 58 Ark. 617, 25 S. W. 1113, 23 L. R. A. 855; *Pennsylvania Co. v. Dolan*, 6 Ind. App. 109, 32 N. E. 802, 51 Am. St. Rep. 300. We hold, then, that the answer to the seventh issue should be deducted from that of the sixth, and the remainder, \$316.75, should in turn be deducted from the value of the contract, represented by the sum of the answers to the fourth and fifth issues, and that the answer to the third issue should be \$238.25, with interest from the termination of the period of the plaintiff's employment, to wit, January 1, 1919. 24 Wash. 88, 64 Pac. 135, 6 L. R. A. (N. S.) 91, 85 Am. St. Rep. 942; *Bond v. Cotton Mills*, 166 N. C. 20, 81 S. E. 936; *Chatham v. Realty Co.*, 174 N. C. 675, 94 S. E. 447.

The judgment entered upon the verdict, as herein modified, is affirmed.

Modified and affirmed.

(182 N. C. 175)

MARTIN v. McBRIDE. (No. 228.)

(Supreme Court of North Carolina. Oct. 19, 1921.)

1. Appeal and error ¶1022(2) — Referee's findings approved by trial court and supported by evidence not reviewable.

Where there is evidence to support referee's findings of fact, and they are approved by the trial judge, they are not reviewable.

2. Partnership ¶110—One partner could sue another for supplies furnished the other in separate business.

Plaintiff was not precluded by the fact that there was a partnership between him and defendant from suing defendant for supplies furnished defendant personally for the express purpose of enabling him to supply his hands who were operating his mill plant, with which plaintiff had no connection, except as book-keeper.

3. Attachment ¶267—Held not dissolved by substitution of bond as security.

In action for supplies furnished, attachment against the property of the proprietor of a sawmill and lumber plant was set aside at the request of the receiver of the sawmill, in order that operations could be resumed, on condition that "the latter" keep in his possession 400,000 feet of lumber pending further hearing, which should be subject to any liens legally asserted by plaintiff. Later, on contempt proceedings brought because defendant was disposing of the lumber outside the state, defendant with the court's approval filed a \$5,000 bond to stand in place of the 400,000 feet of lumber, "conditioned to pay any lien judgment" recovered by plaintiff. *Held*, that the court's action under Revisal 1908, §§ 774, 775, did not discharge the attachment on the merits, but the bond was held as substituted security and as representing the lien for which it was substituted.

4. Attachment ¶210—Defects waived by appearance.

Any defect in attachment was waived by defendant's appearing and pleading to the merits.

Appeal from Superior Court, Sampson County; Bond, Judge.

Action by J. Reid Martin against D. L. McBryde. Judgment for plaintiff, and defendant appeals. *Affirmed*.

This action was brought to recover the sum of \$3,663.90, alleged to be due by account stated. An attachment was issued and levied upon certain personal property of the defendant, an itemized list of which was annexed by the sheriff to his return. The attachment was afterwards ordered by Judge Devin to be set aside at the request of J. F. Parker, receiver, in order that the operations of the Garland Lumber Company could be resumed under its contract with defendant, and it was further ordered that "the latter" keep in his possession at least 400,000 feet of lumber pending the further hearing of this cause

on the return day thereof, "which lumber shall be subject to any liens which the plaintiff may legally assert against the same."

The plaintiff alleged on affidavit that McBryde was disposing of the lumber, or had already disposed of it, in disobedience of the former order of the court, whereupon Judge Gulon ordered that defendant show cause why he should not be attached for contempt, and afterwards discharged the rule upon the defendant's filing a sufficient bond in the sum of \$5,000, which should stand in the place of the lumber ordered to be held by the defendant for the purpose mentioned in the former order, and "shall be conditioned to pay any such lien judgment as plaintiff may recover against defendant herein."

The court appointed a referee to take and state the account. He made his report, which was set aside so that defendant might introduce further evidence; the notice to him of the hearing of the referee having been deficient. Thereupon Mr. Richard L. Herring was appointed referee for the same purpose, and he filed the following second and final report, as it is termed in the case:

"To the Superior Court of Sampson County:

"The undersigned, Richard L. Herring, referee, appointed in this cause by order of his honor O. H. Gulon, judge, having formerly made a report on January 29, 1921, and said cause having been referred to said referee by order of Hon. W. M. Bond, judge at March term, 1921, of the superior court of Sampson county, begs to report as follows:

"On April 5, 1921, at 12 o'clock noon, in the law office of Grady & Graham, Clinton, N. C., the plaintiff being absent in person, but represented by counsel, Henry A. Grady, and the defendant being present in person and also represented by counsel, Messrs. Q. K. Nimocks and E. S. Smith, the defendant proceeded to offer his evidence, which is contained in the typewritten report thereof herewith sent to the court, the plaintiff having heretofore by consent at a former meeting offered in evidence the same testimony that was offered before J. Abner Barker, referee, which appears in the file; and upon all of the evidence, pleadings, exhibits, and admissions of the parties the referee makes the following findings of fact, it being agreed by all parties that this report should be heard and passed upon at May term, 1921, all parties waiving time:

"First. That heretofore, prior to January 1, 1915, the plaintiff and the defendant were engaged in the mercantile business at Garland, N. C., under the firm name and style of South River Supply Company, and on said January 1, 1915, the defendant, D. L. McBryde, conveyed to the plaintiff, W. Reid Martin, all of his right, title, and interest in and to said mercantile business by written conveyance filed with the referee and marked Exhibit B. The referee finds that said paper writing was intended as a chattel mortgage, made for the purpose of securing the plaintiff for certain moneys advanced by him in the conduct of said business.

"Second. That during the conduct of the business the said D. L. McBryde was operating a large sawmill and lumber plant near the town of Garland, which was not connected with the South River Supply Company; that he employed a number of hands and made settlement with said hands with metal pay checks, which were cashed at the store of the plaintiff at par; that it was understood and agreed between the plaintiff and the defendant that said pay checks should be received at the store of the plaintiff, as cash, with the further understanding and agreement that the plaintiff should hold said checks in the same manner, and that the same should be collectible upon the same basis as if held by the original parties from whom they were purchased by the plaintiff, and in furtherance of this agreement the defendant executed a certain paper writing in words and figures as follows:

"April 1, 1914.

"W. Reid Martin, Proprietor, South River Supply Company, Garland, N. C.—Dear Sir: I hereby authorize you to handle and accept metal pay checks that I issue to my laborers in exchange for their work, the same to be due and payable to you on my regular pay days, the same as if held by said laborers, and I hereby agree that all accounts and holdings of same due and collectible on the same basis as if held by the original parties to whom the checks are paid.

"Yours respectfully, D. L. McBryde."

"Third. That during the course of business the plaintiff purchased from the laborers of the defendant, under the agreement referred to in the second finding of fact, metal pay checks, amounting in value of \$5,404.06.

"Fourth. That this action was commenced on October 13, 1913, and thereafter, on October 17, 1913, J. F. Parker, receiver of the Commonwealth Land & Timber Company, came in to court and made himself a party to this action, and upon affidavits filed by the said J. F. Parker and others an order was entered by Hon. W. A. Devin, judge at Kinston, N. C., dissolving the warrant of attachment which appears in the file, and providing as follows: 'And it is further ordered that the said D. L. McBryde proceed to resume operations under his said contract, as though said attachment had not been issued or served, and that he keep in his possession at least 400,000 feet of lumber pending the further hearing of this cause on the return day thereof, which lumber shall be subject to any liens which the plaintiff may legally assert against the same.'

"Fifth. That thereafter, on or about January 9, 1919, a petition was filed in this cause, alleging that all of said lumber had been disposed of in violation of the order entered by Judge Devin hereinbefore referred to, and thereupon his honor O. H. Guion issued an order requiring the defendant to appear before him at the courthouse in Clinton, N. C., on Saturday, February 8, 1919, and show cause why he should not be punished for disobeying the former orders made in this cause, and thereafter at the hearing of said motion said writ was vacated upon condition that the defendant file a good and sufficient bond in the sum of \$5,000, payable to the plaintiff, which bond was filed by the defendant, with W. L. Williams, Jr., B. F. McBryde, and E. S. Smith as sureties thereto, and contains the following provision: 'The

condition of this obligation is such that, whereas the plaintiff has sued the defendant herein for a certain alleged indebtedness amounting to \$3,663.90, and claims a lien on certain lumber as appears by the pleadings and papers herein: Now, therefore, if the plaintiff shall recover judgment against the defendant herein and shall be adjudged entitled to a lien on said lumber as security for the payment of said judgment or any part thereof not exceeding the amount sued for, and if the defendant shall pay such judgment as the court may find and adjudge subject to such lien then this obligation to be null and void; otherwise to be and remain in full force and effect.'

"Sixth. That the time of the institution of this action D. L. McBryde was indebted to the South River Supply Company on account of metal pay checks taken under the written contract hereinbefore referred to in the sum of \$5,404.06, and in addition thereto was personally indebted to said company for goods sold to him individually in the sum of \$527.03; so that on the 1st of January, 1917, the assets of said company consisted of the following items:

Cash in bank.....	\$ 13 62
Merchandise on hand.....	313 21
Open accounts	28 81
Personal account D. L. McBryde.....	527 03
Metal pay checks account.....	5,404 06
Total	\$6,297 73

"Seventh. That at the time above referred to, January 1, 1917, the South River Supply Company was indebted to plaintiff, Martin, in the sum of \$1,754.46 for money loaned to said company from time to time; that the plaintiff has received from the cash in bank, merchandise on hand, and open accounts the sum of \$366.65, which should be charged against him and deducted from his one-half interest in the business; so that the account between the two copartners should be stated as follows:

Total assets of the company.....	\$6,297 73
Account due Martin for money advanced to company	1,174 46
Net worth of business.....	\$4,543 27
Of this Martin is entitled to one-half.....	\$2,276 685
Of this McBryde is entitled to one-half....	2,276 685
Total	\$4,543 27
Amount due Martin, one-half of business..	\$2,276 685
Less amount received from accounts and cash in bank	366 65
Balance	\$1,910 035
Amount due Martin, one-half business....	\$2,276 685
Amount due Martin for money advanced business	1,754 46
Total amount due Martin.....	\$3,664 495

"Eighth. That at the time of the institution of this action the defendant, McBryde, was in serious financial difficulties, there being many recorded judgments against him; that he was in fear of executions being issued on said judgments and his property seized by his creditors; that he was shipping lumber from Garland, N. C., to J. S. Kent & Co., of Philadelphia, Pa., as fast as the railroad facilities would permit, which had the effect of removing the property beyond the reach of the court and of hinder-

delaying, and defeating his creditors from collecting the amounts due them, and such was his intention.

"Ninth. That the order requiring the defendant to keep in his possession at Garland, N. C., the 400,000 feet of lumber hereinbefore referred to was consented to by all of the defendants to this action, and was made at the suggestion of defendant J. F. Parker, receiver, and he is bound thereby.

"Upon the foregoing finding of fact the referee makes the following conclusion of law:

"(1) That by reason of the written contract entered into between the defendant and South River Supply Company he thereby created a valid lien upon the lumber, etc., cut at his mill, and subrogated the said South River Supply Company to any rights of lien that might have been asserted by his employees to whom the metal pay checks were given, and to all other remedies that said employees might have asserted.

"(2) That by reason of the fact that the defendant, McBryde, at the time this action was instituted, was financially embarrassed, and was shipping his assets beyond the state, etc., as found in finding of fact No. 8, the issuance of the writ of attachment herein was provident and proper, and the plaintiff thereby secured and was entitled to a valid lien upon all of the property seized by the sheriff, consisting of the 400,000 feet of sawed lumber described in the return of said sheriff.

"(3) That by reason of the fact that the amount due the South River Supply Company by D. L. McBryde on account of metal pay checks is in excess of the total amount due the plaintiff, Martin, the plaintiff is entitled to assert the amount of his recovery as a lien against said 400,000 feet of lumber, and require the defendant McBryde to accept his open account as a credit on his one-half in the business.

"(4) That all of the defendants are bound by the order entered herein requiring the defendant to keep 400,000 feet of lumber on hand to pay any judgment that may be recovered in this action by the plaintiff, which is adjudged to be a lien on the lumber seized by the sheriff, and, by reason of the fact that the \$5,000 bond filed herein was substituted in lieu of said lumber, that the defendant and the sureties on said bond are liable for the amount of the recovery adjudged in this action.

"(5) That the plaintiff, Martin, is entitled to recover of the defendant, McBryde, as principal, and B. F. McBryde, E. S. Smith, and W. L. Williams, Jr., sureties, the sum of \$5,000, the penalty of the bond filed herein, to be discharged upon payment to the plaintiff, W. Reid Martin, of the sum of \$3,664.50, with interest thereon from the 1st day of January, 1917, together with the costs of this action to be taxed by the clerk.

"The date above named, January 1, 1917, is an arbitrary date fixed by the referee on account of the fact that the business was in process of being wound up at that time, said date being subsequent to the issuance of summons herein.

"All of which is respectfully submitted this April 22, 1921.

"Richard L. Herring, Referee."

The defendant filed nine exceptions to this report, each of which was based upon the following ground:

"The defendant excepts to the findings of fact in article — of the referee's report, for that it is contrary to the evidence taken in the case."

And he also filed five exceptions to said report, each of which was based upon the following ground:

"The defendant excepts to the conclusions of law found in article — of the referee's report, for that the same is not a correct conclusion of law based upon the evidence taken in the above cause, and that said conclusion of law was based upon an erroneous finding of fact."

The above exceptions to findings of fact and those to conclusions of law were therefore all alike in form and substance.

The defendant further excepted to said report because the referee failed to consult the plaintiff at the conclusion of the plaintiff's evidence and again at the close of all the evidence. Judge Bond approved and confirmed the report of Referee Herring in all respects, and rendered judgment against defendant for the sum of \$3,663.90 and costs, to include referee's fee of \$50 and premium on attachment bond.

Defendant appealed, and assigned the following errors:

"(1) To the referee's denial of defendant's motion for nonsuit.

"(2) To referee's denial of defendant's motion to vacate the attachment.

"(3) To referee's denial of defendant's motion at the close of all evidence for nonsuit.

"(4) To referee's denial of defendant's motion at the close of all evidence to vacate the attachment.

"(5) To the refusal of the presiding judge to sustain the defendant's exceptions to the referee's findings of fact and conclusions of law, as more fully set out in the record.

"(6) To the refusal of the presiding judge to allow defendant's motion of nonsuit and to vacate the attachment made before the referee, as above stated and renewed before the presiding judge at the hearing before him on exceptions to referee's report.

"(7) To the judgment as signed, as appears of record."

Q. K. Nimocks, of Fayetteville, E. S. Smith, of Raeford, and Murray Allen, of Raleigh, for appellant.

Grady & Graham, of Clinton, for appellee.

WALKER, J. (after stating the facts as above). [1] It is useless to consider the exceptions filed to the referee's report as to the facts further than to say that the judge afterwards reviewed the evidence and findings of fact by the referee, and approved and confirmed the same adopting them as his own. We have repeatedly held that, where this is the case, we will not review the judge's final decision in this respect, where

there is evidence to support the findings. *Dorsey v. Mining Co.*, 177 N. C. 60, 62, 97 S. E. 746; *Maxwell v. Bank*, 175 N. C. 180, 95 S. E. 147; *Southern Spruce Co. v. Hayes*, 169 N. C. 254, 85 S. E. 382, where this court held:

"As said in another case, *McCullers v. Cheatham*, 163 N. C. 63: 'The misfortune of the defendants (the plaintiff in the case at bar) in this case is that the referee has found all the essential facts against them, and when these findings were reviewed and approved by the judge, upon consideration of the report and exceptions, there being evidence to warrant them, we are precluded from changing the report in this respect, but must decide the case upon the findings of fact as made by the referee and approved by the court. * * * We will not review the referee's findings of fact, which are settled, upon a consideration of the evidence, and approved by the judge, when exceptions are filed thereto, if there is some evidence to support them.'"

Turning to *McCullers v. Cheatham*, supra, we find that the following cases are cited there: *Boyle v. Stallings*, 140 N. C. 524, 53 S. E. 346; *Harris v. Smith*, 144 N. C. 439, 57 S. E. 122, and cases cited; *Thornton v. McNeely*, 144 N. C. 622, 57 S. E. 400; *Frey v. Lumber Co.*, 144 N. C. 759, 57 S. E. 464; *Thompson v. Smith*, 160 N. C. 258, 75 S. E. 1010.

There was some evidence in this case to support the rulings of the referee and judge as to the facts.

Now as to the exceptions taken to the referee's conclusions of law: One ground of these exceptions is that they are not correct conclusions based upon the evidence. The conclusions of law are not based upon the evidence, but upon the facts found by the referee; and the other ground, that the conclusions of law were based upon an erroneous finding of fact, is but saying that the facts were erroneously found by the referee and judge, which we have shown is a matter not reviewable in this court.

When the assignments of error are considered, they really present but two questions: First. Was it error in the court to refuse the motion to nonsuit? Second. Should the referee and judge have vacated the attachment? There may be a third question, which we also will consider, though it is not definitely and sufficiently raised by the defendant in his exceptions and assignments of error, and that is: Could the plaintiff sue the defendant, the latter being his partner, as defendant alleges, and, we think, erroneously.

1. The court did not err in refusing a nonsuit. This really involves the two questions as to the right of plaintiff to sue the defendant and the attachment.

[2] It is contended that the plaintiff could not sue the defendant, because they were partners, and one can sue the other

only for a settlement of the partnership affairs. But this, if correct generally, is not so with reference to the particular facts of this case. Here the plaintiff alleges his right to recover damages because he had, upon defendant's request, furnished to him "goods, wares, and merchandise and feed supplies in order that McBryde could carry on the business in which he was then engaged, it being the operation of a lumber and mill plant." This is in no way connected with any partnership affair, but entirely separate therefrom, if any partnership existed, and altogether independent thereof. The following is settled, according to *George on Partnership*, p. 814 (131):

"A partner may maintain an action at law against his copartner upon a claim due to the one from the other as individuals. The following classes of cases fall within the above rule:

"(a) Claims not connected with the partnership.

"(b) Claims for an agreed final balance.

"(c) Claims upon express personal contracts between partners."

And *Ruling Case Law*, vol. 20, p. 926, says:

"The general rule prohibiting the bringing of suits by one partner against another until a balance is struck does not apply to all possible cases which might appear to be within its scope. The limitation may be removed by statute or agreement between the parties. Thus one partner may sue another at law on a promissory note executed by the partnership to him, where there is a statute providing that all contracts which by the common law are joint shall be construed as joint and several, and that in all cases of joint obligations of copartners and others suits may be prosecuted against any one or more of them who are liable."

The general rule, therefore, even as between partners is not inexorable, but has its exceptions. The case of *Owen v. Merooney*, 136 N. C. 475, 48 S. E. 821, 103 Am. St. Rep. 952 (opinion by the Chief Justice), as reported in 1 Ann. Cas. p. 834, is an opposite one. The substance of it, as stated in the headnote to 1 Ann. Cas., supra, is as follows:

"An action may be maintained by one partner against another to recover damages for the failure of the latter to comply with an agreement made by him as a condition precedent to the formation of the partnership."

There is a valuable note to that case at pages 835 and 836, in which, among other things, it is said:

"Thus an action will lie for a breach of promise to furnish money or property for carrying on the partnership. A partner may recover the damages suffered by him personally, unless ascertainment of such damages involves an examination of the partnership accounts, when the only remedy is in equity."

The note is amply supported by the citation of relevant authorities. And in *Newby v. Harrell*, 99 N. C. 149, 5 S. E. 234, 6 Am. St. Rep. 503, this court held:

"While the general rule is one partner cannot maintain an action against his copartner to recover money which might have been taken into account of the partnership until after a settlement, he may sue before such settlement to recover for the wrongful conversion or destruction of the joint property or for the loss or destruction of his individual property used in the business, resulting from the negligent use by the other partner."

If the plaintiff, who happens to be a partner, can recover on a promissory note given by the firm to him individually, or for damages suffered by him, in the same way, and resulting from a breach of contract or a tort, there is no conceivable reason why he cannot recover here for the sale of goods, wares, and merchandise sold or supplied to defendant, even if the two were partners in the supply business (which is denied), because the goods were furnished to defendant personally for the express purpose of enabling him to supply his hands who were operating his mill plant, with which the plaintiff had no connection except as bookkeeper. The debt due the plaintiff was in no sense an item in any partnership account, and the case in no view falls within the principle invoked by the defendant.

[3] Now as to the lien of plaintiff under the contract with the defendant set forth in the case: The judge did not discharge the attachment on the merits, but he was evidently proceeding or at least in analogy to the proceeding, for a discharge, as authorized by the statute (Pell's Revision, vol. 1, §§ 774 and 775), and the bond required by the judge and given by the defendant in place of the 400,000 feet of lumber was so conditioned as to require the defendant "to pay any such judgment in the action as plaintiff may recover against him therein," in addition to the bond being held to secure any lien which plaintiff had on the lumber, for which the bond was a substitute; the object of all this being to release the property attached so that defendant or the receiver could use it in the prosecution of the business. It would be a clear perversion of the true intent and purpose for which the bond was allowed to be filed as an accommodation to the defendant so that he might use the property attached or the lumber held in lieu of it, if we should hold otherwise. We must decide according to the letter and spirit of the transaction, and not let the defendant take advantage of his own repudiation of his agreement, upon the faith of which he or the receiver secured the release of the attached property and afterwards of the lumber, so that the work of the mill might proceed.

The referee, in his admirable report upon the facts and the law, has found as a fact, that the defendant, being involved in serious financial difficulties, and being much embarrassed, there being many recorded judgments against him, and while he was in fear of executions being issued against his property, was shipping lumber from Garland, N. C., to points outside the state as rapidly as possible, which had the effect of hindering, delaying, and defrauding his creditors, and such was his intention. The defendant does not say in his exceptions that there was no evidence of those facts, but that they were found by the referee contrary to the evidence. We have already discussed the character of such an exception where the referee's findings have been considered and approved by the judge on exceptions filed to the referee's report. However, there was some evidence to support the findings.

[4] Attention is called by the appellee to the fact that there was no exception taken to the orders of the court as to the lumber or the bond of \$5,000, and also to the special condition of the bond requiring any judgment recovered to be paid. The attachment being regular and valid, and intended to bring the defendant before the court to answer in the cause, and the defendant having answered, and the receiver intervened for the purpose of discharging the attachment, for the special purpose just mentioned and substituting security therefor, first, in the form of lumber, and, second, by bond in lieu thereof, it is apparent that it is too late now to claim that the same security, in the form of a lien on the lumber, was not transferred to the bond when it was given in place of that lien, and further that defendant has waived any defect in the attachment (if there was any, and we concur with the referee that there was not) by appearing and pleading to the merits, and further that the court did not vacate the attachment because of any defect therein, or because of insufficient grounds for issuing it, but simply at the request of defendant and the receiver that it be done, so that the prosecution of the mill business, then in the hands of the receiver, would not longer be interrupted. It was held in *Rocky Mount Mills v. Railroads*, 119 N. C. 693, 25 S. E. 854, 56 Am. St. Rep. 682, affirming order of Hoke, J., refusing to vacate an attachment, that—

"Where a defendant, brought into court on attachment process, subsequently entered a general appearance and filed an answer to the merits, a motion to dismiss the attachment on the ground that it would not lie under the statute was properly refused as immaterial."

In *Symons v. Northern*, 49 N. C. 241, Judge Battle said:

"A defendant may come into court without process, and confess a judgment (*Farley v. Lea*,

4 Dev. & Bat. Rep. 169 [20 N. C. 307]), and we cannot perceive any reason why he may not come in, in the same way, and accept the plaintiff's declaration and plead to it. If this be so, why may he not appear and plead upon the defective process? The main object of the leading process is to bring the defendant in to court, and, if he does not choose to object in limine to the manner in which he has been brought in, it would be wrong to allow him to do so after he has, by his acts, admitted himself to be there, ready to defend himself against the plaintiff's action."

See *Toms v. Warson*, 66 N. C. 417. And in *Price v. Sharp*, 24 N. C. 417, it was held that—

"In an attachment the defendant, by accepting a declaration and pleading to [the merits], waives all objection to defects in the process."

It perhaps may be useless to state that a lien is acquired by the levy of an attachment (*McMillan v. Parsons*, 52 N. C. 163), as such a proposition will hardly be gainsaid. Consol. Statutes, § 807. The lien of the original levy created by the statute was not destroyed or vacated, but is now represented by the bond of the defendants, a new form of security, to be sure, but only as a substitute for the old, upon which the plaintiff is entitled to judgment for the satisfaction of his debt. The report of referee Herring was properly approved and confirmed by the court in its judgment, which will not be disturbed.

Having taken this view, it is unnecessary to discuss the question as to the alleged laborers' and mechanics' lien arising from possession of the metal checks.

We find no error.

Affirmed.

(182 N. C. 308)

WRIGHT v. IREDELL TELEPHONE CO.
(No. 330.)

(Supreme Court of North Carolina. Nov. 2, 1921.)

Corporations § 113—Charter and stock certificate provision against transfer without approval of directors held valid.

There being no statute to the contrary and the Secretary of State being authorized to grant corporate charters by virtue of Const. art. 8, § 1, a provision in a charter granted to a telephone company that shares of the stock therein should not be transferred or sold until reported to and approved by the directors was valid, and a purchaser was not entitled to enforce a transfer over the action by the directors in good faith.

Appeal from Superior Court, Durham County; Horton, Judge.

Petition by R. H. Wright for writ of mandamus against the Iredell Telephone Com-

pany. Writ refused, and petitioner excepted and appealed. Affirmed.

The writ of mandamus was asked to require the defendant to transfer and issue to the plaintiff certain certificates of its corporate stock. The facts are fully set out in the judgment of the superior court:

"This cause was regularly instituted in the superior court of Durham county by issuance of summons on the 26th day of May, 1920, complaint and answer were duly filed, and it was agreed by the parties that the court should find the facts and enter judgment in accordance with such finding of facts, and after hearing the pleadings and the testimony offered at the trial the court finds the following facts:

"(1) This is a proceeding by mandamus to compel the defendant to transfer to the plaintiff 116 shares of common capital stock of the defendant.

"(2) That prior to the year 1906 the citizens of the city of Statesville and county of Iredell, N. C., enjoyed the benefit of a locally owned independent telephone system; that the Bell Telephone Company had repeatedly made application to the board of aldermen of said city for a franchise to establish its system in said community, and the said board of aldermen had from time to time refused to grant said franchise; that on the — day of —, 1906, the Bell Telephone Company, without notice to the board of aldermen or to the citizens of Statesville, bought out the independent system, and undertook to control and monopolize the telephone business in Statesville, and thereafter charged rates greatly in excess of the rates formerly charged by the independent company for said service.

"(3) That after the purchase of the local system by the Bell Telephone Company, the citizens of said community, in order to free themselves from what they believed to be a monopoly, and for the purpose of establishing and maintaining a local independent telephone system, organized the Iredell Telephone Company, the defendant in this case, and thereupon procured a certificate of incorporation under the general laws of the state on August 22, 1906, said certificate of incorporation containing the provisions hereinafter set out: That said certificate of incorporation was approved by the stockholders of the defendant, and was immediately recorded in the office of the clerk of the superior court of Iredell county, and under and by virtue of said certificate of incorporation the defendant since said time has and is now engaged in the telephone business in the city of Statesville, N. C., under its said certificate of incorporation. That the certificate of incorporation of the defendant, among other things, specifies the objects of the corporation as follows: 'To build, operate, maintain and own an independent telephone business in the city of Statesville, N. C., and generally to carry on an independent telephone system in said city and elsewhere.'

"(4) That at the time of organizing said corporation the stockholders, realizing that unless the sale and transfer of its capital stock was safeguarded that there would be a possibility of a majority of the stock of the corpora-

tion being bought up by persons not in harmony with the independent telephone business, and that the control of the corporation would pass directly or indirectly into the hands of unfriendly and antagonistic interests, and that thereupon the stockholders, in order to safeguard their investment and to prevent the said corporation falling into the hands of persons or corporations antagonistic to the objects and purposes of an independent telephone company, procured the Secretary of State to grant the defendant a certificate of incorporation or charter, containing the following limitations upon the sale and transfer of its stock, to wit:

"Section Eleventh. Shares of stock in this corporation shall not be transferred or sold until said sale or transfer shall have been reported to the directors and approved by them."

"(5) That to further safeguard the sale of its stock, as well as to give notice to parties who might attempt to purchase the same of the limitations contained in the charter and the terms upon which said stock was issued, accepted, and held by the stockholders, the defendant caused its certificate of stock to be written in the following words and figures, to wit:

"Certificate of Common Stock.

"Incorporated under the laws of the State of North Carolina.

"No. _____ Shares, _____
"Iredell Telephone Company, Statesville, N. C.

"This certifies that _____ is the owner of _____ shares of twenty-five dollars each of the capital stock of Iredell Telephone Company, which cannot be sold or transferred until reported to, and approved by, the board of directors, and then transferable only on the books of the corporation by the holder thereof in person or by attorney, upon surrender of this certificate properly indorsed.

"In witness whereof, the said corporation has caused this certificate to be signed by its duly authorized officer and to be sealed with the seal of the corporation at Statesville, N. C.

"This the _____ day of _____, A. D. 190—.

"_____, Pres.

"_____, Sec'y & Treas."

"(6) That the stock desired by the plaintiff to be transferred to him on the books of the corporation in this action is in the identical language above set out.

"(7) That none of the owners of the stock now held by the plaintiff have complied with the provisions of defendant's charter governing sales and transfers of its stock, and have never complied with the provisions and limitations set out in the certificates of stock, and that none of said owners ever applied to the directors of the defendant for approval of said sale to the plaintiff or the transfer of any of said stock to the plaintiff.

"(8) That the plaintiff has no financial interest in the Southern Bell Telephone Company, but that plaintiff, a Mr. Martin, and two nephews of the plaintiff, own the Interstate Telephone & Telegraph Company, of Durham, N. C.; that at the time the plaintiff undertook to acquire shares of stock in the Iredell Telephone Company, there was an agreement or understanding between the Interstate Telephone & Telegraph Company of Durham and the South-

ern Bell Telephone Company, and the American Bell Telephone Company could use the office of the Interstate Telephone & Telegraph Company of Durham, N. C., for long distance, the Interstate Telephone & Telegraph Company of Durham, N. C., receiving a commission on all outgoing long distance messages. The Interstate Telephone & Telegraph Company of Durham had under such agreement no right to build long distance lines to points where the Bell Telephone had long distance lines. The Interstate Telephone & Telegraph Company was doing the local business in Durham, and the Southern Bell and American Bell were doing the long distance business. The Southern Bell and the American Bell had no local line in Durham; that the plaintiff knew there was competition between the Southern Bell Telephone Company and the Iredell Telephone Company, at Statesville, and the plaintiff and his associates bought out the Bell Company at Statesville, and that the Iredell Telephone Company has never paid any dividends on its stock, and that the plaintiff had no knowledge of what rates were charged by the Southern Bell Telephone Company in Statesville, or anything about the controversy between the Iredell Telephone Company and the Southern Bell Telephone Company in Statesville, N. C., other than that there was competition between them.

"(9) That the plaintiff is in the possession of more than 116 shares of the capital stock of the defendant, he having attempted to purchase said shares of stock, and has paid a valuable consideration therefor, and never purchased any stock in the Southern Bell Telephone Company. That the plaintiff has never been able to get the shares of stock in the defendant transferred to him on the books of the company, and has never been permitted to vote in any of the meetings of the stockholders of the defendant.

"(10) That on the _____ day of August, 1917, the plaintiff applied to the defendant's directors to have the stock held by him transferred; that thereupon, in pursuance of power contained in the certificate of incorporation and also written in the face of each share of stock issued by the defendants, the said directors met, and, after carefully considering the matter, acting in good faith, declined to approve the transfer of said stock to the plaintiff, and declined to approve the sale or transfer of said stock to the plaintiff. The action of the board of directors was put in writing, and was duly communicated to the plaintiff. The answer of the board of directors was as follows, to wit:

"This board, after duly considering the matter, disapproved the sale of said stock to Mr. Wright, but approved of the sale of stock by said stockholders at the price offered to the agents of Mr. Wright, and have secured purchasers therefor who are local citizens and stockholders of the Iredell Company, and in sympathy with the independent telephone business, and engaged in building up the Iredell Telephone Company as an independent telephone company, and are ready, upon delivery of said stock properly indorsed, to pay therefor in cash."

"On the foregoing finding of facts the court is of the opinion that the plaintiff is not entitled to the relief prayed, and it is ordered and adjudged by the court that the writ of man-

damus be, and the same is hereby, denied, and the plaintiff taxed with the costs.

"J. Lloyd Horton, Judge," etc.

From the foregoing judgment, the plaintiff excepted and appealed.

W. D. Turner, of Statesville, and Fuller, Reade & Fuller, of Durham, for appellant.

Bryant, Brogden & Bryant, of Durham, and H. P. Grier, of Statesville, for appellee.

STACY, J. It appears from the facts found by his honor and embodied in the judgment of the superior court that, prior to the year 1906, the people of Statesville and Iredell county enjoyed the benefits of a locally owned independent telephone system. The Southern Bell Telephone Company had repeatedly made application to the board of aldermen of the city of Statesville for a franchise to establish its system in said community, but this request had been consistently denied. Whereupon, in 1906, the Southern Bell Telephone Company, without notice to the board of aldermen or the citizens of Statesville, bought out the independent system, and undertook to control and to monopolize the telephone business at rates greatly in excess of those formerly charged in said locality. In order to rid the community of this situation, and for the purpose of establishing and maintaining a local independent telephone system, the Iredell Telephone Company, defendant herein, was organized by a number of interested citizens who lived in the city of Statesville. For reasons which seemed compelling to the incorporators, and which they deemed necessary to safeguard the interests of stockholders in the defendant company, there was embraced in the certificate of incorporation the following limitation on the sale and transfer of stock:

"Shares of stock in this corporation shall not be transferred or sold until said sale or transfer shall have been reported to the directors and approved by them."

The charter was duly approved and issued by the Secretary of State, accepted by the corporators, and the certificates of stock, issued to each stockholder, contained a statement on the face of said stock that it could not "be sold or transferred until reported to, and approved by, the board of directors, and then only transferable on the books of the corporation by the holder thereof in person or by attorney," etc.

The plaintiff, a resident of Durham, has in his possession 116 shares of stock of the defendant corporation which in August, 1917, he demanded that the directors transfer to him. The directors met, and, after carefully considering plaintiff's demand, and acting in good faith, declined to approve the sale and transfer of said stock, and made the following order in reference thereto, which was communicated to the plaintiff:

"This board, after duly considering the matter, disapproved the sale of said stock to Mr. Wright, but approves of the sale of said stock by said stockholder, at the price offered to the agents of Mr. Wright, and have secured purchasers therefor who are local citizens and stockholders of the Iredell Telephone Company and in sympathy with the independent business and engaged in building up the Iredell Telephone Company as an independent telephone company, and are ready, upon delivery of said stock, properly indorsed, to pay therefor in cash."

The plaintiff contends that the aforesaid restrictions and powers granted defendant in its charter, and set out in its certificates of stock, are against public policy, and therefore void. On the other hand, the defendant contends that said provisions are just, proper, and reasonable limitations on the sale and transfer of its stock, and that the action of its directors in refusing to transfer the 116 shares to the plaintiff, but approving said sales at the price offered by his agents, and securing purchasers therefor who were in sympathy with the objects and purposes of the defendant, was within the rights granted to the defendant, and did not and does not constitute any unreasonable restraint upon the power of alienation.

We have found no statute in the laws of this state forbidding restrictions and limitations in the sale and transfer of stock in corporations. And it would seem that where the Legislature, in the exercise of its constitutional grant, or reservation (article 8, § 1, Const.) has authorized the Secretary of State to issue certificates of incorporation and approve the application for charters, the provisions of such charters, not inconsistent with the Legislative policy and so approved by the Secretary of State, have, at least, the force and effect of a valid agreement, and binding as between the stockholders who take with notice of such provisions. *Dempster Mfg. Co. v. Downs*, 126 Iowa, 80, 101 N. W. 735, 106 Am. St. Rep. 340, 3 Ann. Cas. 187, and note. As bearing somewhat upon this point, see, also, *White v. Kincaid*, 149 N. C. 415, 63 S. E. 109, 23 L. R. A. (N. S.) 1177, 128 Am. St. Rep. 663.

In the case of *Longyear v. Hardman*, 219 Mass. 405, 106 N. E. 1012, Ann. Cas. 1916D, 1200, Rugg, C. J., in an opinion of great force and clearness, states this position as follows:

"The absence of any definite limitation upon the power of the incorporators to impose restrictions must be taken to be a legislative determination that considerable latitude was intended. No such restrictions can be declared to be unlawful under these circumstances unless palpably unreasonable. A corporation bears some resemblance to a partnership. Plainly no new partner can be introduced into a partnership without the assent of all the partners. Said Chief Justice Holmes in *Barratt v. King*, 181 Mass. 476, at page 479, when

discussing a somewhat similar proposition: 'Stock in a corporation is not merely property. It also creates a personal relation analogous otherwise than technically to a partnership. * * * There seems to be no greater objection to retaining the right of choosing one's associates in a corporation than in a firm.' The motives for the retention of such right in a small business corporation, where substantial changes in ownership of stock well might be accompanied by a change of managing officers, are obvious. Subscriptions of stock sufficient to organize the corporation with adequate capital might be difficult to obtain unless permanency of management were secured in some way against possible changes arising from mutations in the ownership of a bare majority of the stock. Elements of importance both to the subscribers of capital stock and to the executive officers might render some such restriction a valuable security to the investment of money and to the personal devotion of individuals in building up the business. The characteristics of associated stockholders may be important. Harmony of purpose and of business methods and ideals among stockholders may be a significant element in success. The insertion of the restriction upon the right of transfer of the shares of stock in the agreement of association, the initial act in the organization of the company upon which depends all that comes after, is a limitation upon the corporation. It becomes a part of its being, and enters into each share of stock as a part of its essence. The corporation comes into existence with this inherent qualifying restraint. It is agreed to by all the original incorporators who in respect of determining the nature of the corporation speak for future stockholders. It must be approved by the commissioner of corporations as representative of the commonwealth before the charter can issue. A copy of it is a public record in the office of the secretary of the commonwealth, where it may be read by all who contemplate becoming stockholders. * * * The owners of stock in a corporation thus organized cannot complain of such a congenital characteristic. Each stockholder takes his stock subject to this restraining condition. * * * That there is nothing inherently unconscionable in such a limitation upon the right of transfer is manifest from the very broad power exercised by organizers of companies under the English acts and in some of our states."

Mr. Thompson, in his work on Corporations (2d Ed.) vol. 4, § 4185, states the general law as follows:

"The rule is well settled that a provision in the charter or articles of incorporation that no stockholder shall sell and transfer his stock either without the consent of all other stockholders or that he will first offer it to the stockholders or to the corporation before selling to other persons is binding on persons who become owners of stock. These provisions, which really amount to agreements between stockholders themselves, are not invalid as against public policy, nor do they amount to an improper restraint of the power of alienation. There seems to be no objection to a corporation reserving to existing members the

right to choose their associates. Such a provision justifies the refusal of the corporation to transfer the stock."

And this is supported by a number of authorities cited in the text. See, also, the following section 4136 and our own statutes (C. S. § 1114, subsec. 7, § 1128).

Counsel for appellant have called our attention to the decisions of this court rendered in *Bridgers v. Bank*, 152 N. C. 293, 67 S. E. 770, 31 L. R. A. (N. S.) 1199, and *Sheppard v. Power Co.*, 150 N. C. 776, 64 S. E. 894, as tending to establish a contrary doctrine, but we do not think these cases are in point. The questions there presented dealt with the validity of voting trust agreements.

Probably it should also be observed that we are not now considering a case where the restrictions and limitations are contained only in a resolution or by-law of the corporation, and not in the provisions of its charter. In the case at bar, the limitations under consideration are contained in the defendant's charter, and they are also set out in its stock certificates. The corporation came into existence with this inherent, qualifying restraint as one of the rights and powers which it might exercise. It was agreed to by all the original incorporators, and the same was approved by the Secretary of State. The board of directors have acted in good faith, and we think the judgment of his honor, holding that such was permissible under the defendant's right of organization, must be upheld, in the absence of any allegation or proof of arbitrary, oppressive, or unreasonable conduct.

Affirmed.

(182 N. C. 809)

STATE v. MEARES. (No. 273.)

(Supreme Court of North Carolina. Oct. 19, 1921.)

1. Criminal law §822(6)—Instruction as to promise of marriage not erroneous when considered as a whole.

In a prosecution for seduction, an instruction that the promise of marriage must be either expressed to prosecutrix or implied by defendant's acts and his relationship to her held not erroneous when considered in connection with the remainder of the charge.

2. Seduction §45—Evidence supporting finding of seduction under marriage promise.

In a prosecution for seduction, evidence held sufficient to support a finding that the seduction was accomplished by promise of marriage.

3. Criminal law §1171(6) — Argument of prosecuting attorney held not prejudicial.

In a prosecution for seduction, arguments of counsel for the prosecution relative to protecting the womanhood of the county against human vultures and wolves held not prejudicial.

4. Criminal law §919(3) — When new trial will be granted because of counsel's argument stated.

It is only when prosecuting counsel goes beyond the evidence in the case and makes charges against defendant which are not a reasonable and just inference from the evidence that the court will grant a new trial if the trial judge does not stop counsel and instruct the jury to disregard what he said.

Walker and Stacy, JJ., dissenting.

Appeal from Superior Court, Brunswick County; Kerr, Judge.

Thomas K. Meares was convicted of seduction, and he appeals. No error.

John D. Bellamy & Sons, of Wilmington, and C. Ed Taylor and Lorenzo Medlin, both of Southport, for appellant.

J. S. Neauming, Atty. Gen., and Frank Nash, Asst. Atty. Gen., for the State.

OLARK, C. J. This appeal presents, we think, but two exceptions that require consideration.

The court, after instructing the jury fully and correctly as to the nature of the offense with which the defendant was charged and explaining to the jury the bill of indictment and instructing them as to the contentions of both the state and the defendant, and that before the defendant could be convicted the state must prove beyond a reasonable doubt that (1) the prosecuting witness was seduced by the defendant, and (2) that at the time of her seduction she was then and before that time had been an innocent and virtuous woman, added "that the state must also prove beyond a reasonable doubt that the seduction by the defendant was under a promise of marriage, either expressed or implied by the acts and conduct of the defendant," and said further, "and if the state had failed to satisfy the jury beyond a reasonable doubt of either of these essential facts then the jury should acquit the defendant."

The court also told the jury that they could not convict the defendant upon the unsupported testimony of the prosecutrix, and further charged the jury:

"And so, gentlemen of the jury, are you satisfied from the evidence that the defendant seduced the prosecutrix, and at the time she was an innocent and virtuous woman, and that the seduction was induced by a promise upon the part of the defendant to marry her, either expressed to her or implied by his acts and his relationship to her? These facts, gentlemen of the jury, are to be determined by you from the evidence, and if you are so satisfied then you should find him guilty. If you are not so satisfied, gentlemen of the jury, then you should return the verdict of not guilty. If the prosecuting witness willingly surrendered her chastity, prompted by her own lustful passion, or by any other motive than that produced by a promise

of marriage, then the court charges you that the defendant would not be guilty, and you should acquit him."

The court further charged the jury:

"The burden of proof is upon the state of North Carolina to satisfy you beyond a reasonable doubt of the guilt of the defendant, and it must satisfy you of the criminal act, and it must satisfy you beyond a reasonable doubt that the prosecuting witness, Etta Beck, was seduced by the defendant, that at the time of her seduction she was an innocent and virtuous woman, and that the seduction was made under a promise of marriage, and, unless the state has so satisfied you, you should return a verdict of not guilty. If the state has so satisfied you beyond a reasonable doubt of the three essential elements that I have explained to you that constitutes the crime, then you should return a verdict of guilty."

[1] The jury found that there was no reasonable doubt that the defendant was guilty. The charge was very full and complete and carefully expressed. The defendant excepts to the paragraphs above set out in quotation, because the court charged that the promise must be either "expressed to her or implied by his acts and his relationship to her." But it will be seen by reading all the charge bearing upon that point that the court throughout instructed the jury that they could not convict unless they were satisfied beyond a doubt of the three essential matters, (1) that the defendant seduced Etta Beck, (2) that she was and had been an innocent and virtuous woman, and that (3) the seduction was procured upon a promise by the defendant to marry her, but that, "if the prosecuting witness willingly surrendered her chastity prompted by her own lustful passion or for any other motive than that produced by promise of marriage, then the court charges you that the defendant would not be guilty and you should acquit him."

[2] The evidence on the part of the state, if believed by the jury, was amply sufficient to satisfy them beyond a reasonable doubt that the seduction was procured by such promise of marriage. The prosecuting witness testified unequivocally to the promise of marriage and that it was the sole inducement which procured her seduction; that he had been going with her since she was 16 years old and that they were engaged then; that in 1918 he joined the navy, and while in service of the government she received letters from him every week; that on his return he came to see her and renewed his promise of marriage, and that she told her mother that they were engaged, and her mother and sister both testified that the defendant told them that he was engaged to marry the prosecutrix. The court properly charged that they could not convict the defendant unless they believed the corroborating evidence.

The prosecuting witness also testified that, when she discovered that she was to become a mother, she told the defendant, who said that it would be all right; that he would marry her the next week; this promise he put off from time to time, and finally left in October and went to Mullins, S. C., but wrote her that he would meet her in the city of Wilmington at a time named, but did not do so; that while there he wrote and asked her to destroy all his letters that she had received from him. It was also in evidence that while in Mullins he wrote to a witness in Wilmington telling him to inform the prosecutrix that he was in Galveston, Tex., and not to let her know where he was. The evidence was very full and complete, and its credibility was for the jury.

It will be seen that the court instructed the jury fully and completely that unless they were satisfied beyond a reasonable doubt that the sole inducement to the seduction was the promise of marriage and "induced by no other motive" to acquit. The words "promise expressed or implied by the acts and conduct of the defendant," which is the sole ground of this exception, would be harmless, as there was evidence, corroborated by the mother and sister, of the promise of marriage, but, if it were otherwise, the language of the judge, taken with the repeated instruction that they must be satisfied beyond a reasonable doubt that the seduction was procured "by the inducement of a promise of marriage and no other motive," could have no other meaning than that there was an expressed promise or such acts and conduct on the part of the defendant that was unequivocal and would satisfy the jury beyond a reasonable doubt that such acts and conduct were the full equivalent of an express promise, and not a mere inference which the prosecuting witness might draw. "Acts speak louder than words," and the conduct of the defendant which might amount to an implied promise must have been such under the charge of the judge that it would convince the jury beyond a reasonable doubt that such promise was the sole inducement which procured the seduction. The jury were not misled by the charge of the judge, which was explicit that there must have been a "promise," and that, whether expressed or implied by his acts, such promise was the sole inducement which caused the seduction.

In *State v. Ring*, 142 N. C. 599, 55 S. E. 195, 115 Am. St. Rep. 759, it was said by Walker, J.:

"It is not necessary to a conviction under this law that the state should show that the defendant directly and expressly promised the prosecutrix to marry her if she would submit to his embraces. It is quite sufficient if the jury from the evidence can fairly infer that the seduction was accomplished by reason of the promise, giving to the defendant the benefit of any reasonable doubt."

In *State v. Raynor*, 145 N. C. 475, 59 S. E. 345, it is said, quoting *State v. Ring*, supra:

"Such conduct is the legal equivalent of an express promise to marry if she would submit to his lecherous solicitations, provided the jury found, as they did, that it had the effect of alluring her from the path of virtue."

In *State v. Maloney*, 154 N. C. 203, 69 S. E. 786, it is again said by Walker, J.:

"We said in *State v. Ring*, supra, that it is sufficient if the jury can fairly infer from the evidence that the seduction was accomplished by reason of the promise of marriage, giving to the defendant the benefit of any reasonable doubt, and that no set form of words is necessary to show the causal relation between the promise and the act of sexual intercourse."

In *State v. Fulcher*, 176 N. C. 727, 97 S. E. 8, it is said:

"As to the seduction by reason of the promise, the defendant admitted the engagement to other witnesses, and his assiduous attentions to the girl at the time when she alleged they committed the act, with other circumstances already related, tended to support her testimony that he had promised to marry her, and she was thereby persuaded, after hesitation, to yield to his wishes. The woman could not easily be supported in any other way, for the man is not apt to admit his own guilt, though there are witnesses of it. *State v. Pace*, supra; *State v. Whitley*, 141 N. C. 823; *State v. Kincaid*, 142 N. C. 657; *State v. Moody*, 172 N. C. 967. It is said in *Underhill on Cr. Evidence*, § 388: 'The conduct and relations of the parties after, as well as before, the date of the alleged seduction may be shown, such evidence being relevant to prove that consent was obtained by promise and inducements, and of what they consisted.' This is cited with approval in *State v. Moody*, 172 N. C. 971."

In *State v. Cooke*, 176 N. C. 735, 97 S. E. 172, it was said:

"There was unqualified evidence of the promise of marriage, though in *State v. Ring*, 142 N. C. 596, it was held that it was sufficient if this could be reasonably inferred from the evidence; there was evidence of the good character of the girl, which was held sufficient supporting testimony in *State v. Horton*, 100 N. C. 448, and *State v. Maloney*, 154 N. C. 202; there was evidence that she told her mother and father of the engagement and the conduct of the defendant, which was held sufficient as supporting testimony in *State v. Moody*, 172 N. C. 967, and numerous cases there cited by Walker, J., from this and other states. The testimony of the mother that the daughter told her of her engagement and of the conduct of the defendant was also held sufficient in *State v. Whitley*, 141 N. C. 823, and *State v. Kincaid*, 142 N. C. 823."

In 24 R. O. L. p. 746, the law is thus summed up as to the promise of marriage:

"In many states, though not in all, seduction is punishable as a crime only when accomplished under a promise of marriage. When such promise is a necessary element of the crime,

it need not be shown that the defendant directly and expressly promised the prosecutrix to marry her if she would submit to his embraces, and it is sufficient if the jury, under the evidence, can fairly infer that the seduction was accomplished by reason of the promise, giving to the defendant the benefit of any reasonable doubt. But it must appear that the prosecutrix yielded her virtue in consequence of such promise, and not to gratify her curiosity or lustful passion."

The learned judge charged exactly in accord with the law as stated in the above extract and in our own cases above quoted.

One of the counsel for the prosecution in closing his speech to the jury said:

"The time has come when the decent people in North Carolina should stand up and defend the virtue and integrity of the fireside and home against the vicious assaults of human vultures and wolves."

He was interrupted by one of the counsel for the defendant, who asked the court to order the counsel to desist. The court refused to stop counsel in his argument, who then said:

"Regardless of what the counsel says, the Supreme Court has said, I propose to defend the womanhood of Brunswick county and the virtue of the prosecutrix in this case."

The court remarked that the counsel for the state was within his rights and the defendant excepted.

[3] We cannot see that the defendant was in any wise prejudiced by the statement of counsel for the prosecution. He was endeavoring to convince the jury that the defendant was guilty of the crime charged. In so arguing upon the evidence he was strictly within his rights, and in his generalization that those who committed such offenses were "human vultures and wolves" he certainly was not doing any prejudice to the defendant that would compare with his argument that upon the facts the jury should be satisfied beyond a reasonable doubt that the defendant had committed that offense. It was to decide that question that the jury had been impaneled, and that this trial was had.

[4] It is only when counsel goes beyond the evidence in the case, and makes charges against the defendant which are not a reasonable and just inference from the evidence, that the court will grant a new trial if the presiding judge does not stop counsel and instruct the jury to disregard what he said. *State v. Surles*, 117 N. C. 724, 23 S. E. 324.

The prosecution could and did claim that this case was an effort on the part of the decent people of the state to stand up and defend the virtue and integrity of the fireside and the counsel were arguing that upon the evidence the defendant had been guilty of that offense. This is what the trial was to determine and counsel had the right to argue

that the state had done so, according to the evidence. It was not error, therefore, for the learned judge to hold that the counsel was within his rights in stating that this offense was a most heinous one, and that the public was interested in its being punished. This was a generalization, indeed a truism, to which every one must agree. The statute makes it a felony. This court has said:

"There is no crime more despicable than this. It is committed in secret, by lust and lying, by deception and the stronger taking advantage of the weaker." *State v. Cooke*, 176 N. C. 735, 97 S. E. 171.

So far from the remark being prejudicial, it put the jury on guard as to the importance of the offense and was the statement of a legal and moral truth.

Upon consideration of all the exceptions we find no error.

WALKER and STACY, JJ., dissent.

(182 N. C. 225)

BRADFORD v. BANK OF WARSAW. (No. 118.)

(Supreme Court of North Carolina. Oct. 26, 1921.)

1. Tenancy in common \S 15(4)—Seven years' possession under conveyance of entire interest from tenant in common insufficient as against cotenants or successor in interest.

Seven years' possession under conveyance of entire interest by a tenant in common held not sufficient to give possessor title to entire interest by adverse possession as against cotenants or their successor in interest under registered deed, 20 years' adverse possession being necessary in such case in view of C. S. § 480.

2. Tenancy in common \S 15(5)—Registered deeds of partition held not to give color of title as between persons claiming under the same source.

In partition action in which plaintiff and defendant claimed under a common source of title, partition deeds between heirs of common grantor held not to make defendant's possession under color of title, so as to acquire title by 7 years' adverse possession, where not registered until the trial.

3. Appeal and error \S 263(1)—Charge not excepted to not considered.

Assignment of error complaining of charge not excepted to will not be considered.

4. Tenancy in common \S 15(4)—Possession less than 20 years under registered deed of tenant in common insufficient as against cotenants.

A conveyance by one tenant in common, though duly registered, and continuous, open, notorious, and adverse possession for less than 20 years under such registered deed, would not bar the title of a cotenant.

5. Tenancy in common \Rightarrow 15(4)—20 years' adverse and continuous possession will bar title of other cotenants where there has been an oral partition.

Where there is an oral partition, 20 years' adverse and continuous possession under conveyance of one cotenant will bar title of cotenant.

Hoke, J., dissenting.

Appeal from Superior Court, Wayne County; Lyon, Judge.

Petition by N. E. Bradford against the Bank of Warsaw for sale for partition of lot. From judgment for petitioner, the defendant appeals. No error.

Stevens, Beasley & Stevens, of Warsaw, and Kenneth C. Royall, of Goldsboro, for appellant.

D. H. Bland, of Goldsboro, for appellee.

CLARK, C. J. The plaintiff and defendant claim under a common source of title, and the court so charged the jury, to which there was no exception. The defendant admits in its brief that Needham Kennedy was in possession of the land at the time of his death, and mentions his heirs by name. The plaintiff contends that he has shown a better title to the three-fifths interest in the land from this common source. *Mobley v. Griffin*, 104 N. C. 112, 10 S. E. 142. It is not denied that the defendant has a good title through the conveyances from the two daughters of their two-fifths interest in said lot.

The plaintiff put in evidence the deed to Needham Kennedy dated January 12, 1870, and registered in January, 1876, covering the property. It was in evidence that he died about 1905, leaving five children—Fannie Aldridge, Ida Darden, Bryant Kennedy, William Kennedy, and Levi Kennedy.

The plaintiff also put in evidence deeds to J. J. Ham from William Kennedy, Bryant Kennedy, and Levi Kennedy, each conveying their undivided interest in said lot, all of them dated July 14, 1916, and registered in Wayne August 24, 1916, and a conveyance from J. J. Ham to plaintiff covering the grantors' rights as conveyed in the three above deeds, dated October 17, and registered October 24, 1917. The plaintiff testified that the deeds covered the lot in question, and that there is no evidence that Needham Kennedy left a will nor that his widow is living.

The defendant offered in evidence a deed from Fannie Aldridge and husband to her sister Ida Darden, dated March 12, 1910, registered March 22, 1912, and also a deed from William Kennedy to Ida Darden January 24, 1910, registered April 12, 1921; and a mortgage March 21, 1910, from Ida Darden to Matthew Aldridge March 21, 1910, and registered the same day, and a deed dated

May 10, 1912, from M. W. Aldridge, mortgagee, to A. J. Brown, registered June 11, 1912, and a deed dated March 27, 1915, from Daisy Brown and J. G. Brown and wife dated March 27, 1915, and registered May 1, 1916, all purporting to convey the entire interest. Said J. G. Brown and Daisy Brown were the only children of A. J. Brown, who died in 1913. Daisy Brown testified that the defendant bank of Warsaw had a mortgage on this property, and she and her brother made a deed to the bank in settlement of their father's debt.

The court charged the jury that it was agreed and admitted that both parties, the plaintiff and defendant derived their title from Needham Kennedy, who owned the land. The court also charged the jury in part:

"There has been something said about a parol division of the land between the five children of Needham Kennedy. There has been no evidence in the opinion of the court offered to show that there has been a legal division of the land, and the partition deeds that have been offered were only registered here this week, but the deed from Ham to the plaintiff was registered soon after its execution. You will remember the date of the deed and the date of its registration. It is the first deed that goes on record that covers the title."

The defendant also set up a further defense that the plaintiff bought in the title of the three heirs under whom he claims while acting as agent for the bank in attempting to sell the land, and that, discovering what he supposed to be a defect in the title, he took a conveyance of the interests of the three heirs under whom he now claims. On this point the court charged the jury:

"If you find from the evidence that the plaintiff here bought this land from Ham, and that Ham bought it from William, Bryant, and Levi, and that at the time the plaintiff took his deed from Ham he was not the agent of the defendant bank of Warsaw, and was not acting for them—that they had repudiated the contract of purchase when the deed was made to him, and if you shall find that the deeds were made to Ham by these three parties and their wives, and registered at the time the evidence tends to show that they were registered, the court charges you that the plaintiff would be entitled to recover whatever interest in this land these three parties—William, Bryant, and Levi—had, and the court charges you that, there being only five children, they own three-fifths of the land. The court charges you that, if he was the agent of the bank of Warsaw for getting the title, then the title would go to the bank of Warsaw, but if you find that he was not its agent at the time you will answer the issue two-fifths or three-fifths, whatever you find it to be."

To both of the above instructions the defendant excepted. There was voluminous evidence as to the alleged agency on both

sides, and the plaintiff testified to the rupture of the agency and the severance of a connection between them prior to the time that Ham acquired the title under which he claims.

The defendant also excepted that the court erred in refusing to charge the jury as follows:

"If you find from the evidence that during the year 1910 Ida Darden received a deed to the premises in fee simple from Matthew Aldridge, and that the same was recorded in March, 1912; and if you still further believe from the evidence that the said Ida Darden executed a mortgage on the premises to Matthew Aldridge, and that the said mortgage was duly recorded in March, 1910; and that in May, 1912, the said Aldridge foreclosed and sold said property to A. J. Brown by deed duly recorded in June, 1912; and that in March, 1915, his heirs conveyed said premises to the bank of Warsaw by deed recorded in May, 1916; and if you further believe that the said Ida Darden, the said A. J. Brown, and said J. G. Brown and Daisy Brown, and the said bank of Warsaw possessed the said property, either themselves, or by their agents, under said deeds and conveyances for a period of more than 7 years before the commencement of this action, and that the said possession was open, notorious, continuous, adverse, and under claim or right of color of title—then it would be your duty to answer the issue, 'No.'"

[1] This prayer for instruction was properly refused. The defendant claims under a mortgage recorded in March, 1910, and a deed on foreclosure thereof to A. J. Brown recorded in June, 1912, and under the deed to the defendant recorded in May, 1916. These were at most merely color of title, and there was not 7 years' possession thereunder prior to the conveyance registered in 1916 of the true title under which the plaintiff claims the three-fifths interest. It has been held in all our cases, from *Cloud v. Webb*, 14 N. C. 317, down to *Gill v. Porter*, 176 N. C. 451, 97 S. E. 381, that 20 years' adverse possession is required to vest the title between tenants in common. See cases collected under O. S. § 430. And the same is true where one tenant in common attempts to convey the whole estate. *Alexander v. Cedar Works*, 177 N. C. 137, 98 S. E. 312.

[2] The defendant put in evidence certain deeds of partition which were not registered until the trial. As to these deeds it is sufficient to quote from *Buchanan v. Hadden*, 169 N. C. 224, 85 S. E. 417.

"The defendants did not contend that they had been in adverse possession long enough to ripen their title without color, and as the deed under which they claimed title was not registered, and as both parties derived title from the same source, there was no color of title. *Janney v. Robbins*, 141 N. C. 406; *Gore v. McPherson*, 161 N. C. 638; *King v. MacRackan*, 168 N. C. 621."

The headnote to that case sums up the proposition correctly thus:

"An unregistered deed is not color of title when the parties to an action for the recovery of land are claiming under the same source."

The only request to charge was, as above set out, that the defendant, claiming title under a possession beginning with the mortgage in 1910 by one tenant in common for 7 years, had acquired title to the entire tract, which was refused.

[3] The defendant made no exception to the charge that there was "no evidence offered to show that there has been a legal division of the land," and hence the assignment of error on that ground, if there were anything in it, is not before us. The entire defense was stated in the refused prayer except the issue as to the plaintiff being estopped by his alleged agency from the defendant "to cure its defect in title," which the jury negatived.

The defendant's sole claim of title is a conveyance by one of the daughters of her "interest" for \$75 to her sister in 1910, and a later mortgage by the other daughter alleged to cover the entire tract (though the deed was not set out) and an alleged possession thereunder for 7 years under a conveyance to the purchaser under that mortgage, and under another mortgage by said purchaser to the defendant bank, and the release by the mortgagor to said bank, and collection of rents thereunder as a substitute for actual possession. This was certainly not good under our uniform decisions requiring not less than 20 years' possession under a registered deed from one tenant in common (or his grantee) as against the conveyance of the title by the other three tenants in common of their three-fifths to the plaintiff registered in 1916.

The tract in question is a lot in "Negro Town," a suburb of Goldsboro 42 feet by 210 feet, which was hardly capable of actual partition, and no adverse possession against the other three tenants in common (who were residing in another state) is shown by residence thereon of one tenant in common in 1910 and by a mortgage from her and payment of rent after foreclosure to the defendant bank.

[4] A conveyance by one tenant in common, though duly registered, and continuous, open, notorious, and adverse possession for less than 20 years under such registered deed, would not bar the title of the other tenants. Certainly, therefore, the alleged oral conveyance by an oral partition (which the judge charged was not shown and the defendant did not except) and possession beginning with a mortgage by one tenant, even though it might cover the whole tract, for 7 years cannot bar the other tenants and the plaintiff claiming under registered deed from them.

It would be an anomaly indeed if an alleged oral partition and the residence by one tenant in common on said lot and a chain of

mortgages and the payment of rent to the defendant under a possession for 7 years—not even shown to be adverse—should give title to the defendant when nothing less than 20 years' adverse possession would confer title, even under a registered deed, as against the other tenants and their grantee holding under a duly registered conveyance of their interest.

[5] Where there is an oral partition 20 years' possession, adverse and continuous, will bar Rhea v. Craig, 141 N. C. 602, 54 S. E. 408, 8 Ann. Cas. 400, cited and approved in Collier v. Paper Corporation, 172 N. C. 74, 89 S. E. 1006. This last case affirmed the ruling of Stacey, J., in the court below. In Gilchrist v. Middleton, 107 N. C. 681, 12 S. E. 85, it is said:

"The sole reception of the profits of land by one tenant in common is not an ouster, and will raise no presumption of an ouster against his fellows until he has enjoyed the exclusive profits of such rents for 20 years, and the grantee of a tenant in common, though he may hold possession under a deed purporting to convey the whole, stands, in this respect, precisely in the position of his grantor. Linker v. Benson, 67 N. C. 150; Caldwell v. Neely, 81 N. C. 114; Page v. Branch, 97 N. C. 97."

This has been cited since with approval in many cases, among them Hilton v. Gordon, 177 N. C. 344, 99 S. E. 5.

Upon full consideration of all the exceptions we find no error.

HOKE, J. (dissenting). I am unable to concur in the present disposition made of defendant's appeal. This, a proceeding in partition, is, in effect, an action to recover three-fifths interest in a lot in the city of Goldsboro under deeds from three of the children and heirs at law of Needham Kennedy, deceased, Bryant, Levi, and William, duly proven and registered in Wayne county in July and August, 1916; the two other children and heirs at law being Fannie, wife of Matthew Aldridge, and Ida, wife of John Darden.

The action was instituted and the summons in the cause bears date March 15, 1920, and defendant resists a recovery on allegations with evidence tending to show: That at the time plaintiff acquired his deeds from these three Kennedy children he was in charge and control of the property as agent of the defendant, and the title relied on by him was obtained in fraud of defendant's rights and in breach of plaintiff's trust and duties as agent; second, that defendant and those under whom it claims have been in the open, exclusive, adverse, and continuous possession of said property asserting title thereto for more than seven years next before action brought.

The allegation and issue as to plaintiff's agency and breach of trust was submitted to the jury and resolved against the defendant.

On the position as to title by adverse possession, the court in effect ruled that on the entire evidence a 7 years' adverse possession was insufficient to mature title in defendant, but that 20 years is required for the purpose, to which ruling defendant excepted. There was judgment for plaintiff, and defendant appealed. On defendant's exception as to the statute of limitations, the facts in evidence permit the inference if they do not require the finding:

"That Needham Kennedy died in 1898, owner and in possession of certain property, including that in dispute. He was survived by five children, Ida Darden, Fannie Aldridge, Levi Kennedy, Bryant Kennedy, and William Kennedy, and by a widow (the stepmother of the children) who died in 1908. After the death of the widow the children made arrangements for the division of the property, whereby William and Bryant (who lived in New Jersey) were to receive money, and Ida, Fannie, and Levi were to divide the property, Ida to get the lot now in controversy (designated A) and Fannie and Levi to get other lots (designated B and C respectively).

"Accordingly, on June 17, 1909, Bryant conveyed A to Ida in fee; on January 24, 1910, William also conveyed A to Ida in fee; and during 1910, Levi conveyed A to Ida in fee; the deeds from Bryant and William were probated and delivered on the dates named, but were not recorded until April 12, 1921. The deed from Levi was lost, and never recorded. The arrangement was completed on March 21, 1910 in the office of Col. A. C. Davis, an attorney and notary, by the exchange of the following deeds for the following property: From Fannie Aldridge and husband, Matthew Aldridge, to Ida Darden for A; from Fannie and Matthew Aldridge to Levi Kennedy for C; and from Levi Kennedy and wife and Ida Darden and husband to Matthew Aldridge for B. The deeds to B and C were immediately probated. All three parties had gone into possession of their respective lots after the death of the widow; and they remained in possession. Levi later sold his lot.

"The deed for A from Fannie and husband to Ida was probated March 22, 1912. To secure a sum due him, Ida gave Matthew Aldridge a mortgage on A dated and recorded March 21, 1910. Ida received the rents from A from her stepmother's death until May 20, 1912. On that day Matthew sold the property under mortgage to Capt. A. J. Brown, the deed being recorded June 11, 1912.

"Capt. Brown, and after his death his heirs, received the rents of A from that date until March 27, 1915. On that day the Brown heirs conveyed the lot to Bank of Warsaw, the defendant, by deed recorded May 1, 1916. The bank has received the rent from the property from then until the present."

From these facts it appears:

That under a deed from Fannie Aldridge, made pursuant to the parol division of the estate, there has been continuous possession of the land in controversy, open, adverse, and in the assertion of ownership in Ida Darden and her grantees, including defend-

ant, for eight years before this suit was entered.

Second, that Ida Darden, while in undisputed and exclusive possession, asserting title, executed a mortgage to Matthew Aldridge for the land in dispute, and the grantees of Aldridge possessed the land under the same for more than 7 years before suit was entered.

Third, that Matthew Aldridge, said grantee, pursuant to powers in the deed, conveyed the land in dispute to A. J. Brown, and Brown and his descendants and grantees, including defendant, possessed the same in assertion of ownership for more than 7 years before suit entered.

Fourth, it appears further that this occupation and possession in assertion of title by Ida Darden and her grantees under deeds purporting to convey the entire property in dispute was had in pursuance of a parol division of the real and personal property of Needham Kennedy in which the three grantors of plaintiff, children of Needham, took part, and that these three grantors as early as 1910 had executed to Ida Darden deeds for the land in controversy, two of them not being registered, however, until 1921, and the other lost, and it is under these and a similar deed from Fannie Aldridge, the other daughter, and her grantees, that the possession and occupation of the defendants has been continually maintained.

It is very generally held that in case of tenants in common an occupation in assertion of ownership and sole perception of the rents and profits will not of itself mature a title in the occupant as against his cotenants for any period short of 20 years. It is said that after that period of time an ouster of the cotenants will be presumed, but no shorter time will suffice. *Adderholt v. Lowman*, 179 N. C. 547, 103 S. E. 1; *Dobbins v. Dobbins*, 141 N. C. 210, 53 S. E. 870, 10 L. R. A. (N. S.) 185, 115 Am. St. Rep. 682. And in this jurisdiction it has been insistently held that the position is not affected because the occupation of one of the tenants is under a deed purporting to convey the entire property, whether that deed is from one of the other cotenants or a stranger. *Boggan v. Somers*, 152 N. C. 390, 67 S. E. 965; *Clary v. Hatton*, 152 N. C. 107, 67 S. E. 258; *Caldwell v. Neely*, 81 N. C. 114; *Covington v. Stewart*, 77 N. C. 148; *Cloud v. Webb*, 14 N. C. 317.

As pointed out in *Roper Lumber Co. v. Richmond Cedar Works*, 165 N. C. 83, 80 S. E. 982, this position requiring 20 years' occupation by one tenant in common under a deed conveying the entire interest has been carried very much further in this state than elsewhere, our decisions holding that the title of a cotenant will not be destroyed by occupation for any period short of 20 years, though the claimant may have known

that the occupant was asserting sole ownership under a deed purporting to convey the entire property. But the ruling is fully established here, and we have no disposition to question it.

In all of these decisions, however, the tenant in common, occupant of the property, was endeavoring to assert title against a cotenant who had in no way acquiesced in or recognized the occupant's claim of sole ownership, and none of them so far as examined would uphold the position on the facts presented in this record, where the claimants have joined in a division of the property awarding the sole ownership to the tenant in possession, and assuredly so where they have made deeds to such in recognition of the division as made.

The ruling involved in these North Carolina decisions, as shown, rests upon the position that an ouster will not be presumed against a tenant in common by mere occupation for any period short of 20 years, though such occupation is under color of title and to the knowledge of the claimant, but all the authorities here and elsewhere are to the effect that there may be an actual ouster of one tenant in common by another. *Mott v. Land Co.*, 146 N. C. 525, 526, 60 S. E. 423, citing *Covington v. Stewart*, 77 N. C. 148; *Tyler on Ejectment*, p. 882. The test in such cases is whether the occupation of the tenant in possession asserting title has become hostile to cotenant, and both the reason of the thing and the authorities appertaining to the subject are to the effect that a conveyance of a grantor to a grantee and occupation in assertion of ownership under it will constitute a hostile holding. *Kirkman v. Holland*, 139 N. C. 185-189, 51 S. E. 856; *Newton Academy v. Bank of Asheville*, 101 N. C. 483, 8 S. E. 174. And it has been directly held that possession with assertion of ownership pursuant to a parol partition of land will amount to a disseizin, and the occupation will be considered as hostile to the title of the others taking part therein. *Collier v. Paper Corporation*, 172 N. C. 74, 89 S. E. 1006; *Boston & Worcester R. R. v. Sparhawk et al.*, 46 Mass. (5 Metc.) 469; *Russell v. Tennant*, 63 W. Va. 623, 60 S. E. 609, 129 Am. St. Rep. 1024; *Justice et al. v. Lawson*, 46 W. Va. 163, 33 S. E. 102.

True, in the North Carolina case referred to, the possession was for 20 years and more, but that was only relied on in view of the ruling that a parol partition acquiesced in and acted on for 20 years becomes valid, and it was fully recognized that it created at the inception a possession hostile to the parties concerned and all others.

The court below seems to have been influenced by the consideration that the deeds pertinent to the question were not registered till after those of plaintiff, and that the parol partition was invalid, and this is referred to in the principal opinion as a reason for the

decision. But neither the deeds nor the partition are relied on or referred to as controlling the title, but the question here is, What effect should they be allowed on the nature of defendant's occupation—did they show that the possession of Ida Darden and those claiming under her was hostile to the plaintiff who has bought from the cotenants, and all of whom took part in the parol partition and have made deeds in recognition of the title of their sister under whose deed defendants claim and have had possession, asserting title for more than 7 years?

We are cited by counsel for appellees to *Janney v. Robbins*, 141 N. C. 406, 53 S. E. 863, and other cases to the effect that unregistered deed is not to be considered color of title as against a claimant under a registered deed from same source—under the restricted facts there appearing the cases so hold; but, as we have endeavored to show, defendant here is not relying on these unregistered deeds either for title or for color. Defendant has color both under the deed from Matthew Aldridge and wife and from the mortgagee deed—under which it claims, and the unregistered deed of the three tenants as stated and referred to, and relied on only as they may effect the character of defendant's possession, and as showing that his occupation and claim of ownership was of a hostile character—assured and acquiesced in by plaintiff grantors and so amounting to an ouster.

In my opinion, if the facts referred to and presented in the record are accepted by the jury, the defendant should be declared the sole owner, and for the error in refusing to submit this view of the case, there should be a new trial of the issue.

New trial.

WALKER, J., concurred.

(182 N. C. 266)

TAYLOR et al. v. MEADOWS et al.
(No. 331.)

(Supreme Court of North Carolina. Oct. 26, 1921.)

Trial 244(5) — Instruction giving undue credit to testimony erroneous.

In boundary case, an instruction that, if from the calls in the deeds, the survey, and the surveyor's testimony explanatory thereof the jury was satisfied as to the proper location of the boundaries, it should render its verdict accordingly, without regard to oral testimony of other witnesses, was erroneous, as giving undue credit to the surveyor's testimony.

Appeal from Superior Court, Granville County; Horton, Judge.

Action by J. F. Meadows and others against R. P. Taylor and others in ejectment. The locus in quo is a small strip of land 30 feet wide by 161½ feet long, situated on the north side of Williamsboro street in the city of Oxford. From a verdict and judgment in favor

of plaintiffs, the defendants appealed. New trial ordered.

Hicks & Stein, Parham & Lassiter, and Royster & Royster, all of Oxford, and Hicks & Son, of Henderson, for appellants.

A. W. Graham & Son, of Oxford, A. L. Brooks, of Greensboro, and James A. Taylor and D. G. Brummitt, both of Oxford, for appellees.

STACY, J. The case at bar has been tried three times in the superior court and this is the third appeal here. Former opinions reported in 169 N. C. 124, 85 S. E. 1, and 175 N. C. 373, 95 S. E. 662. As desirable as an ending of this litigation would seem, we are unable to sustain the following portion of his honor's charge, which was given at the request of the plaintiffs, and to which the defendants have specifically excepted:

"That if from the calls in the deeds and the map of survey offered in evidence and the testimony of the surveyor explaining such survey, you are satisfied as to the proper location of the several lines bounding the land in dispute, then it would be your duty to act upon the same and render your verdict accordingly, without regard to the oral testimony offered by either side tending to show the proper location of the line or lines."

This instruction was erroneous because its effect was to give undue credit to the testimony of the surveyor. The plaintiffs were not entitled to have the court single out by name any one witness from among all the others who had testified to the same matter, and tell them that if they were satisfied from his evidence, taken in connection with the deeds and the map, they should render their verdict accordingly. This was in direct conflict with a number of our decisions. *Cogdell v. Railroad*, 129 N. C. 398, 40 S. E. 202; *Jackson v. Com'rs*, 76 N. C. 282; *Anderson v. Steamboat Co.*, 64 N. C. 399. In *Weisenfeld v. McLean*, 96 N. C. 248, 2 S. E. 56, Davis, J., speaking for the court, said:

"It would be error to single out the testimony of one witness, when there are others testifying to the same matters, and charge the jury that if they believed that witness they must find in accordance with his testimony."

And this for the very good reason, among others, that though the witness may speak truthfully, yet his evidence is given in the light of other testimony which may tend to modify and explain it, and it would be improper to take it from its own setting. *Willey v. Gatling*, 70 N. C. 410.

There are other exceptions appearing on the record, worthy of consideration, but we apprehend they will not arise on another hearing.

For the error, as indicated, the cause must be tried again; and it is so ordered.

New trial.

(182 N. C. 793)

STATE v. FALKNER. (No. 90.)

(Supreme Court of North Carolina. Oct. 19, 1921.)

1. Husband and wife \S 303—Statute against abandonment to be strictly construed, and not extended by implication.

C. S. \S 4447, punishing willful abandonment of wife or children, being a penal statute, must be strictly construed, and the court cannot extend its terms by implication to include cases not clearly within its meaning.

2. Husband and wife \S 313—One accused of abandonment presumed innocent.

One accused of abandonment of wife under C. S. \S 4447, enters on trial with the common-law presumption of innocence in his favor, and, when the state has shown abandonment, the jury may infer it was intentional and without just cause.

3. Husband and wife \S 313—Burden of proving adultery of wife justifying abandonment not on defendant.

In prosecution under C. S. \S 4447, for abandonment of wife, defendant is not required to offer any evidence, and failure to do so is not to be taken against him; hence on the question of his wife's alleged infidelity the burden of proving the issue, as distinguished from the duty of going forward with the evidence, is not shifted to the defendant, but the burden is still with the state.

4. Criminal law \S 823(9)—Instructions on burden of proof as to wife abandonment and as to justification therefor held misleading.

In prosecution under C. S. \S 4447, for wife abandonment, instruction that, if abandonment was caused by infidelity of the wife or any just cause, the jury should acquit, and that "the burden being on defendant to satisfy you of the adultery of the wife not beyond reasonable doubt nor by the great weight of the evidence, but simply to your satisfaction," etc., was misleading and erroneous, though the court instructed that the burden was on the state to satisfy them from all the evidence beyond a reasonable doubt that defendant willfully abandoned his wife without providing adequate support.

5. Criminal law \S 1172(4, 5)—Conflicting instructions ground for reversal.

Where there are conflicting instructions with respect to a material matter, new trial must be granted, as the jury are not supposed to know which one of the two states the law correctly, and the court on review cannot say that they did not follow the erroneous instruction.

Clark, C. J., dissenting.

Appeal from Superior Court, Vance County; Cranmer, Judge.

David Falkner was convicted of willfully abandoning his wife without providing for her support, and appeals. New trial.

The prosecutrix and defendant were married June 2, 1918. The defendant enlisted in the navy three days later, and while stationed in Norfolk, Va., his wife spent some time with him there. He was discharged in January, 1919, and returned to his home in Henderson, where he lived with his wife until July, 1920. Defendant testified that he left the prosecutrix on account of her infidelity and because she had infected him with a venereal disease. There are no living children of the marriage. Upon the question of the wife's adultery the evidence was conflicting.

The defendant's principal exception is directed to the following portion of his honor's charge, dealing with the burden of proof:

"If you shall find the defendant abandoned his wife without providing adequate support for her, and that such abandonment and failure were provoked and caused by the infidelity of the wife of the defendant, or for any just cause he had abandoned his wife, then in either case you would acquit the defendant.

"The burden being upon the defendant to satisfy you of the adultery of the wife, not beyond a reasonable doubt, nor by the greater weight of the evidence, but simply to your satisfaction, you will consider and pass upon all the evidence in the case in making up your verdict, and determine what weight you will give to it."

The court subsequently charged the jury as stated in the record:

"That the burden was on the state to satisfy them from all the evidence beyond a reasonable doubt that the defendant willfully abandoned his wife without providing adequate support for her, and that, if they were so satisfied, they would find defendant guilty, but, if they were not so satisfied, they would find the defendant not guilty."

There was a verdict of guilty; and from a judgment of 18 months on the roads pronounced thereon, the defendant appealed.

J. H. Bridgers, of Henderson, for appellant.

James S. Manning, Atty. Gen., and Frank Nash, Asst. Atty. Gen., for the State.

STACY, J. Section 4447 of the Consolidated Statutes, under which the defendant is indicted, provides as follows:

"If any husband shall willfully abandon his wife without providing adequate support for such wife, and the children which he may have begotten upon her, he shall be guilty of a misdemeanor."

[1, 2] It will be observed that a willful abandonment is the conduct which is condemned by this enactment of the Legislature. Being a penal statute, we must apply the rule of strict construction, and we are

not at liberty to extent its terms, by implication, to include cases not clearly within its meaning. *State v. Colonial Club*, 154 N. C. 177, 69 S. E. 771, 31 L. R. A. (N. S.) 387, Ann. Cas. 1912A, 1079; *State v. Railroad*, 122 N. C. 1052, 30 S. E. 133, 41 L. R. A. 248. Willfulness is an essential element of the crime, and this must be found by the jury. The issue, upon an indictment for a violation of the present law, is the alleged guilt of the defendant. He enters on the trial with the common-law presumption of innocence in his favor. When the state has shown an abandonment and the defendant's failure to provide adequate support, the jury may infer from these facts, together with the attendant circumstances, and they would be warranted in finding, if they are so satisfied beyond a reasonable doubt, that it had been done intentionally, without just cause or legal excuse—i. e., willfully. *State v. Taylor*, 175 N. C. 833, 96 S. E. 22.

The position just stated has been approved by us in a number of carefully considered decisions.

"The abandonment must be willful; that is, without just cause or excuse; unjustifiable and wrongful." *State v. Smith*, 164 N. C. 475, 79 S. E. 979.

Again, in *State v. Morgan*, 136 N. C. 628, 48 S. E. 670, Mr. Justice Walker, speaking for a unanimous court says:

"If the act may be innocent or not according to the intent with which it is done, or if its criminality depends upon the intent, it is incumbent on the state to show the intent or to show the facts and circumstances from which the intent may be inferred by the jury, and it is necessary that the jury should find the intent as a fact before the defendant charged with the commission of the act can be adjudged guilty of a crime"—citing *State v. McDonald*, 133 N. C. 680, 45 S. E. 582.

Unless the willfulness of the defendant's conduct is established, the offense is not made out; and this is a question of fact for the jury, under all the evidence, and not for the court. *State v. King*, 86 N. C. 603; *State v. Wolf*, 122 N. C. 1079, 29 S. E. 841; *State v. Martin*, 141 N. C. 832, 53 S. E. 874.

In this connection it may be well to observe that the next section (O. S. § 4448), dealing with what shall be deemed presumptive evidence of a willful abandonment, requires the showing of something more than a mere separation and failure to provide adequate support. These circumstances having been established, "then the fact that such husband neglects applying himself to some honest calling for the support of himself and family, and is found sauntering about, endeavoring to maintain himself by gaming or other undue means, or is a common frequenter of drinking houses, or is a known common drunkard, shall be presumptive evidence that such abandonment and neglect is will-

ful." Thus it would appear that the Legislature selected the words of the statute under which the defendant is indicted with studied care and deliberation and with a full appreciation of their meaning.

[3] The defendant is not required to offer any evidence, and his failure to do so is not to be taken against him. *State v. Smith*, supra. Hence upon the question of his wife's alleged infidelity or unfaithfulness the burden of proving the issue, as distinguished from the duty of going forward with the evidence, is not shifted to the defendant. He may put the question of her chastity in issue, by cross-examination or otherwise, but this does not reverse the position of himself and that of his wife and make him the prosecutor and his wife the defendant. She is not on trial. The burden is still with the state, under all the evidence, to satisfy the jury beyond a reasonable doubt of the defendant's guilt. *State v. Woody*, 47 N. C. 276; *State v. Wilbourne*, 87 N. C. 529; *State v. Hopkins*, 130 N. C. 647, 40 S. E. 973; *State v. Connor*, 142 N. C. 700, 55 S. E. 787; *State v. Leeper*, 146 N. C. 655, 61 S. E. 585; and *State v. A. C. L. R. Co.*, 149 N. C. 470, 62 S. E. 755.

It is sometimes said that the burden of producing evidence rests upon the party best able to sustain it, because of facts and circumstances peculiarly within his knowledge. Thus it was held in *Farrall v. State*, 32 Ala. 557, that, the existence of a license being a fact peculiarly within the knowledge of the party accused, it was incumbent upon him to show the license, even though the nonexistence thereof was the gravamen of the offense charged. To like effect, and for the same reason, are our own decisions. *State v. Morrison*, 14 N. C. 299; *State v. Smith*, 117 N. C. 809, 23 S. E. 449; *State v. Emery*, 98 N. C. 670, 3 S. E. 636; *State v. Glenn*, 118 N. C. 1194, 23 S. E. 1004; *State v. Holmes*, 120 N. C. 576, 26 S. E. 692. But in the instant case the alleged adultery of the defendant's wife is not a fact peculiarly within the defendant's own knowledge. Indeed, if this rule is to be invoked here, and we do not think it is, it might well be said that such is undoubtedly within the knowledge of the prosecutrix. At any rate, we hold that the raising of this question does not shift the burden of the issue to the defendant. *Govan v. Cushing*, 111 N. C. 458, 16 S. E. 619. On the other hand, in a case like the one at bar, where the husband is indicted for a willful abandonment and nonsupport, there is no presumption of law or of fact against the wife's virtue. She not being on trial, the matter is left at large, and it is an open question, just like any other question of fact, to be determined by the jury. Certainly there is no presumption that she has committed adultery, or that she has been unfaithful to her marriage vow.

The position here taken with respect to the burden of the issue, has been approved in a long line of decisions, and is nowhere better stated than by Ruffin, J., in *State v. Wilbourne*, 87 N. C. 529, as follows:

"The general rule most undoubtedly is that the truth of every averment, whether it be affirmative or negative, which is necessary to constitute the offense charged, must be established by the prosecutor. The rule itself is but another form of stating the proposition that every man charged with a criminal violation of the law is presumed to be innocent until shown to be guilty, and it is founded, it is said, upon principles of natural justice; and so forcibly has it commended itself by its wisdom and humanity to the consideration of this court that it has never felt willing, whatever circumstances of difficulty might attend any given case, to disregard it."

Of course, where an abandonment and nonsupport are both established or admitted, it may be necessary for the defendant to come forward with his evidence and proof, or else run the risk of an adverse verdict. But where there is no opposite presumption, sufficient to overcome the presumption of innocence, the most that can be required of him, under our system of jurisprudence, is explanation, not exculpation. The defendant is not required to show his innocence. The state must establish his guilt beyond a reasonable doubt, and the burden of this ultimate issue never shifts. The laboring oar upon the question of guilt is constantly with the prosecution. *State v. Wilkerson*, 164 N. C. 432, 79 S. E. 888.

In *Shepard v. Tel. Co.*, 143 N. C. 244, 55 S. E. 704, 118 Am. St. Rep. 796, the present Chief Justice, speaking for a unanimous court, states the rule as follows:

"In criminal cases, when a homicide with a deadly weapon is proved or admitted, there is a presumption of law that the killing is murder, and the burden is on the prisoner to prove all matter in mitigation or excuse to the satisfaction of the jury (*State v. Matthews*, 142 N. C. 621); and when a totally independent defense is set up, as insanity, which is really another issue (*State v. Haywood*, 94 N. C. 847), the burden of that issue is on the prisoner. But the burden of the issue as to the guilt of the prisoner, except where the law raises a presumption of law as distinguished from a presumption of fact, remains on the state throughout, and, when evidence is offered to rebut the presumption of fact raised by the evidence, the burden is still on the state to satisfy the jury of the guilt of the prisoner upon the whole evidence. Notably, when the prisoner offers proof of an alibi, for example, which goes to the proof of the act. *State v. Josey*, 64 N. C. 56."

This case has been approved in a number of later decisions. See *Cox v. Railroad*, 149 N. C. 117, 62 S. E. 884, *Winslow v. Hdw. Co.*, 147 N. C. 275, 60 S. E. 1130, and *Shepard's N. C. Citations*.

"The rule as to the burden of proof is important and indispensable in the administration of justice, and constitutes a substantial right of the party upon whose adversary the burden rests. It should therefore be jealously guarded and rigidly enforced by the courts." 22 C. J. 69; *Hughes v. Railroad Co.*, 85 N. J. Law, 212, 89 Atl. 769, L. R. A. 1916A, 927; *Wigmore on Evidence*, § 2483 et seq.

The case of *State v. Schweitzer*, 57 Conn. 532, 18 Atl. 787, 6 L. R. A. 125, while apparently an opposite persuasive authority in support of his honor's charge, must be read in connection with the Connecticut statute which in terms is different from ours. Section 6416, General Statutes of Connecticut, provides:

"Every person who shall unlawfully neglect or refuse to support his wife or children shall, upon conviction, be deemed guilty of a felony and shall be imprisoned not more than one year, unless he shall show to the court before which the trial is had that, owing to physical incapacity or other good cause, he is unable to furnish such support," etc.

It will be noted that the word "unlawfully" is used in the Connecticut statute, while in ours the word "willfully" is employed. An unlawful act is not necessarily willful. *State v. Morgan*, 136 N. C. 628, 48 S. E. 670.

"The word 'willful,' used in a statute creating a criminal offense, means something more than an intention to do a thing. It implies the doing the act purposely and deliberately, indicating a purpose to do it, without authority—careless whether he has the right or not—in violation of law, and it is this which makes the criminal intent, without which one cannot be brought within the meaning of a criminal statute." *State v. Whitener*, 93 N. C. 590.

The term "unlawfully" implies that an act is done or not done, as the law allows or requires; while the term "willfully" implies that the act is done knowingly and of stubborn purpose. *State v. Massey*, 97 N. C. 465, 2 S. E. 445. *Schweitzer's Case* is thus distinguishable from the one at bar, for under the Connecticut statute the state is not required to show a willful neglect in order to make out its case; while with us such is a prerequisite according to the express terms of the statute.

The case of *State v. Hopkins*, 130 N. C. 647, 40 S. E. 973, must be overruled if his honor's charge in the instant case is to be upheld; and this would carry with it a reversal of *State v. Smith*, 164 N. C. 475, 79 S. E. 979, and *State v. Taylor*, 175 N. C. 833, 96 S. E. 22. But it is said that in these cases the court, by "judicial legislation" has ingrafted something into the statute without authority and contrary to the expressed intention of the Legislature. It is even suggested that adultery on a part of the wife is no excuse for the husband's abandonment

and failure to provide for her support. Though we have declared otherwise it is said in criticism that these decisions belong to another day and to another age, and that we should now advance from such a "barbarism." After mature reflection and earnest consideration, we are unwilling to overrule these cases. We think they correctly state the law on the subject of the burden of proof as it obtains in this jurisdiction. The decision in *State v. Hopkins* was rendered nearly 20 years ago, and the numerous Legislatures which have assembled since that time have not seen fit to amend or to make any change in the present statute. That a husband may not be convicted for abandoning an adulterous or unfaithful wife is a position so well fortified by every reasonable consideration and by the force of its own righteousness as to meet with the approval of the common judgment of men. To argue otherwise is but to complain at the standard of human conduct, established in accordance with the eternal fitness of things and in keeping with the everlasting verities. So far as our investigation discloses, no court has ever held to the contrary; and we are confident that our present construction is entirely permissible, and we think entirely correct, under the use of the words in the statute of "willfully abandon."

It may not be amiss to remark that the defendant is not to be released or discharged; he is to be tried again. Furthermore, his wife is not without the civil remedies which are vouchsafed to her by the law. See C. S. § 1667, and cases cited thereunder.

[4, 5] Upon a careful perusal of the record, we think the charge as applied to the defendant was misleading in its effect; and, while the court's general charge in other sections placed the burden of proof upon the state in proper form, yet this specific instruction with respect to the wife's alleged adultery was calculated to mislead, and in all probability did mislead, the jury. *State v. Morgan*, 136 N. C. 628, 48 S. E. 670. It is well settled that, where there are conflicting instructions, with respect to a material matter, a new trial must be granted, as the jury are not supposed to know which one of the two states the law correctly, and we cannot say they did not follow the erroneous instruction. *Edwards v. Railroad*, 132 N. C. 99, 43 S. E. 585; *Williams v. Hard*, 118 N. C. 481, 24 S. E. 217; *Tillett v. Railroad*, 115 N. C. 662, 20 S. E. 480.

The evidence offered by the defendant was in reply to the necessary allegation that his conduct had been willful, but the law does not cast upon him the burden of disproving the criminal intent. This is a fact which the state must establish, not only to the satisfaction of the jury, but beyond a reasonable doubt, before a verdict of guilty can be rendered against him. The instruction of his honor was equivalent to saying that,

upon the question of intent, the burden was on the defendant to satisfy the jury that he had not acted willfully. It is true the instruction related to a specific fact, to wit, the alleged adultery of the wife; but this circumstance, and all the testimony bearing upon it, was competent only on the question of intent. In no other view was the evidence material and relevant.

For the error in the charge, as indicated, in placing too heavy a burden on the defendant, we are of opinion that the cause must be submitted to another jury; and it is so ordered.

New trial.

CLARK, C. J. (dissenting). The defendant is indicted under C. S. § 4447, which provides:

"If any husband shall willfully abandon his wife, without providing adequate support for such wife and children which he may have gotten upon her, he shall be guilty of a misdemeanor."

There is no proviso or exception in the statute.

The defendant testified that he had left his wife and defiantly added that he had not contributed to her support, and does not intend to do so, nor to live with her. His contention is that, though he has abandoned his wife and is not giving her any support—which are the acts which the statute makes a misdemeanor—he cannot be convicted unless his wife shall show beyond a reasonable doubt that he has no excuse for doing so, and that the burden is on her to show beyond a reasonable doubt that she has not committed adultery or done any other act which would justify him in procuring a divorce from her. Such a proposition is not authorized by the statute, and cannot be sustained in reason or by precedent, save in an obiter expression in *State v. Hopkins*, 130 N. C. at page 649, 40 S. E. 973, and some cases based thereon.

If the wife has done anything which will justify releasing the defendant from the marriage, the burden is on him to bring such action and by preponderance of proof to satisfy the jury of the truth of his allegations, and even that will not release him from the obligation under this statute to support his innocent children, for in *State v. Kerby*, 110 N. C. 558, 14 S. E. 856, it is held that—

"The failure by the father to provide for the support of the children is as much a violation of the statute * * * as the failure to provide support for the wife."

And, while a divorce would release him from liability for her support, it would not relieve him of the moral and legal obligation to support his children.

The contention of the defendant that, notwithstanding he is proven or admits (as in

(this case) that he has abandoned his wife and does not support her, she is presumed beyond a reasonable doubt to be guilty of adultery or some other cause that will justify him in such conduct, and that the burden is upon her to show to the contrary beyond a reasonable doubt, if it were well founded, would simply relieve him of the expense and burden of proof in proving her misconduct in an action to sever the marriage tie, and that, if she fails to prove beyond a reasonable doubt that he is not entitled to a divorce, he is discharged from such liability as fully as if there had been a divorce granted. This turns this proceeding practically into an action for divorce, but throws the burden of proof upon the wife.

The whole case therefore turns upon an inadvertent construction placed upon the word "willful" in *State v. Hopkins*, 130 N. C. 649, 40 S. E. 974, which says that willful means "without a cause to justify him in doing so." This certainly cannot be sustained by anything in the statute, and is contrary to every definition of the word in all the dictionaries and is unjust, for it puts upon the woman the burden of disproving everything that the plaintiff is required to prove in bringing an action for divorce. A reference to that case will show that it was, as the judge said, "a remarkable case," but not in the sense that the writer of that opinion intended (which was by a divided court), which was more a criticism of the trial judge than a decision of the case upon the merits as a matter of law. The statement therein that the trial judge had made the case "a trial of the wife for adultery" was the very thing which that opinion requires, for, if followed, it will make every trial for abandonment primarily a trial for divorce, the entire burden being thrown, contrary to law, upon the wife to disprove the charge of any and all conceivable misconduct.

The word "willful" is defined in Webster's International Dictionary as "voluntary; intentional; purposely." In almost the same words is the definition given by the Century, Worcester, Standard, Funk & Wagnall, and all the other dictionaries. It is the simple adjective of the plain Anglo-Saxon word "will," which all men understand, and which is not dependent upon whether an act is excusable or not. It is "willful" if done purposely and intentionally. On reference to 4 Words and Phrases, Second Series, in the multitude of cases defining the word "willful" set out in pages 1293-1310 there is no such definition given to the word "willful" as meaning "without cause to justify him in so doing," as was held in *State v. Hopkins*, as to any case of abandonment, and only three or four cases use it as to other matters, and then only by reason of additional words which do not appear in our abandonment statutes.

With that exception all the cases collected in Words and Phrases supra from all the states define the word "willful" just as it is defined in all dictionaries, as an act done "intentionally," "by design," "with set purpose," etc. They all hold that "willful" means "intentionally, and not accidentally," and in some cases that it means "with deliberation or design or knowingly," and "not negligently"; that it means "purposely."

The obiter expression in *State v. Hopkins* imported into the word "willful" of "being without cause" a meaning that it has never borne in the courts or in the dictionaries, or in common parlance, and is in effect judicial legislation amending the statute to mean what the Legislature did not intend for it to mean, and raises a presumption unknown elsewhere in the decisions of any court in any other state or country, that when a man is charged with willful failure to discharge his duty to support his wife and children which he owes under the laws of God and man, there is a presumption beyond a reasonable doubt that his wife was guilty of adultery or some other grievous offense that would justify him in leaving her, which is equivalent to turning the trial into an action of divorce for adultery, or any other ground, with the burden upon the wife, and not upon the man, and that even in this case, though the defendant has admitted that he had done the act which the statute makes a misdemeanor, the judge must tell the jury that they cannot find the defendant guilty unless the wife has proven beyond a reasonable doubt that she has not committed adultery or any other act that would justify him in leaving her and the children without support.

There are cases in which the statute used other words in addition to the word "willful," or sets up provisos which would withdraw the case from the operation of the statute or make an exception or a defense. In those cases it has been held that the burden of the defense is upon the defendant, but it need only be proven to the satisfaction of the jury, and not beyond a reasonable doubt, and that unless on the whole case the jury is satisfied beyond a reasonable doubt they should acquit.

Those precedents cannot in reason apply to this statute, which prescribes only two things to make the defendant guilty, and that is the willful abandonment of his wife without providing for her adequate support, and in this case both these facts were defiantly admitted by the defendant. There is no proviso nor exception nor defense in this statute.

As long as the marriage relation subsists, the burden is upon the defendant to support his wife. He cannot without procuring a divorce decide in his own behalf, without judge or jury, that he is entitled to a divorce and walk off without making any provision

for the support of his wife and children and then when charged with the acts, which he admits, coolly throw upon his wife the burden of proving beyond a reasonable doubt that if he had sued for a divorce he would have been entitled to it. This is cruel injustice to wife and children, the most defenseless persons who ask justice at the hands of a court. It cannot be supported in reason. It has no foundation in the statute and derives no authority from the definition of the word "willful" in any dictionary or in the courts of any other state than this.

In reference to the offense of abandonment and nonsupport, the law is thus summed up in 21 Cyc. 1614:

"The burden is on the state to prove every element of the offense; while the defendant bears the burden of proving his affirmative defenses. Any evidence which tends to prove or to disprove these matters is therefore admissible. The state must prove its case beyond a reasonable doubt; but an affirmative defense may be established by a preponderance of the evidence."

State v. Schweitzer, 57 Conn. 543, 18 Atl. 789, 6 L. R. A. 128, is a case exactly in point. The court said:

"The defendant is charged with having unlawfully neglected and refused to support his wife. There was evidence tending to prove the marriage, and the refusal to support was not denied. The burden of proof to show the unlawfulness of the neglect was upon the state as fully as to show the neglect itself. Ordinarily the conduct of married women is such that when any husband neglects or refuses to support his wife the law itself presumes such neglect to be unlawful. Having shown the marriage and the neglect, the attorney for the state could safely rest upon that presumption. The unlawfulness was deemed to be true *prima facie*. And when the defendant interposed a defense based upon such misconduct of his wife as made it lawful for him to refuse to support her, it was incumbent upon him to prove such misconduct as he set up, that is, her adultery, and to prove it, as before stated, by a preponderance of evidence."

In the same case the court lays down the universal doctrine as follows:

"All authorities agree that the burden is upon the state to make out its accusation in a criminal case beyond all reasonable doubt. It seems to be agreed with substantially the same unanimity that when a defendant desires to set up a distinct defense, such as is above mentioned, he must bring it to the attention of the court; in other words, he must prove it. A fact controverted before any tribunal can hardly be said to be proved at all unless there is more evidence in its support than there is against it;" that is, the defense must be proven by preponderance of the evidence.

The charge of the court in this case was in accordance with the general principle that is thus clearly laid down.

The court charged as follows:

"There must both be an abandonment of the wife without providing adequate support, and such abandonment and failure to so provide must both be willful, and by willful is meant without just cause or excuse; wrongful, and unjustifiable. In this case, among other evidence the defendant has offered evidence tending to show that the wife was unfaithful, and that she communicated an infectious disease to him and there was evidence in contradiction. You are the sole judges of this and of all the evidence in this case and its credibility and what weight you will give it. The jury found that the defense of the misconduct of the wife was untrue."

It is true that in the Connecticut statute the word "unlawfully" is used, but that distinction is against the defendant in this case, for in State v. Massey, 97 N. C. 465, 2 S. E. 445, it is said:

"The term 'unlawfully' implies that an act is done or not done, as the law allows or requires," while the term "willfully" is "done knowingly and of stubborn purpose."

In this case the act of abandonment and leaving the wife without provision was admitted by the defendant to have been done knowingly and of his stubborn purpose.

The defendant contends, however, that such burden to excuse himself does not devolve upon the defendant, but that upon all the evidence, if the jury were in doubt about it, the defendant should be found not guilty, and relies upon the instance of an alibi, citing State v. Josey, 64 N. C. 56, but the court put that defense of an alibi entirely upon the ground that it is incumbent upon the state to prove the identity of the defendant, and, if upon the whole case and considering the evidence for the defendant there is a reasonable doubt whether the defendant was the person who committed the crime or not, he should be found not guilty.

Here there is no doubt as to the identity of the defendant or of his having left his wife without adequate support, and there is nothing in the statute in the nature of an exception which the state must disprove. When the defendant relies upon the alleged misconduct of his wife, the burden is upon him to prove the truth of the defense by reason of which he would take himself from under the statute. As the judge told the jury, it was not incumbent upon the defendant to prove such defense beyond a reasonable doubt, but merely to the satisfaction of the jury.

Where insanity is pleaded, the burden of proof is upon the defendant to establish such defense to the satisfaction of the jury. State v. Terry, 173 N. C. 766, 92 S. E. 154; State v. Hancock, 151 N. C. 699, 66 S. E. 137; State v. Brandon, 53 N. C. 408; State v. Starling, 51 N. C. 366.

The defendant also relies upon the proposition that on an indictment for "the slander

of an innocent woman" the burden is upon the state to prove the innocence of the woman, but the gist of the indictment in that case rests upon the prosecutrix being a virtuous woman, and this must, of course, be proven as an essential ingredient of the offense.

If an indictment were allowable simply for the "slander of a woman," then the truth of the charge might be pleaded in defense, and even then the burden would be upon the defendant to prove this to the satisfaction of the jury, but the statute authorizing an indictment only for the slander of "an innocent woman" makes her innocence an essential element of the crime, and the state undertakes that burden in instituting the proceeding.

The lawmaking power has not thought proper to make it indictable to abandon an "innocent" wife without adequate support. It would be a great hardship, unauthorized by statute, to require the state to prove that the wife was virtuous and free of fault in every case where the husband has left her without adequate support. On the contrary, the offense guarded against by the statute is the abandonment by the husband "willfully"—that is, "purposely"—of his wife without adequate support for her and the children. Though the court has permitted him to exempt himself from the statute by showing that the wife has committed adultery, there is no such exception in the statute, and the court should permit him to avail himself of such defense only upon his alleging and proving it to the satisfaction of the jury. He cannot merely set up such defense and throw upon the state the burden of proving his wife is a virtuous woman.

The reasonable presumption is that, if she is not virtuous, he would avail himself of that fact by an action for divorce. It is for him to show any excuse for the intentional abandonment of his wife without adequate support.

To sustain the defendant's contention the court must necessarily hold it to be a presumption of law that, when a wife has been abandoned by a husband, beyond a reasonable doubt she has been guilty of adultery, since it holds that the burden is upon the state to prove beyond a reasonable doubt that she is not guilty thereof. There is nothing in this statute which requires this to be proven. There is nothing in the statute which authorizes it.

The defendant relies upon *State v. Hopkins*, 130 N. C. 847, 40 S. E. 973, in which case the learned judge was seeking to create the defense that, if a wife has been guilty of adultery, the husband should not be held liable for abandoning her. But in the absence of any such provision in the statute he endeavored in some way to annex this defense or excuse to the word "willful," with which

it had no connection. The statute attached "willful" to the abandonment in contradistinction to instances in which the husband had separated himself from his wife, otherwise than willfully, as, for instance where he might be incarcerated in an asylum for the insane. At most, the proposition should be laid down that, where the wife has been guilty of adultery, it makes him excusable, but the burden is upon him to prove his defense. Even that cannot be sustained as to the children "which he may have gotten upon her," for the wife's misconduct will not justify his failure to provide support for them. *State v. Kerby*, supra.

The rule as to the burden of proof to be deduced from the cases is this:

"If the state's evidence, if true, shows a complete crime of purposely and willfully abandoning without providing adequate support for her, then the burden is upon the defendant to show matters and facts which will excuse his willfully leaving his wife without adequate support as the law requires." *State v. Wilbourne*, 87 N. C. 529, and *State v. Connor*, 142 N. C. 700, 55 S. E. 787.

There is not only no requirement in the statute that the state must allege or prove the virtue of the wife, but there is not even a proviso withdrawing the husband from liability in case of the wife's misconduct. It is for the defendant to allege and prove it as a defense. When the state has shown, and here the defendant has admitted it, that his wife has been abandoned by him without support, if he may withdraw himself from criminal liability therefor, he should show, if he can, that she has not been a virtuous woman since her marriage. This is a matter of defense, not a part of the offense, and the burden of proof is upon the defendant. This has been the uniform ruling of this court when there has been a proviso (and there is none here) which withdraws the defendant upon a certain state of facts from liability under the broad general terms of the statute creating the offense. *State v. Norman*, 13 N. C. 222; *State v. Call*, 121 N. C. 649, 28 S. E. 517; *State v. Welch*, 129 N. C. 580, 40 S. E. 120. A very similar case to this was *State v. George*, 93 N. C. 570, "for abduction of a child," in which the court held that the words of the proviso "without the consent and against the will of the father" were not a part of the description of the offense, and must be proven by the defendant.

In an indictment for embezzlement C. S. § 4268, "not being an apprentice or other person under 16 years of age," must be charged, but the defendant must show that he is under 16. *State v. Blackley*, 138 N. C. 622, 50 S. E. 310, and cases there cited. Under the former law in prosecutions for retailing spirituous liquor (Revisal, § 3529) the bill must have charged that it was done "without license,"

but the burden was upon the defendant to show that he had license. *State v. Emery*, 98 N. C. 668, 3 S. E. 636; *State v. Smith*, 117 N. C. 809, 23 S. E. 449; *State v. Holmes*, 120 N. C. 576, 26 S. E. 692, and a long line of authorities.

In an indictment for fornication and adultery (C. S. § 4343) the bill must allege "not being married to each other," but the burden is on the defendants to show that they are married as a matter of defense. *State v. McDuffie*, 107 N. C. 888, 12 S. E. 83; *State v. Peeples*, 108 N. C. 769, 13 S. E. 8; *State v. Cutshall*, 109 N. C. 769, 14 S. E. 107, 26 Am. St. Rep. 599.

In an indictment for entering upon land without license (C. S. § 4305) the bill must allege that the entry was "without license," but the burden is on the defendant to prove license. *State v. Glenn*, 118 N. C. 1194, 23 S. E. 1004.

The statute under which the defendant is indicted does not require allegation of proof that the wife was a virtuous woman, nor is there any proviso withdrawing the husband from liability if the wife has committed adultery. It is solely a matter of excuse which he must allege and prove, for there is no presumption of her guilt. In other states the courts hold that, even when the statute, unlike ours, makes the chastity of the woman a part of the description of the offense of abduction, there is a presumption in favor of female virtue, and hence, when the state has shown that the defendant has abducted or eloped with the wife of another man, the burden is on him to show that she was unchaste as a matter of defense. In the absence of proof the courts elsewhere will not presume that a woman who is shown to have been abducted was unchaste. *Bradshaw v. People*, 153 Ill. 159, 38 N. E. 652; *Slocum v. People*, 90 Ill. 281; *Griffin v. State*, 109 Tenn. 32, 70 S. W. 61; *People v. Brewer*, 27 Mich. 138; *Andre v. State*, 5 Iowa, 389, 68 Am. Dec. 708; *State v. Higdon*, 32 Iowa, 264.

The sole answer vouchsafed to all these settled precedents and principles is that the burden must be put upon the wife of proving beyond a reasonable doubt (before she can force her husband to support her and her children who he admits he has left) that she has not been guilty of adultery or any other misconduct because it is said in *State v. Hopkins*, supra, that the word "willful" meant not only what the statute said and the dictionaries hold, but it further means, in this particular matter, "without just cause," and therefore the burden is upon her to disprove that beyond all reasonable doubt.

When a precedent is so patently wrong and unjust to wives and children and without warrant in any statute or in any reason, it is creditable and proper to overrule it, that it may no longer be a hindrance in execut-

ing the law and doing justice. It is true the Legislature has not interfered and told the court that they had misconstrued the meaning of the word. That is a matter for the court to correct, and it should do so now. The Legislature used the word "willful" in the ordinary acceptation of the word, and as defined in all the dictionaries and in the decisions of all the courts, and there is nothing for the Legislature to amend. It used the word "willful" and no other, and the court should apply and use the settled meaning attached to that word. There is no proviso or defense which in the statute would withdraw the act of leaving the wife and children without support from the penalty provided by the statute.

There is no superstitious sanctity attaching to a precedent. It is proper that precedents should not be lightly changed or without sufficient cause. But they should not be adhered to when an opinion has clearly misconstrued a statute or is otherwise palpably erroneous.

This court has never held that it was infallible, nor has any other court. We have repeatedly overruled our own decisions, and a large pamphlet was issued some years ago containing a list of such cases, and a similar compilation now would be two or three times as large. The same is true of the United States Supreme Court and all other courts. Men and nations may—

"Rise on stepping-stones
Of their dead selves to higher things."

Courts can only maintain their authority by correcting their errors to accord with justice and the advance and progress of each age. They must slough off that which is obsolete and correct whatever is erroneous or contrary to the enlightenment and sense of justice of the age and to the spirit of new legislation.

While the courts are properly slow to change decisions unless justice requires it (as it so loudly does in this case), there are two classes of cases in which there should be close adherence to decisions:

(1) When a decision has become a rule of property. In such case the matter should be left to legislation, which speaks prospectively.

(2) As to matters of practice, which are founded not on principle, but are more or less arbitrary rules. These should be left till there is a change either in the rules of the court or by legislation. But this case does not involve a rule of property, nor is it merely a question of practice not involving a denial of justice or discrimination.

Even in such an important matter as *Hoke v. Henderson*, 15 N. C. 1, 25 Am. Dec. 677, which was decided by one of the ablest courts we ever had, and which was affirmed no less than 62 times, it was properly and justly overruled by this court in *Mial v. Ellington*,

134 N. C. 136, 46 S. E. 961, 65 L. R. A. 697, notwithstanding it had been held for law for more than 70 years. The court felt itself strong enough and under a duty to correct that erroneous decision. The courts do not claim infallibility. This court not infrequently overrules the court below, and in turn on writs of error our decisions have been overruled by the United States Supreme Court. That court has corrected its own errors to the extent that it has overruled a large number of its own decisions. Some years ago it held invalid a statute of the state of New York which protected working men from working more than 10 hours per day in a temperature of more than 120 degrees. Since then that court has advanced and has held valid the Adamson Law (U. S. Comp. St. §§ 8680a-8680d), which protects working men in the open air from more than 8 hours labor a day. The court advanced with the age. It has overruled many other important cases. And when it has not done so the public have done so by constitutional amendments, notably by the Eleventh, the Sixteenth and other amendments.

In this state two of our most eminent judges held in *State v. Black*, 60 N. C. 262, 86 Am. Dec. 436, and *State v. Rhodes*, 61 N. C. 455, 98 Am. Dec. 78, speaking for unanimous courts, that a husband had a right to thrash his wife, even without any provocation, with the restriction only that he could not permanently injure her. In less than 10 years thereafter, in *State v. Oliver*, 70 N. C. 60, while both those judges were still on the bench, and counsel, as shown by his brief printed in the report of the case, relied upon those (then) recent decisions, Judge Settle speaking for a unanimous court, curtly said (with their approval), without deigning to argue the question: "We have advanced from that barbarism."

In *State v. Edens*, 95 N. C. 696, 59 Am. Rep. 294 (as late as 1886), the court reverted to the former ruling that a husband was not

liable for beating his wife "unless the battery is so great and excessive as to put life and limb in peril or permanent injury is inflicted," and for this reason deducing the ruling that, where the husband in that case had married a young wife who refused to live in the same house with his mistress, but left him, and thereupon he circulated the vilest slanders against her, without any foundation in fact, the court held that he was not liable under the statute which made it indictable to "attempt to wantonly and maliciously injure and destroy the reputation of an innocent and virtuous woman," on the ground that the slanderer was her husband, though this was an aggravation, and not a defense. This barbarism was also overruled. *State v. Fulton*, 149 N. C. 485, 63 S. E. 145.

In *State v. Hopkins* the decision is even more barbarous, if possible, holding, without authority in any statute or in reason, and by a dictum originating in that case (which gave to the word "willful" a meaning which it does not have in the dictionaries, or in any other court), that a wife asking for legal support is presumed to be guilty of adultery or other misconduct, and that "beyond a reasonable doubt" she must prove that she is not. Surely it is time that we had advanced "from that barbarism" also, and should place ourselves in line with all the other courts which hold that there is no presumption against the virtue of women, just as there is none against the honesty of men, and that he who asserts the contrary must prove it, and when it is set up as a defense it must be shown by the defendant, and at least to the satisfaction of the jury.

No presumption that a woman has committed adultery and that she must disprove it beyond a reasonable doubt can rise merely because she asks that the courts make her husband give her and her children the support which the law requires him to give and when he admits (as in this case) or is proven leaving them without such support.

(182 N. C. 188)

CARTER v. CARTER et ux. (No. 282.)

(Supreme Court of North Carolina. Oct. 19, 1921.)

1. Frauds, statute of §138(2)—Upon repudiation of parol agreement to sell, purchaser may recover price paid.

Where the full amount of the purchase money is paid and the purchaser enters into possession under a parol contract to convey land which the vendor afterwards repudiates by refusing to convey, the purchaser may recover the price paid.

2. Frauds, statute of §138(5) — Purchaser may recover for improvements upon vendor's refusal to convey.

When the purchaser has entered into possession, paid the purchase money, and made improvements on the faith of vendor's parol promise to convey, which he refuses to do, pleading the statute of frauds, the purchaser may recover, in addition to the price paid, compensation for his improvements to the extent that they have enhanced the value of the land.

Appeal from Superior Court, Columbus County; Cranmer, Judge.

Action by Fannie Carter against Sam C. Carter and wife. From a judgment of dismissal, plaintiff appeals. Error, judgment set aside, and cause remanded.

This action was brought to recover the purchase money paid by plaintiff to the defendants upon a parol contract for the purchase of land which the latter have repudiated, and refused to convey to the plaintiff, and also to recover the amount by which the land was enhanced in value by certain improvements and betterments placed by the plaintiff upon the tract of land so sold to her, as will appear from the complaint, which is as follows:

"(1) That the defendants were prior to the — day of October, 1919, the owners in fee simple of the following described tract of land: In Columbus county, state of North Carolina, adjoining the lands of — and others, and bounded as follows, viz.: Beginning at a stake the second corner of lot No. 7 and runs north 45 degrees east the line of lot No. 8, to the corner of Dunn swamp the fork of it and alley bay, thence up said bay to a black gum bay by the public road Manaduke Powell's corner, thence with the road to lot No. 7, thence with it south 70 degrees east to the beginning, containing 43 acres, more or less, and being lot No. 9 of the division of the land of James Dyson, deceased, excepting two acres already conveyed, and for a more perfect description reference is hereby made to said division and deed made by Precilla Dyson on the 7th day of June, 1888, to Samuel Merritt, and recorded July 13, 1887 in Book N-N of Deeds at page 247, records of Columbus county, in the office of register of deeds, and which is hereby referred to and made a part of this deed, which see for further description of this land.

"(2) That the plaintiff on the — day of October, 1919, purchased from the defendants above named the tract of land described in paragraph 1 of this complaint at the price of \$1,750, and paid to the defendants the whole amount of said purchase price. The defendants at the time they received said purchase price promised, agreed, and contracted to execute to the plaintiff a deed for said tract of land.

"(3) That this plaintiff, immediately after she had purchased said tract of land and paid the whole amount of the purchase price therefor, erected a dwelling house on the land, which cost her \$925, and also erected one tobacco barn thereon, at the cost of \$350, making a total of \$1,275 which the plaintiff has spent in making improvements on said tract of land, making a total including the purchase price of \$3,025, which the plaintiff has expended on the tract of land.

"(4) That the plaintiff took possession of said tract of land on the — day of January, 1920, and has been living on the same, occupying the house she erected thereon as a dwelling.

"(5) That on the 5th day of March, 1920, the plaintiff had a deed in fee simple prepared from Sam C. Carter and wife, Lillian Carter, to the plaintiff, conveying to her the tract of land described in paragraph 1 of this complaint, and presented the same to Sam C. Carter and wife, Lillian Carter, and requested them to execute it in due form and according to law.

"(6) That Sam C. Carter and wife, Lillian Carter, defendants above named, failed and refused to execute the deed, and doth still refuse to execute the same to the plaintiff, in violation of their promise and agreement to convey the same.

"(7) That the defendants are now cutting and removing timber from the tract of land, and are threatening to continue to cut and remove timber therefrom, to the plaintiff's great damage of \$300.

"(8) That the plaintiff has caused a summons to issue from the superior court of Columbus county in an action entitled as above.

"(9) That the defendants are insolvent as this plaintiff is informed, believes, and so alleges.

"Wherefore the plaintiff prays the court that an order be made restraining the defendants, their agents, servants, and employees, from cutting and removing any timber from said tract of land, or in any manner committing acts of trespass thereon or from going upon said tract of land, and for such other and further relief as to the court may seem proper."

Donald McRackan, of Whiteville, and S. Brown Shepherd, of Raleigh, for appellant.

WALKER, J. (after stating the facts as above). We are of the opinion that there was error in the judge's ruling. The plaintiff had entered into a parol contract with the defendants by which it was stipulated that the defendants should convey to her a certain tract of land, containing 43 acres, more or less, and particularly described in

the complaint, upon the payment by the plaintiff of the purchase money, which was \$1,750, and which was duly paid by the plaintiff, believing that defendants would comply with their promise and convey the land, and that, relying upon the defendants' promise, the plaintiff entered into the possession of the land, and erected valuable improvements thereon which reasonably cost \$1,275. The plaintiff caused a proper deed to herself for the premises to be prepared, which was sufficient in form and substance to convey the estate promised by parol to be conveyed by the defendants to her, and defendants refused to execute the same, and now deny that the contract was ever made, pleads the statute of frauds, and claims ownership of the land, and all this notwithstanding they have the purchase money in their pocket. We must be governed in our decision by the allegations of the complaint, on which our statement of the facts is based, the court having dismissed the action upon the pleadings, and certain alleged admissions, which do not, in our opinion, affect the question, at this stage of the case, and, when so controlled we must hold that such a transaction does not look well for the defendants, and upon it the judgment of the lower court is not sustained by the law, and certainly not by equity.

[1] We have solemnly adjudged in this court, more than once, that where there is a parol contract to convey land, the full amount of the purchase money is paid, the vendee enters into possession, and the vendor afterwards repudiates the contract by refusing to make a deed for the land, the purchaser may recover the price of the land so paid by him (*Durham Land, etc., Co. v. Guthrie*, 116 N. C. 381, 21 S. E. 952), and further that where the vendor elects so to repudiate his parol contract by refusing to convey and sets up the statute of frauds, the purchaser may recover the amount paid by him for the land under his prayer for general relief, although the action be for specific performance (*Wilkie v. Womble*, 90 N. C. 254 [cited in the note, at page 879, of 19 L. R. A.]; *Murdock v. Anderson*, 57 N. C. 77; *Ellis v. Ellis*, 16 N. C. 398). Under the old system, when the courts of law and equity were separate, it was held that the purchaser could not proceed in equity to recover the purchase price which had been paid by him, as he had a full and adequate remedy at law, that is, by an action for money had and received to his use by the vendor or for money paid under a contract, the consideration having failed by the conduct of the adverse party, but now the two systems are blended, and since 1868 that rule has become obsolete. *Murdock v. Anderson*, supra; *Wilkie v. Womble*, supra. But even under the former system, if from peculiar circumstances the remedy at law would be inadequate, the equi-

ty court would have interfered and given redress. *Ellis v. Ellis*, supra.

[2] The general right of the purchaser to recover what he has paid on the purchase money, and the obligation of the vendor to restore what has been unjustly received by him on his repudiated promise, results (says *Smith, C. J.*, in *Wilkie v. Womble*, supra) from the annulling of the executory agreement for the sale of the land and will be enforced against the party so avoiding it. This was also held in *Beaman v. Simmons*, 76 N. C. 43, which was an action to recover back the purchase money paid on a repudiated, or canceled, contract. And when the purchaser has entered into possession of the land, paid the purchase money, and made improvements, on the faith of the vendor's parol promise to convey to him, which he refuses to do, and repudiates the contract by pleading the statute of frauds, the seller may recover not only the purchase money paid by him, but compensation for his improvements to the extent that they have enhanced the value of the land. *Ford v. Stroud*, 150 N. C. 362, 64 S. E. 1; *Pass v. Brooks*, 125 N. C. 129, 34 S. E. 228 (modified, but not on this point, in 127 N. C. 119, 37 S. E. 151); *Albea v. Griffin*, 22 N. C. 9; *Hedgepeth v. Rose*, 95 N. C. 41; *Railroad Co. v. Battle*, 66 N. C. 541; *Tucker v. Markland*, 101 N. C. 422, 8 S. E. 169. The court said in *Pass v. Brooks*, supra, 125 N. C. at page 131, 34 S. E. 228:

"The law will not allow the plaintiff to take possession of the lot without repaying the purchase money so paid to him, and without also paying for the valuable improvements put on the lot, by reason of said parol contract; this would be unjust and inequitable."

We said in *Jones v. Sandlin*, 160 N. C. 150, at page 154, 75 S. E. 1075, 1077:

"The general rule is that if one is induced to improve land under a promise to convey the same to him, which promise is void or voidable, and after the improvements are made he refuses to convey, the party thus disappointed shall have the benefit of the improvements to the extent that they increased the value of the land"—citing *Kelly v. Johnson*, 135 N. C. 647, 47 S. E. 674; *Reed v. Exum*, 84 N. C. 430; *Luton v. Badham*, 127 N. C. 96, 37 S. E. 143, 53 L. R. A. 337, 80 Am. St. Rep. 783; *Albea v. Griffin*, 22 N. C. 9; *Hedgepeth v. Rose*, 95 N. C. 41; *Pitt v. Moore*, 99 N. C. 85, 5 S. E. 389, 6 Am. St. Rep. 489.

This court, in *Joyner v. Joyner*, 151 N. C. 181, at page 182, 65 S. E. 896, 897, refers to *Albea v. Griffin*, supra, *Baker v. Carson*, 21 N. C. 381, and *Pitt v. Moore*, 99 N. C. 85, 5 S. E. 389, 6 Am. St. Rep. 489, and says:

"An examination of these cases, as well as *Luton v. Badham*, 127 N. C. 96, in which case many of the previous decisions of this court are reviewed, will disclose that the basis of the relief granted in each of these cases was a parol agreement to convey certain land, or an interest therein, which induced an expenditure

of money, in good faith, in its improvements and the enrichment of the land, the repudiation of the agreement to convey, and the attempt thereby to perpetrate a fraud."

Albea v. Griffin, *supra*, decided that—

"Although payment of the purchase money, taking possession, and making improvements, will not entitle the vendee to the specific performance of a parol agreement for the sale of land, yet he has, in equity, a right to an account of the purchase money advanced, and the value of his improvements, deducting therefrom the annual value during his possession," and the case of *Baker v. Carson*, *supra*, was approved.

See, also, *Wharton v. Moore*, 84 N. C. 479, 37 Am. Rep. 627; *Barker v. Owen*, 93 N. C. 198, at 203.

We wish to be exactly just to the defendants, and this induces us to state that in the answer it is denied that defendants contracted with the plaintiff, as the latter alleges, but that they did contract to sell her, and did afterwards convey to her, a smaller tract of land on which the improvements were made; but we do not agree with the judge that no issues of fact or law were raised by the pleadings, or that the pleadings were in such a state that he could dismiss the action, without giving proper consideration to the plaintiff's equity, or even to his remedy at law.

The fact that plaintiff has received a deed for the land on the northwest side of the drain, and has no other deed, or other writing for any other part of the land, did not authorize a nonsuit, or dismissal of the action, because plaintiff does not allege that she had any other writing, but that by parol defendants agreed to convey the land in question and that she paid the purchase money and was let into possession of the said land, under the agreement, and then made the improvements. If it turns out that plaintiff has received some land for the purchase money paid by her, she would only be entitled to recover the fair balance due to be ascertained in the proper way.

It is not now required that we should consider the question relating to the injunction which was refused, as it is not relevant to the controversy. We do not, however, see why plaintiff should be entitled to an injunction against the cutting of timber when it appears she is not the legal or equitable owner of the land.

We may add that, when the allegations in the case are threshed out, it may finally appear that plaintiff's allegations are not sustained, and that she is really not entitled to any return, either legal or equitable. But as there was a peremptory dismissal of the case, we are not dealing with the actual facts, but with plaintiff's allegations in her complaint.

The judgment will be set aside and the

case submitted to a jury upon proper issues, unless a reference, or other method of trial, is agreed upon by the parties, and the case is accordingly remanded, with directions for further proceedings therein not inconsistent with this opinion, and, in other respects, according to the course and practice of the courts.

Error.

(182 N. C. 818)

STATE v. JENKINS. (No. 93.)

(Supreme Court of North Carolina. Oct. 26, 1921.)

1. Criminal law \S 1189—Newly discovered evidence not ground for application for new trial in Supreme Court.

The Supreme Court will not grant motion for new trial in a criminal action for newly discovered evidence.

2. Larceny \S 68(1)—Receiving stolen goods \S 9(1)—Evidence sufficient to warrant submission of case to jury.

In a prosecution for stealing meat and for receiving and having stolen meat in possession, evidence held to warrant submission to the jury of the question of defendant's guilt as against a motion for a dismissal under C. S. \S 4643.

3. Criminal law \S 822(16)—Instruction as to reasonable doubt held not erroneous when considered as a whole.

In a prosecution for stealing meat and having stolen meat in possession, an instruction as to reasonable doubt, as applied to defendant's explanation of possession of the stolen property, held not erroneous when considered as a whole.

Appeal from Superior Court, Northampton County; Cranmer, Judge.

J. M. Jenkins was convicted of larceny and of having and receiving stolen goods, and he appeals. No error.

The following is the bill of indictment:

"The jurors for the state upon their oath present: That J. M. Jenkins, late of the county of Northampton, on the 5th day of March, 1921, with force and arms, in said county a lot of bacon meat of the value of \$25, the goods and chattels of G. B. Warren then and there being found, then and there did feloniously steal, take, and carry away, against the form of the statute in such case made and provided, and against the peace and dignity of the state.

"And the jurors aforesaid, upon their oath aforesaid, do further present, that on the day and year aforesaid in said county the said J. M. Jenkins a lot of bacon meat of the value of \$25, the goods and chattels of G. B. Warren, then and there being found, feloniously did have and receive, well knowing the same to have been feloniously stolen, taken and carried away, contrary to the statute in such case

made and provided, and against the peace and dignity of the state."

Stanley Winborne and Lloyd J. Lawrence, both of Murfreesboro, and S. Brown Shepard, of Raleigh, for appellant.

James S. Manning, Atty. Gen., and Frank Nash, Asst. Atty. Gen., for the State.

ADAMS, J. [1] When the case was called for argument, the defendant's counsel filed a motion for a new trial upon the ground of newly discovered evidence. The motion must be denied. In numerous decisions this court has held that a new trial will not be awarded in a criminal action for newly discovered evidence; and in *State v. Lilliston*, 141 N. C. 857, 54 S. E. 427, 115 Am. St. Rep. 705, the Chief Justice said:

"So the point is settled if the uniform practice of this court and its repeated and uniform decisions to the same effect can settle anything."

See *State v. Register*, 133 N. C. 747, 46 S. E. 21; *State v. Turner*, 143 N. C. 641, 57 S. E. 158; *State v. Ice Co.*, 166 N. C. 403, 81 S. E. 956, 52 L. R. A. (N. S.) 219, Ann. Cas. 1916C, 728.

[2] The defendant in apt time made a motion to dismiss the action as in case of nonsuit. C. S. § 4643. Recapitulation of the testimony would serve no useful purpose, for it is plain that the controversy could be determined only by the verdict of the jury. At the trial there was evidence tending to show that on the night of March 5 some one had broken into the prosecutor's smokehouse and had stolen six hams and six shoulders, which on March 7 were found in possession of the defendant; also evidence of various other circumstances tending to connect the defendant with the offense charged. The defendant testified, and introduced several witnesses in his behalf. An issue of fact was thus joined between the state and the defendant, and the court properly submitted to the jury the question of the defendant's guilt. In *State v. Carlson*, 171 N. C. 823, 89 S. E. 30, it is said:

"The motion to nonsuit requires that we should ascertain merely whether there is any evidence to sustain the allegations in the indictment. The same rule applies as in civil cases, and the evidence must receive the most favorable construction in favor of the state for the purpose of determining its legal sufficiency to convict, leaving its weight to be passed upon by the jury."

There is an exception to the charge. The record contains this statement:

"The court further charged the jury that one found in possession of stolen property recently after the commission of the theft is presumed to be the thief, but that this is a presumption of fact and not of law, and is weak or strong according to the facts and circumstances of the case; that one found in possession of goods recently stolen was called upon

to account for or explain his possession by the evidence in the case and circumstances, but that this presumption arising from the possession of goods recently stolen could be rebutted and explained, and the burden was on the defendant to show to the satisfaction of the jury, if they found from the evidence beyond a reasonable doubt that the defendant was in the possession of the stolen meat, how he came into its possession; but he would not have to show it beyond a reasonable doubt nor by a preponderance of evidence, but merely to the satisfaction of the jury; and if the evidence in the case in explanation of such possession, or any evidence or circumstances, raised a reasonable doubt in the minds of the jury as to the guilt of the defendant that they would return a verdict of not guilty; and the court further charged the jury that before they could consider any presumption arising from what it called recent possession the jury would have to be satisfied from the evidence beyond a reasonable doubt that the meat found in the smokehouse of the defendant was the meat in question of the prosecuting witness, and that it had been stolen.

"The court further charged the jury that the defendant was presumed to be innocent, and that this presumption of innocence continued throughout the entire case, and that before they could convict the defendant they must be satisfied from the evidence beyond a reasonable doubt of his guilt, and that if they were so satisfied they would find him guilty, but if they were not so satisfied they should return a verdict of not guilty."

[3] The court instructed the jury in effect that the prosecution was begun with a presumption of innocence in favor of the defendant and throughout the trial the burden remained with the state to satisfy the jury beyond a reasonable doubt that the defendant was guilty of the offense charged in the indictment. That portion of the charge which imposed upon the defendant the burden of explaining possession of the stolen property to the satisfaction of the jury, considered alone, was technically incorrect. If, after they had considered all the evidence, the jury entertained a reasonable doubt of his guilt, the defendant was entitled to an acquittal; and such reasonable doubt may have existed although the jury may not have been satisfied with the defendant's particular explanation. However, by considering the charge in its entirety, "in the connected way in which it was given" (*State v. Exum*, 138 N. C. 599, 50 S. E. 283), we observe that his honor, after saying that the burden was on the state to satisfy the jury beyond a reasonable doubt of the defendant's guilt, gave the additional instruction that, if the evidence in explanation of the defendant's possession of the property, or any evidence or circumstances, raised a reasonable doubt as to the guilt of the defendant the verdict should be not guilty. Upon consideration of the record we find no reversible error.

No error.

(182 N. C. 192)

REID et ux. v. NEAL. (No. 59.)

(Supreme Court of North Carolina. Oct. 19, 1921.)

1. Deeds \Leftrightarrow 128—Wills \Leftrightarrow 608(2)—Rule in Shelley's Case one of law, excluding intent.

The rule in Shelley's Case is not a rule of construction, but one of law, and, if the language used in a particular instrument brings the case within the operation of the rule, the intention of the grantor or deviser does not control.

2. Wills \Leftrightarrow 608(3)—When rule in Shelley's Case applies stated.

In order that the rule in Shelley's Case may apply, the words "heirs" or "heirs of the body" must be taken in their technical sense, carrying the estate to the entire line of heirs, to hold as inheritors under the canons of descent, and, if it appears by correct construction that these words are not used in that sense, but only as words designating certain persons or a restricted class of heirs, the rule does not apply.

3. Wills \Leftrightarrow 450—Should be construed to make every word effective and clauses harmonious.

A will should be construed so as to give effect to every word and every clause, and to harmonize the several clauses, provided the effect is not inconsistent with the general intent of testator as gathered from the entire instrument.

4. Wills \Leftrightarrow 105, 493—Devise over to testator's "estate" not void for uncertainty.

Devise of land to daughter for life and at her death to her bodily heirs, if any, and if none "to return to my estate," held not void for uncertainty, since the legal significance of the word "estate" must be ascertained from the context, and, there being no residuary clause, must be held to mean heirs.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Estate.]

5. Wills \Leftrightarrow 858(1)—Office of residuary clause stated.

The office of a residuary clause in a will is to provide for the ultimate disposition of legacies and devises which are void, or have lapsed, or have been refused.

6. Wills \Leftrightarrow 866—In absence of residuary clause, lapsed or void gifts go to next of kin or heirs.

In the absence of an effective residuary clause, a lapsed or void legacy or devise will go to the next of kin, or to the heirs of the testator, as in case of intestacy.

7. Wills \Leftrightarrow 608(3)—Devisee held to take life "estate," and not fee, under rule in Shelley's Case.

Where testator lent land to his daughter for life, and after her death gave it to her bodily heirs, if any, "and, if none, to return to my estate," the daughter took a life estate merely, and not the fee under the rule in Shelley's Case, the devise over to the "estate" in effect being one to testator's general heirs, there being no residuary clause.

Appeal from Superior Court, Wilson County; Connor, Judge.

Submission of controversy without action by H. S. Reid and wife, as plaintiffs, and Oscar Neal, as defendant. From a judgment for plaintiffs, defendant appeals. Reversed.

H. S. Reid and wife, Laura Reid, and Oscar Neal, desiring to submit a question in difference, which might be the subject of a civil action, have agreed upon the following statement of facts, upon which the controversy depends, and present the controversy for submission to this court for determination:

(1) Laura Reid is the daughter of Ishmael Wilder, and H. S. Reid is her husband.

(2) Ishmael Wilder died domiciled in the county of Wilson, N. C., in February, 1917, having first made and published his last will and testament, by the third item of which he devised to his daughter, Laura Reid, certain lands, the following being a true and correct copy thereof, to wit: "I lend to my daughter, Laura Reid, 59½ acres, the remainder of my land, to include the house where Joe Barnes now lives, to her during her natural life, and at her death, I give it to her bodily heirs, if any, and if none, to return to my estate." The said last will and testament after having been duly proven according to law was admitted to probate and recorded in Book of Wills No. 6, p. 1, in the office of the clerk of the superior court of Wilson county.

(3) That no other item or part of said will deals in any manner with the lands devised unto Laura Reid, and there is no residuary clause therein.

(4) That, after the death of Ishmael Wilder, the devisees caused the lands to be surveyed by J. T. Revell, surveyor, on April 20, 1920, and the lands devised unto Laura Reid by the third item of said last will and testament are described as follows:

"Beginning at a stake, C. E. Brame's corner, and runs thence N. 3° E. 283 poles to a stake, H. G. Wilder's corner; thence N. 87° W. 38½ poles to a stake in Hinnant's line, H. G. Wilder's corner; thence S. 8° W. 283 poles to a stake in Brame's line; thence 87° E. 38½ poles to the beginning, containing 59½ acres, as surveyed by Jont T. Revell."

(5) That H. S. Reid and his wife, Laura Reid have contracted and agreed to sell the said 59½ acres of land to Oscar Neal, and Oscar Neal has agreed to purchase the same and to pay therefor the sum of \$10,000, upon the tender to him of a good and sufficient deed, conveying unto him the said lands in fee simple.

(6) That H. S. Reid and wife, Laura Reid, have tendered unto the said Oscar Neal a deed, properly executed, conveying the said lands unto him and demanding the payment of the purchase price, according to the terms of the contract, but the said Oscar Neal declines to accept the said deed and pay the purchase price.

(7) H. S. Reid and wife, Laura Reid contend that, under the terms of the will of Ishmael Wilder, the said Laura Reid is seized in fee simple of the said land. Oscar Neal contends that, under the terms of the will of

Ishmael Wilder, the said Laura Reid is not seized of a fee-simple estate therein, and she and her husband cannot convey the same to him in fee simple.

Wherefore the said parties submit to this court the determination of the question in difference between them, and if the said court shall be of the opinion that the said Laura Reid is seized of a fee-simple estate in and to the said lands, then judgment shall be rendered by the said court requiring the said Oscar Neal to accept the said lands and pay the purchase price according to the contract; but if the court shall be of opinion that the said Laura Reid is not seized of fee-simple estate in said lands, then judgment shall be rendered accordingly.

His honor, Judge George W. Connor, rendered the following judgment:

This controversy without action coming on to be heard before the undersigned resident judge of the Second judicial district, in which the county of Wilson is located, upon the agreed statement of facts submitted, and it appearing to the court that the said agreed statement of facts is properly verified under the statute and, after giving the matter consideration, the court being of the opinion that Laura Reid is seized in fee simple of the lands devised unto her by the last will and testament of Ishmael Wilder, it is, therefore, upon motion of Connor and Hill, attorneys for H. S. Reid and wife, Laura Reid, ordered, decreed, and adjudged that the said Oscar Neal accept a deed tendered to him by the said H. S. Reid and wife, Laura Reid, and pay unto them purchase price agreed upon, to wit, \$10,000, and the costs of this proceeding to be taxed by the Clerk.

The defendant excepted and appealed.

E. J. Barnes, of Wilson, for appellant.

Connor & Hill, of Wilson, for appellees.

ADAMS, J. In February, 1917, Ishmael Wilder died domiciled in the county of Wilson, having made his last will and testament which has been duly proved and probated. Item 3 is as follows:

"I lend to my daughter Laura Reid, 59½ acres, the remainder of my land, to include the house where Joe Barnes now lives, to her during her natural life, and at her death, I give it to her bodily heirs, if any, and if none, to return to my estate."

The plaintiffs contend that the devise over—"to return to by estate"—is void; that the word "estate" refers, not to persons, but to the condition or circumstances in which the testator stood with reference to his property—the nature and extent of his interest; that there is confusing uncertainty as to the persons who might succeed to the title upon the failure of the feme plaintiff's "bodily heirs," and that the devisee, Laura Reid, has an estate in fee simple under the rule in Shelley's Case. It therefore becomes necessary to decide whether the rule in Shelley's Case applies, and, if it does not, to construe the

devise under which the feme plaintiff claims title to the land.

This noted rule, a prolific source of litigation, is stated by Coke as follows:

"When an ancestor, by any gift of conveyance, taketh an estate of freehold, and in the same gift or conveyance an estate is limited, either mediately or immediately, to his heirs in fee or in tail, the word heirs is a word of limitation of the estate, and not a word of purchase." 1 Coke, 104.

In Kent's Commentaries, as a citation of Preston's definition, the rule is given in this language:

"Where a person takes an estate of freehold, legally or equitably, under a deed, or will, or other writing, and in the same instrument there is a limitation by way of remainder, either with or without the interposition of another estate, of any interest of the same legal or equitable quality to his heirs, or heirs of his body, as a class of persons to take in succession from generation to generation, the limitation to the heirs entitles the ancestor to the whole estate." 4 Kent, Com. 215.

[1] It is held with practical unanimity that the principle stated is not a rule of construction, but a rule of law. If the language used in a particular instrument brings the case within the operation of the rule, the intention of the grantor or deviser does not control.

In Nobles v. Nobles, 177 N. C. 245, 98 S. E. 715, Justice Hoke, speaking for this court, said:

"The rule in question has always been recognized with us, and a perusal of these and other like cases will disclose that, when the terms of the instrument by correct interpretation convey the estate in remainder to the heirs of the first taker as a class, 'to take in succession from generation to generation,' to the same persons as those who would take as inheritors under our canons of descent and in the same quantity, the principle prevails as a rule of property both in deeds and wills, and regardless of any particular intent to the contrary otherwise appearing in the instrument."

This court has had occasion from time to time to construe divers instruments in which the language used bears striking similarity to the language in the devise under consideration. Recourse to former adjudications may, in the present instance, serve to direct us to the correct conclusion.

In Francks v. Whitaker, 116 N. C. 518, 21 S. E. 175, the devise was in these words:

"I give and devise (real estate) to my beloved son E. S. Francks, during his natural life, and after his death to his lawful heir or heirs, should he have any surviving him, but should he not have any lawful heir or heirs surviving him, then I give and devise the same to the children of my beloved son W. W. Francks."

The court held that the proper construction of the will is as if it read:

"I give and devise to my beloved son E. S. Francks, during his natural life, and after his death to his issue, should he leave any surviving him, but should he not leave issue then I give and devise the same to the children of my beloved son W. W. Francks."

In *Bird v. Gilliam*, 121 N. C. 327, 28 S. E. 489, the devise was:

"To my daughter Mary during her natural life and give the same to the heirs of her body, but if my daughter Mary should not have no lawful heirs of her body the said land at her death shall go back to my son William and the heirs of his body."

The court said:

"The rule in *Shelley's Case* does not apply here. If there had been no words explanatory of the words 'heirs of her body' in connection with the estate devised to Mary, she would under the rule, have taken the fee. *Nichols v. Gladden*, 117 N. C. 497. But there were such explanatory words where the testator said: 'But if my daughter Mary should not have no lawful heirs of her body the said land,' etc. Such explanatory words have been construed by this court to mean 'issue.' *Rollins v. Keel*, 115 N. C. 68. Mary then took only a life estate."

The case of *May v. Lewis*, 182 N. C. 115, 43 S. E. 550, is of similar import. There the devise was in the following words:

"I loan unto my son Benjamin May my entire interest in the tract of land * * * to be his during his natural life, and at his death I give said land to his heirs, if any, to be theirs in fee simple forever; and if he should die without heirs, said land to revert back to his next of kin."

The court held that the son took a life estate, saying that—

"Any words added to the limitation which carry the estate to any other person, in any other manner or in any other quality than the canons of descent provide, will take the case out of the operation of the 'rule,' and limit the interest of the first-taker to an estate for his life."

Puckett v. Morgan, 158 N. C. 344, 74 S. E. 15, presents the case of a devise, the terms of which, excepting the last clause, are substantially identical with the language used in this case:

"I leave Martha Morgan, the wife of James Morgan, 48½ acres of land, known as the Rachael tract, on the east side, during her life, then to her bodily heirs, if any; but if she have none, back to her brothers and sisters."

Martha Morgan died in 1894, leaving two daughters, one of whom was the plaintiff, who had intermarried with P. H. Puckett. James Morgan, the surviving husband of Martha, was in possession of the land, claiming a life estate as tenant by the curtesy. Upon demurrer, the judge held that under *Shelley's Case* Mrs. Morgan took an estate

in fee, and that the defendant was entitled to the possession of the land during his life. But in the opinion of this court Justice Brown said:

"It is also manifest that the testator did not intend that his daughter should take an estate in fee, for in express words he devised her an estate for life only, and the context shows that he intended that her children should take at her death, and, in the event of her death without children, then that her brothers and sisters should receive the property."

These precedents are maintained in the more recent decisions of this court. *Blackledge v. Simmons*, 180 N. C. 535, 105 S. E. 202; *Wallace v. Wallace*, 181 N. C. 158, 106 S. E. 501. In the former case there was a devise of real estate to the testator's daughter for life, and at her death unto the heirs of her body lawfully begotten, with a provision that, in the event of her dying without heirs of her body, the land should go to the testator's heirs at law. Justice Walker, citing numerous decisions bearing upon the question, concluded that the words "heirs of her body" should not be construed in their technical sense, as denoting an entire class of heirs to take in indefinite succession, but should be construed as meaning the children of the testator's designated child. Accordingly it was held that the first taker acquired a life estate and the children an estate in fee as purchasers. In the latter case, *Elisba Wallace* and his wife executed a deed conveying to C. A. Wallace a tract of land, to hold during his natural life, subject to the support and protection of the grantors during their lifetime. In the deed is this additional provision:

"And then after the death of the above said C. A. Wallace, then said land to descend in fee simple to his bodily heirs if any, and if none, to go to his next of kin."

C. A. Wallace died without the birth of issue, and made his will devising the land for life to his widow, Selina, "and at her death to the children of R. I. Wallace." The representatives and children of the deceased brothers and sisters of C. A. Wallace instituted a special proceeding for partition, making parties his widow and his surviving brothers and sisters. The widow and the petitioners contended that C. A. Wallace took an estate in fee simple, while the defendants insisted that he took only a life estate, and that upon his death they acquired title to the land by virtue of the limitation to the next of kin. In an opinion reviewing the authorities, Justice Hoke said:

"We must * * * hold that C. A. Wallace took only a life estate under the deed from his father, and that under the ulterior limitation to his next of kin, the property belongs to his surviving brothers and sisters to the exclusion of the widow and his nephews and nieces."

[2] The prevailing doctrine drawn from the decisions in this jurisdiction is crystalized in *Wallace v. Wallace* in the following paragraph:

"From these and other authorities it will be noted that, in order to an application of the rule in *Shelley's Case* (being contrary as it is to the expressed will of the grantor that the first taker should have a life estate only), the words 'heirs' or 'heirs of the body' must be taken in their technical sense carrying the estate to the entire line of heirs and at this time and in this jurisdiction to hold as inheritors under our canons of descent, and if it appears by correct construction that these words are not used in that sense, but only as words designating certain persons or confining the inheritance to a restricted class of heirs, the rule does not apply and the ancestor or first taker will be held to have acquired only a life estate according to the express words of the instrument."

But the plaintiffs insist that the instruments construed in these decisions may be differentiated, in that the ulterior devise in the instant case, limited not to a person or class of persons, but to "my estate," is void because indefinite and uncertain. The immediate question, then, is this: "What is the proper legal construction of the words 'if any, and if none, to return to my estate'?"

It is true that the rule in *Shelley's Case* is a rule of law, and not of construction; but whether the ulterior devise is valid, or whether the limitation is to the "technical heirs" of the first taker, or to a particular class of heirs, is essentially a preliminary question as to the construction of the particular instrument under consideration; and the intent of the grantor or deviser is to be disregarded only where a proper interpretation of his language brings the particular case within the rule. *Puckett v. Morgan*, supra; *Blackledge v. Simmons*, supra. In construing this clause: "If any, and if none, to return to my estate"—the intent of the testator must be sought unless we hold as a matter of law that the clause is void upon its face. If the words referred to are susceptible of any construction which is consistent with the validity of the will in its entirety, we cannot declare them void without doing violence to one of the cardinal rules of construction.

[3] A will should be construed so as to give effect to every word and every clause, and to harmonize the several clauses provided the effect is not inconsistent with the general intent and purpose of the testator as gathered from the entire instrument. 30 A. & E. En. (2d Ed.) 664; *Gardner on Wills*, 373; *Satterwaite v. Wilkinson*, 173 N. C. 39, 31 S. E. 599.

[4] It cannot be successfully urged that the word "estate" makes the last limitation void for uncertainty. This word has more than one meaning, and is susceptible of more than

one construction. Anciently confined to land, it has been enlarged so as to embrace property of every description. Enumerated with words which are descriptive of personal or chattel interests, it may exclude real estate altogether. It may denote the quantity of interest, or the thing devised, or the condition or circumstances in which the owner stands in regard to his property. 3 Words and Phrases, First Series, 2475 et seq. Also, it has been construed as meaning a person. *Bennett v. State*, 62 Ark. 516, 36 S. W. 948. Its legal signification must be ascertained from the context, or an examination of all the provisions of the instrument in which it appears. In *Downing v. Grigsby*, 251 Ill. 568, 96 N. E. 513, it is said that the ordinary meaning of the words "revert to my estate" is, "return to the aggregate of all the property which I may leave at my death."

It will be observed that in the last will and testament of Ishmael Wilder there is no residuary clause—in fact no clause, excepting item 8—which purports to deal with the land in question. If Laura Reid die without bodily heirs, or children, or "issue" (*Francks v. Whitaker*, supra; *Bird v. Gilliam*, supra; C. S. § 1739), and effect be given to the ulterior limitation, in whom will the title vest?

[5, 6] The office of the residuary clause in a will is to provide for the ultimate disposition of legacies and devises which are void, or have lapsed, or have been refused. In the absence of an effective residuary clause, a lapsed or void legacy or devise will go to the next of kin, or to the heirs of the testator, as in case of intestacy. *Johnson v. Johnson*, 38 N. C. 426; *Winston v. Webb*, 62 N. C. 1, 93 Am. Dec. 599; *Robinson v. McIver*, 63 N. C. 645; *Twitty v. Martin*, 90 N. C. 648.

[7] After a careful consideration of the authorities, we conclude that effect must be given to the ulterior limitation, "and if none to return to my estate"; that the testator gave to his daughter Laura a life estate, with remainder in fee, defeasible upon the failure of her "bodily heirs" (*Kirkman v. Smith*, 174 N. C. 603, 94 S. E. 423); and that the devise in item 8 should be construed as if it read:

"I devise to my daughter, Laura Reid, 59½ acres, the remainder of my land, to include the house where Joe Barnes now lives, to her during her natural life, and at her death, I give it to her issue, if any, and if none, to my heirs"

—i. e., in the absence of a residuary clause, to those who would have been entitled had the testator died intestate. It is obvious, then, that under the will of her father Laura Reid takes only a life estate, and that the plaintiffs cannot convey the land in fee simple. The judgment is therefore reversed.

Reversed,

(152 Ga. 190)

(108 S.E.)

SPOONER v. SHELFER et al. (No. 2529.)

(Supreme Court of Georgia. Oct. 14, 1921.)

(Syllabus by the Court.)

Landlord and tenant \Rightarrow 296(2)—Vendor and purchaser \Rightarrow 3(2)—Contract held lease with option to purchase, not contract of sale, and landlord might sue out warrant of ejection after term.

The contract (set out in the statement of facts) examined, and construed to be a lease with an option to the lessee to buy at the stipulated price, exercisable within the time specified during the term of the lease, upon the lessee's full performance of the terms of the contract; and after the expiration of the rent term it was the right of the landlord to sue out a warrant, under section 5385 et seq. of the Civil Code of 1910, for the tenant's summary eviction.

Error from Superior Court, Decatur County; R. O. Bell, Judge.

Action by J. M. Spooner against N. H. Shelfer and others. Judgment for defendants, and plaintiff brings error. Affirmed.

On March 9, 1920, N. H. Shelfer and Mrs. Julia M. Spooner entered into a written contract, executed in duplicate, by the terms of which Shelfer agreed to "rent, let, and lease" certain land to Mrs. Spooner, in consideration of \$1,000 paid, for the remainder of the year 1920, "and up to the 1st day of January, 1921." In consideration of the cash payment Shelfer further agreed to make no additional charge for the use of the land "during the time that the said Mrs. Spooner has been in possession of the same prior to the execution of this agreement." The contract stipulated:

"It is further agreed and understood that the said Mrs. Julia M. Spooner shall have the right and privilege of converting this lease into an agreement on the part of the said N. H. Shelfer to sell and deed to her said above-described property for the sum of * * * \$6,500, by paying in cash to the said N. H. Shelfer, on or before the 1st day of May, 1920, the sum of \$2,250, and contemporaneously therewith executing and delivering to him her promissory note of the date the option is exercised, and due July 1, 1920, for the principal sum of \$3,250, with interest from date at the rate of 8 per cent. per annum, with 10 per cent. of principal and interest as attorney's fees, if collected by law. * * * In the event the option to purchase said property is exercised under the terms herein stated, then and in that event the \$1,000 cash this day paid as rental shall be applied on the purchase price," and the payment of the sums aforesaid, as specified, "shall be in full consideration of the deed."

The contract further provided that it was "clearly and expressly understood and agreed that the option to buy said property shall

be exercised only in the manner herein prescribed," and that "in the event the said Mrs. Spooner does not exercise her option to buy said property on or before the said 1st day of May, 1920," by paying the sum named in cash and by executing the promissory note as aforesaid, "then and in that event the option herein expressed shall become null and void, and the \$1,000 this day paid shall be in consideration, and only in consideration, of the rental of said property up to the 1st day of January, 1921," on which date Mrs. Spooner agreed to surrender the premises "in as good condition as when she took possession of the same, usual wear and tear excepted." The contract recited that it "expresses the full and complete agreement between the parties hereto, and that no verbal interpolations can be inserted or insisted upon at any time by either of said parties." Mrs. Spooner paid to Shelfer \$1,000 and entered into or remained in possession of the land. She did not pay or offer to pay the \$2,250 on or by the 1st day of May, 1920, and she did not execute and deliver, or offer to execute and deliver, to Shelfer her promissory note for \$3,250, due July 1, 1920, as stipulated in the contract. Mrs. Spooner remained in possession of the land until February 22, 1921, on which date Shelfer sued out a warrant to evict her as a tenant holding over.

Thereupon Mrs. Spooner filed her petition against Shelfer, alleging that the contract was one of purchase, and that the relation of landlord and tenant did not exist by virtue thereof; that she had paid the \$1,000 cash, whereas, the reasonable value of the premises for rent for the year 1920 was not more than \$294; and that she was making every effort to dispose of other property belonging to her (and of the value of \$5,000) in order to enable her to pay the purchase money as stipulated in the contract. She prayed for injunction against the further progress of the warrant to evict. Shelfer filed an answer, alleging that the relation between the parties was that of landlord and tenant, that Mrs. Spooner had not exercised the option to purchase, and that his right to evict her as a tenant holding over exists, both under the contract and under the law. The plaintiff testified that she was making a bona fide effort to sell certain property owned by her, for the purpose of paying the defendant, but that she had been unable to sell her property on account of the general financial depression, and consequently had not paid the defendant the \$2,250 at the time of the suing out by the defendant of the warrant to evict, or at the date of the hearing. That the written contract expressed the purpose and intention of the parties to it was admitted; but she contended that the relation of the parties under the contract was that of vendor and

vendee, and not that of landlord and tenant. The court denied an interlocutory injunction, and Mrs. Spooner excepted.

W. V. Custer, of Bainbridge, for plaintiff in error.

Erle M. Donalson, of Bainbridge, for defendants in error.

GEORGE, J. (after stating the facts as above). It is not contended that the written contract did not express the intention and purpose of the parties to it. The contract is plain and unambiguous. It is the only evidence of what the parties intended and understood by it. In these circumstances the whole duty of the court is to construe the contract. That the provision in the lease, giving the lessee an option to purchase the premises, if she so desired, in no way affected the relation of landlord and tenant, or the former's right to evict the latter, if she held over and beyond her term, must be considered as settled. *Clifford v. Gressinger*, 96 Ga. 789, 22 S. E. 399; *Crawford v. Cathey*, 143 Ga. 403, 85 S. E. 127. The parties designate their contract as one of lease. By its plain terms it is such. Mrs. Spooner was also given an option to buy during the term of the lease. The consideration paid was for the use of the premises to the end of the term stipulated, and, it would seem, for the option to purchase. But Mrs. Spooner was not bound to purchase. She did not obligate herself to pay \$2,250 on or by May 1, 1920, and to execute and deliver to Shelfer her promissory note for \$3,250 due and payable July 1, 1920. The consideration paid may be in excess of the fair rental value of the premises for the term stipulated; but Mrs. Spooner obtained, not only the right to use and occupy the premises, but the privilege and the power to buy the premises upon the terms stated. If the contract expresses the true intention and purpose of the parties to it, Mrs. Spooner was not entitled to an injunction.

The case of *Lytle v. Scottish American Mortgage Co.*, 122 Ga. 458, 50 S. E. 402, does not demand a construction that the contract in this case creates the relation of vendor and vendee. That case does not authorize us to so construe the contract here involved. The distinction between that case and the case at bar is clearly pointed out in *Crawford v. Cathey*, supra. Under the cases of *Crawford v. Cathey* and *Clifford v. Gressinger*, supra, we are compelled to construe the contract between the parties in this case as a lease with an option to buy. Mrs. Spooner never having exercised the option the relation of landlord and tenant continued, and the landlord had the right to evict the tenant holding over beyond the term.

Judgment affirmed. All the Justices concur, except ATKINSON, J., absent on account of sickness.

(152 Ga. 189)

SMITH et al. v. WHITE. (No. 2451.)

(Supreme Court of Georgia. Oct. 14, 1921.)

(Syllabus by the Court.)

1. Cancellation of instruments \S 46—Appeal and error \S 1050(1)—Record setting aside year's support admissible in action to cancel deed, and harmless, if erroneous.

The court did not err in admitting the record setting aside year's support, for the reasons:

(a) There was some evidence that William E. Smith, from whose estate the year's support was set aside, and who was the husband of Emma Smith, the original plaintiff, died in possession of the land in question. Moreover, the sole issue was the question of cancellation of the deed, and therefore the introduction of the evidence showing that the land was set aside as year's support was not injurious to the objectors, who were grantees in the deed.

(b) Under the facts of the case the jury were authorized to find that the deed, cancellation of which was sought, purported to convey land set aside in the year's support.

2. Motion for new trial properly overruled.

With the exception of the assignment of error mentioned in the preceding headnote, there is no complaint of any rulings of the court during the progress of the trial. The verdict is supported by evidence. The court did not err in overruling the motion for a new trial.

Error from Superior Court, Atkinson County; A. B. Lovett, Judge.

Action by Mrs. Emma Smith against Bob Smith and others, in which J. O. White, guardian of minor children of the plaintiff, intervened upon her death. From an adverse judgment, defendants bring error. Affirmed.

Mrs. Emma Smith filed a petition praying that a deed which she had made conveying described land to Bob Smith et al., be set aside and canceled. The petitioner [grantor named in the deed] was the widow of W. E. Smith. The grantees named are children of W. E. Smith by a former wife. The petition alleged that the property involved was, with other property, set aside to petitioner and her two minor children as year's support; that the deed conveying the land to the defendants was void and should be set aside for the reasons (a) she received no consideration for the same; (b) that it was obtained by duress in that the defendants threatened to take all the property which had been set aside to her as year's support; that they would burn her out and would kill her if she did not make the deed to them; (c) that the deed was obtained through fraud in that the defendants represented to petitioner that she could not get possession of any of the property assigned as year's support unless she would make to

them a deed to the land involved, and that because of her ignorance, inexperience, and fear, caused by the threats made, she was induced to execute the deed; that while the deed purports to be a deed of gift, she had no reason for giving the grantees anything; that she did not know the purport and meaning of the deed, and the same was not her voluntary act. The two minor children of Mrs. Emma Smith, through their next friend, intervened, setting up the fact that the original plaintiff had died; that they were her sole heirs; that at the time of the execution of the deed their mother was, because of the impairment of her mental faculties, incapacitated to make an intelligent and voluntary disposition of her property, and praying that they be made parties plaintiff and that the cause proceed in their name and for their benefit.

The jury returned a verdict in favor of the plaintiff. Motion for a new trial was filed and subsequently amended, which was overruled by the court, and the defendants excepted. The sole ground of the amended motion complains that the court erred in permitting the plaintiff to introduce documentary evidence to show that the land had been set aside as a year's support. The objections urged against this evidence at the time of its introduction were (1) that the land in question was not shown to have been in the possession of W. E. Smith at the time of his death, and (2) because the proceedings setting aside year's support described the land as "one hundred and fifty acres of lot of land No. 63 in the Seventh district of Coffee county," while the deed, cancellation of which is sought, describes the land as "being parts of lots Nos. 63 and 89 in the Seventh district of Coffee county."

S. Burkhalter, of Homerville, and R. A. Moore, of Douglas, for plaintiffs in error.

Levi O'Steen, of Douglas, for defendant in error.

GILBERT, J. Judgment affirmed. All the Justices concur, except ATKINSON, J., absent on account of sickness.

(152 Ga. 179)

BLACKSTOCK v. BLACKMAN. (No. 2470.)
(Supreme Court of Georgia. Oct. 14, 1921.)

(Syllabus by the Court.)

1. Execution \S 200—Overruling of motion to dismiss levy not ground for new trial.

On the trial of a claim case the overruling of a motion to dismiss the levy cannot be made a ground of a motion for a new trial, but should be made the subject of direct exception.

2. Execution \S 194(3), 202—No verdict in favor of plaintiff in execution in claim case, in absence of evidence of unsatisfied execution.

"There can be no legal verdict in favor of the plaintiff in execution in a claim case, unless there is introduced in evidence at the trial a valid, unsatisfied execution in favor of the plaintiff in execution against the defendant in execution." *Collins v. Hill*, 115 Ga. 485, 41 S. E. 678. This principle is applicable where, although what purports to be a fi. fa. is copied in the record, there is no reference to its introduction in evidence, nor to its connection with any paper used in the trial of the case, and where the bill of exceptions does not specify the fi. fa. as a part of the record material to a clear understanding of the errors complained of.

3. New trial \S 128(2)—Motion grounded on admission of evidence held not in proper form.

We do not rule upon that ground of the motion for a new trial assigning error on the introduction of the record of deeds as secondary evidence, objected to on the ground that there was no sufficient evidence that the notice to produce the originals was made as provided by law. The motion includes numerous questions and answers and colloquies, and is not in proper form, and, moreover, before another trial the plaintiff will have an opportunity, if he so desires, to obviate the issue before the trial court.

4. New trial \S 128(2)—Assignment of error as to admission of testimony partly admissible, without merit.

Where error is assigned, as in several grounds of the amended motion, on the admission of testimony consisting of oral and documentary evidence, some of which was admissible, such assignment is without merit and shows no cause for the grant of a new trial.

5. Execution \S 193—Only issue in claim case is whether property was subject to fi. fa.

This is an ordinary claim case, and the only issue which could have properly been determined is whether or not the property was subject to the fi. fa. It was therefore error to allow the plaintiff in fi. fa. to testify that the nature of the indebtedness on which the judgment was based, and for which the fi. fa. was issued, was borrowed money. Compare *Allen v. Middleton*, 99 Ga. 758, 27 S. E. 752; *Southern Mining Co. v. Brown*, 107 Ga. 284(3), 33 S. E. 73.

Error from Superior Court, Haralson County; F. A. Irwin, Judge.

Claim by Mrs. W. V. Blackstock to property levied upon by sheriff under a fi. fa. in favor of R. T. Blackman against W. V. Blackstock. From an adverse judgment, claimant brings error. Reversed.

Griffith & Matthews and J. S. Edwards, all of Buchanan, for plaintiff in error.

H. J. McBride, of Tallapoosa, for defendant in error.

GILBERT, J. Mrs. W. V. Blackstock filed a claim to a house and lot in the city of Bremen, and in her claim affidavit she stated that the said property had been levied upon by the sheriff under and by virtue of a *fi. fa.* in favor of R. T. Blackman against W. V. Blackstock. The property was found subject, and Mrs. Blackstock, claimant, made a motion for a new trial, and subsequently amended the same, which was overruled, and she excepted. The evidence in regard to possession of the property at the time of the rendition of the judgment and subsequently was conflicting. The levy is not set out in the record, and it is to be assumed that it contained no recital as to possession. It does not appear from the record that the claimant made any admissions in respect thereto, and the jury might have found either way. The plaintiff's *fi. fa.* was not introduced in evidence. In the record before us, immediately following the claim affidavit and the entry of filing the same, appears what purports to be a copy of a *fi. fa.* from a judgment rendered by the city court of Atlanta in favor of R. V. Blackman as plaintiff against W. V. Blackstock as defendant, dated the 14th day of May, 1912. The bill of exceptions recites that R. T. Blackman is plaintiff in *fi. fa.*, thus showing a variance between this *fi. fa.* and the name of the plaintiff in *fi. fa.* as to the second initial. The motion for new trial contained the general grounds and the following amended grounds:

"First. Movant contends that the court committed error on the trial of said case in admitting in evidence the record of a deed purporting to be a deed from H. J. Denham to W. V. Blackstock purporting to convey the premises in dispute, upon the introduction of the following evidence offered by the plaintiff, laying the foundation for the introduction of said deed as secondary evidence."

Then follow three typewritten pages of questions to and answers of witnesses on direct and cross-examination, and colloquies of counsel in regard to whether notice to produce two deeds had been legally served on the claimant and as to the admissibility of the secondary evidence. The second ground of the amended motion complains that the "court committed error on the trial of said case, as movant contends, in admitting in evidence the following testimony of S. J. Ayers, a witness testifying for the plaintiff in said case," and certain documentary evidence. Then follow about three typewritten pages of questions and answers and colloquies, and a statement of the documentary

evidence offered, such evidence tending to show ownership of the premises by defendant in *fi. fa.* The third ground of the amended motion complains of the refusal of the court to rule out testimony to the effect that the property in question was levied upon, such testimony failing to show definitely that the execution levied was the one which had resulted in the claim. The fourth ground of the amended motion complains that—

"The court committed error on the trial of said case in overruling the motion of counsel for claimant, made to the court at the conclusion of the evidence offered by the plaintiff, to dismiss the levy of the plaintiff and to dismiss said case."

Then follows the ground of said motion to dismiss and argument of counsel in favor of the dismissal, and the further recital, "Whereupon the court did then and there overrule said motion, refused to dismiss said case, allowed the case to go to the jury, which ruling movant insists was error," for the reasons recited. Then follow the reasons assigned therefor. The fifth ground of the amended motion complains that the court committed error on the trial of said case in admitting to the jury trying said case the following evidence of R. T. Blackman, the plaintiff:

"Q. What was the nature of the indebtedness on which the judgment was based for which this *fi. fa.* was issued? A. It was borrowed money."

The objection urged at the time was that such evidence was incompetent and immaterial, and that the note on which the judgment and execution was rendered was the highest and best evidence; the court ruling, after such objections were made, "I will admit as circumstances in the case." The last two grounds of the amended motion complain of the admission as evidence of certain entries in the tax digest. The objection urged against this testimony at the time was that the property set out in the tax digest is not sufficiently identified as the property set out in the levy, and on the further ground that it shows entirely different property. The court overruled the objection. The issues raised under the evidence in this case are ruled upon in the headnotes, and it is unnecessary to elaborate upon the rulings there made.

Judgment reversed. All the Justices concur, except ATKINSON, J., absent on account of sickness.

(153 Ga. 193)

(193 S.E.)

HARRIS v. STATE. (No. 2568.)

(Supreme Court of Georgia. Oct. 14, 1921.)

(Syllabus by the Court.)

1. Criminal law \S 1151—Time to be allowed counsel to prepare for trial in sound discretion of trial court.

"The time to be allowed counsel to prepare for trial is in the sound discretion of the trial judge, which discretion will not be interfered with by this court, unless abused. No unusual or intricate matters of law or fact appearing, and nothing being shown as to public excitement, there was no abuse of discretion in overruling the motion for a continuance upon the grounds of want of time to prepare for trial." *Charlon v. State*, 106 Ga. 400 (2), 32 S. E. 347; *Kelloy v. State*, 151 Ga. —, 107 S. E. 488.

2. Corpus delicti established.

There were sufficient circumstances, together with the admission of the shooting by the defendant, to establish the corpus delicti.

3. Criminal law \S 516—Homicide \S 187—Statement to sheriff held admissible.

Error is assigned because the court permitted the sheriff to testify as follows: "I had a conversation with Gene Harris [defendant] some time after he was placed in my custody. He was there one day at the door, and I asked him why he wanted to kill his wife, and he said he did it in self-defense, and I think he tried to show me some scars on him, and I paid no attention." The objection to this evidence was that it was not a confession. The court ruled that "If he stated to the sheriff he killed his wife in self-defense, it would be relevant testimony, if the solicitor desires to introduce it." Held that, while the evidence did not amount to a confession of guilt by the accused, it was relevant on the issues in the case.

4. Materiality of errors.

Other assignments of error on the admissibility of evidence, where sufficient to raise any question for consideration by this court, are not of sufficient materiality to cause the grant of a new trial.

5. Criminal law \S 784(3)—No error in failure to charge upon circumstantial evidence.

Where one accused of a homicide admits the killing but in connection with the admission states that he acted in self-defense, and where in his statement to the jury he also admits the shooting of the deceased, but claims justification, the case is not one dependent wholly upon circumstantial evidence; the failure of the court to charge upon that subject is not cause for reversal. *Eberhart v. State*, 47 Ga. 598, 599 (8); *Griner v. State*, 121 Ga. 614 (2), 49 S. E. 700; *Wilburn v. State*, 141 Ga. 510, 518 (9), 81 S. E. 444.

6. Criminal law \S 781(2), 824(5), 826—Charge on confessions held authorized; timely and proper request for instructions necessary.

Where, upon the trial of one accused of homicide, the accused admitted the killing of

the deceased, but claimed that he was justified in so doing, a charge on the law of confessions is unauthorized. *Owens v. State*, 120 Ga. 296, 48 S. E. 21. Moreover, the failure of the court to charge the law of confessions, in the absence of an appropriate and timely request, is not cause for the grant of a new trial. *Benjamin v. State*, 150 Ga. 78, 102 S. E. 427.

7. Witnesses \S 77—Child of nine years of age may be competent.

On objection to the testimony of a child nine years of age as a witness, based on his youthfulness, the answers given in response to questions were sufficient to authorize the judge to hold the witness competent to testify. *Lucas v. State*, 146 Ga. 315 (2), 91 S. E. 72.

8. Sufficiency of evidence.

The jury were authorized, under the evidence, to find the defendant guilty.

Error from Superior Court, Baldwin County; Jas. B. Park, Judge.

Gene (alias James) Harris was convicted of homicide, and brings error. Affirmed.

T. D. Luther and D. S. Sanford, both of Milledgeville, for plaintiff in error.

Doyle Campbell, Sol. Gen., and A. Y. Clement, both of Monticello, R. A. Denny, Atty. Gen., and Graham Wright, Asst. Atty. Gen., for the State.

HILL, J. Judgment affirmed. All the Justices concur, except ATKINSON, J., absent on account of sickness.

(152 Ga. 184)

CONLEY v. CONLEY. (No. 2431.)

(Supreme Court of Georgia. Oct. 14, 1921.)

(Syllabus by the Court.)

1. Pleading \S 243—Petition addressed to judge amendable by addressing it to court.

A petition addressed to the judge of the superior court, and praying process requiring the defendant to appear at the next term of the superior court, is amendable by addressing the petition to the superior court of the county in which the suit is brought. Civil Code 1910, §§ 5682, 5691; *Parish v. Davis*, 126 Ga. 840, 55 S. E. 1082.

2. Divorce \S 214(3)—Evidence of good character admissible in reply to evidence of specific acts of adultery.

Where a libel for divorce is filed by a wife against her husband on the ground of desertion and cruel treatment, and the defendant by way of answer alleges acts of adultery on the part of the wife, it is competent, on the trial of the question of temporary alimony, for the wife to offer evidence of general good character in reply to evidence tending to show specific acts of adultery. Civil Code 1910, § 5745; *Du Bose v. Du Bose*, 75 Ga. 753.

3. Affidavits \Leftrightarrow 18—Served on opposing counsel day before hearing properly excluded.

The court did not err in excluding an affidavit of a witness for the defendant (plaintiff in error) on the ground that it was served on the opposite party or her counsel one day before the hearing, and not three days as required by the order of the judge; it appearing that the witness who gave the affidavit resided outside of the state, and that the defendant in error would not have time to answer the affidavit by counter affidavit before the hearing. *Huff v. Markham*, 70 Ga. 284; *Hester v. Exley*, 130 Ga. 460, 60 S. E. 1053.

4. Alimony properly allowed.

Under the evidence in the case the trial judge did not err in awarding \$15 a month alimony and \$35 counsel fees to the defendant in error.

5. Divorce \Leftrightarrow 243—Judgment for alimony construed as relating back to filing of suit.

Where a petition was filed December 11, 1921, and the trial judge awarded \$15 alimony "for the month of December," the judgment will be construed as relating back to the filing of the suit. See *Swearingen v. Swearingen*, 19 Ga. 265 (4).

Error from Superior Court, Evans County; W. W. Sheppard, Judge.

Action by Ruth Conley against W. P. Conley for divorce. Judgment for plaintiff, and defendant brings error. Affirmed.

R. H. Burroughs and J. S. Daniel, both of Claxton, for plaintiff in error.

Girardeau & Elmore and Anderson & Hodges, all of Claxton, and W. G. Warnell, of Savannah, for defendant in error.

HILL, J. Judgment affirmed. All the Justices concur, except ATKINSON, J., absent on account of sickness.

(152 Ga. 204)

RASKIN v. MAYOR AND ALDERMEN OF CITY OF SAVANNAH. (No. 2622.)

(Supreme Court of Georgia. Oct. 14, 1921.)

(Syllabus by the Court.)

1. Municipal corporations \Leftrightarrow 636—Statute held not to authorize city recorder to punish acts committed beyond corporate limits.

An ordinance of the city of Savannah providing that "any person who shall, in the night or day, disturb the peace and quiet of the city in any manner whatsoever, or shall be guilty of any riotous, disorderly, or improper conduct, or keep a disorderly house within the limits of the city of Savannah, * * * shall, on conviction before the police court, be fined * * * or imprisoned" (as therein provided), does not authorize the recorder of the city of Savannah to try and punish for acts committed beyond the corporate limits of the city but

within three miles thereof. This is true notwithstanding the provision of the act of the General Assembly approved Aug. 11, 1906 (Ga. Laws 1906, p. 1033), extending the jurisdiction of the police court of the city of Savannah "to try all offenses against the laws and ordinances of the municipal government of the city of Savannah committed within the corporate limits of said city and within three miles thereof, and extending into the county of Chatham." Under proper construction of the ordinance only acts committed within the corporate limits of the city of Savannah are declared to be unlawful.

(Additional Syllabus by Editorial Staff.)

2. Municipal corporations \Leftrightarrow 120—Ordinance prohibiting acts on pain of imprisonment strictly construed.

An ordinance of a city providing for imprisonment of one disturbing the peace, or guilty of riotous, disorderly, or improper conduct, should be strictly construed.

Question certified by Court of Appeals.

Abe Raskin was convicted of a violation of an ordinance of the City of Savannah, and brought error to the appellate court, which certifies questions. Answer in the negative.

The Court of Appeals requested instruction from the Supreme Court upon the following question:

"An ordinance of the city of Savannah is as follows: 'Any person who shall, in the night or day, disturb the peace and quiet of the city in any manner whatsoever, or shall be guilty of any riotous, disorderly, or improper conduct, or keep a disorderly house within the limits of the city of Savannah, such person shall, on conviction before the police court, be fined in a sum not exceeding one hundred * * * dollars, or be imprisoned not exceeding thirty * * * days, or both, at the discretion of the police court; each day's keeping of a disorderly house to be considered a separate offense.'

"It is provided by an act of the General Assembly of Georgia approved August 11, 1906 (Ga. L. 1906, p. 1033), that 'The police court of the city of Savannah is hereby continued a court of record, and shall have jurisdiction to try all offenses against the laws and ordinances of the municipal government of the city of Savannah committed within the corporate limits of said city and within three miles thereof, and extending into the county of Chatham, and to punish for the violation of such laws and ordinances by inflicting such punishments as may be provided by law.'

"Under and by virtue of this act of the Legislature, was the recorder of the city of Savannah authorized to administer punishment for a violation of the city ordinance referred to, where the offense occurred outside the corporate limits of the city of Savannah but within three miles thereof? In other words, did this act of 1906 automatically, so to speak, amend the city ordinance referred to, so that that ordinance was violated if the acts therein made penal were done within the corporate

limits of the city of Savannah or within three miles thereof?"

Robt. L. Colding, of Savannah, for plaintiff in error.

Shelby Myrick and E. A. Cohen, both of Savannah, for defendant in error.

GEORGE, J. [1, 2] If the provision of the act of the General Assembly approved August 11, 1906 (Ga. L. 1906, p. 1033), quoted above, confers authority upon the mayor and aldermen of the city of Savannah to declare penal an act committed beyond the corporate limits of the city but within three miles thereof, the ordinance in question does not undertake to exercise the power conferred. The ordinance must be strictly construed. Under proper construction, only acts committed within the corporate limits of the city of Savannah are declared to be unlawful. The question propounded is therefore answered in the negative.

All the Justices concur, except ATKINSON, J., absent on account of sickness.

(152 Ga. 185)

KAY et al. v. BENSON. (No. 2434.)

(Supreme Court of Georgia. Oct. 14, 1921.)

(Syllabus by Editorial Staff.)

1. Appeal and error ⇨237(2)—No reversal, in absence of prompt motion for mistrial.

If court erred in propounding questions to a witness, such error could not be complained of in the Supreme Court, where the injured party did not promptly move for a mistrial when the questions were propounded.

2. Trial ⇨234(7), 244(3)—Charge held not to emphasize plaintiff's contentions, and shift burden from plaintiff to defendant.

A charge to the jury, "Fraud may not be presumed, but, being in itself subtle, slight circumstances may be sufficient to carry conviction of its existence," was not objectionable, on the ground that it emphasized the contentions of plaintiffs, and minimized evidence introduced by the defendants, and shifted the burden from the plaintiff to the defendants.

3. Trial ⇨259(1)—Party desiring elaboration in charge should present request in writing.

A party desiring an elaboration of an instruction to more completely cover his contentions should duly present to the court a proper request in writing.

4. Evidence ⇨113(8)—Report of receiver as to sale of property held admissible to shew value.

Court did not err in admitting in evidence the report of a receiver, who under appointment of the court took charge of the subject-matter of the suit, such report showing the amount obtained at the sale of the receiver

for said property, where court instructed that the amount of the sale by the receiver could only be considered as illustrating the value of the property at the time in question.

Error from Superior Court, Fulton County; W. D. Ellis, Judge.

Action by H. S. Benson against L. S. Kay and others. From a judgment for plaintiff, defendants bring error. Affirmed.

Weltner, Cheatham & Koplin and D. K. Johnston, all of Atlanta, for plaintiffs in error.

W. S. Dillon, C. H. Calhoun, and W. J. Davis, Jr., all of Atlanta, for defendant in error.

GILBERT, J. [1] 1. One ground of the motion for a new trial complains of questions propounded by the trial judge to a witness who, as notary public, had taken an affidavit of the defendant, as follows:

"Q. Did you tell these men about swearing to this affidavit that it was a mere matter of form? A. No.

"Q. Did you sign your name as notary public, that you had sworn a man, when you had not done so? A. I read that document to them.

"Q. You were appointed notary public by this court; is that the way you transact business? A. Very few would swear a man. At the same time I wrote this out myself. I wrote this out myself, and I read it to them word for word, and then they signed. Mr. David Kay was not present at the time. I don't know where he signed, or when he signed. They took the document with them when they signed there.

"Q. You are still notary public? A. Yes, sir."

The defendants should have promptly moved for a mistrial when the above questions were propounded, if they considered their interests prejudiced thereby, and a new trial will not be granted in the absence of such timely motion. *Moore v. McAfee*, 151 Ga. 270 (11), 275, 108 S. E. 276. Whether the questions amounted to reversible error, had defendants made a timely motion for a mistrial, need not be decided.

[2, 3] 2. Another ground of the motion for a new trial complains that the court charged the jury as follows:

"Fraud may not be presumed, but, being in itself subtle, slight circumstances may be sufficient to carry conviction of its existence."

It is urged that this charge was not applicable to the nature of the testimony, that it was prejudicial to movants, in that it emphasized the contentions of respondents, and minimized the evidence introduced by movants, and that it shifted the burden from the plaintiff to the defendants. The charge is not subject to the criticism made. If defendants had desired an elaboration to more

completely cover their contentions, a proper request in writing should have been duly presented to the court.

3. In other grounds of the motion for a new trial complaint is made that the court failed to charge the jury on designated principles of law. In the absence of a proper written request, duly presented, these grounds show no cause for the grant of a new trial.

[4] 4. In other grounds of the motion for a new trial complaint is made of the admission as evidence of the report of the receiver who, under appointment of the court, took charge of the business which was the subject-matter of the present suit, such report showing the amount obtained at the sale of the receiver for said property, and of the charge of the court to the jury in regard to such evidence. The charge complained of was as follows:

"The report of the auditor, I believe, was admitted in evidence here. The question as to the amount of the sale by the receiver can only be considered by you as illustrating, if it does, the value of the property at the time this purchase was made. You are not to consider what it was worth when the receiver sold it as a criterion for going by in this case; but you may consider the amount it brought, and the circumstances under which it was sold, in illustrating its value, if it does throw light on the subject of how much it was worth at the time that this alleged purchase was made. The condition of the goods and their value on the 1st of February, or whatever date it was, on which evidence was introduced, can only be considered by you as illustrating, if it does, its value when he is alleged to have purchased it in January, some date, which has been shown to you."

In the light of the charge, which was not erroneous, the court did not err in admitting the evidence.

5. The verdict was supported by evidence. Judgment affirmed.

All the Justices concur, except ATKINSON, J., absent on account of sickness.

(152 Ga. 203)

MURRAY v. STATE. (No. 2657.)

(Supreme Court of Georgia. Oct. 14, 1921.)

(Syllabus by the Court.)

Criminal law §935(1)—Refusal of new trial proper where evidence authorized verdict.

No error of law is complained of as having been committed on the trial of the case, and only the usual general grounds are relied on. The evidence authorized the verdict, and the court did not err in refusing a new trial.

Error from Superior Court, Harris County; Geo. P. Munro, Judge.

Louis Murray was convicted of crime, and he brings error. Affirmed.

Hardy & Peavy, of Hamilton, for plaintiff in error.

C. F. McLaughlin, Sol. Gen., and Geo. C. Palmer, both of Columbus, and Geo. M. Napier, Atty. Gen., and Seward M. Smith, Asst. Atty. Gen., for the State.

HILL, J. Judgment affirmed. All the Justices concur, except ATKINSON, J., absent on account of sickness.

(152 Ga. 203)

BRADFORD v. STATE. (No. 2669.)

(Supreme Court of Georgia. Oct. 14, 1921.)

(Syllabus by the Court.)

Criminal law §951(3, 4, 5)—No jurisdiction of motion for new trial made during vacation; ordinary motion must be made at trial term, and extraordinary motion at subsequent term.

Under the practice in this state, every motion for a new trial, whether ordinary or extraordinary, must be made during term. An ordinary motion must be made during the term at which the trial was had, and an extraordinary one may be made during a subsequent term. In this case an extraordinary motion for a new trial was made and filed in vacation; the judge heard it on its merits in vacation, and overruled it in vacation. The entire proceeding was nugatory. The judge erred in entertaining jurisdiction of the motion, and deciding it upon its merits. According to previous rulings of this court, his judgment must be reversed, with direction that the motion be dismissed. *Perkins v. State*, 126 Ga. 578, 55 S. E. 501, and cases cited.

Error from Superior Court, Wilkes County; E. T. Shurley, Judge.

Will Bradford was convicted of crime, and brings error, Judgment denying new trial reversed, with directions to dismiss motion. See, also, 106 S. E. 718.

F. H. Colley, C. D. Colley and I. T. Irvin, Jr., all of Washington, Ga., and John R. Cooper, of Macon, for plaintiff in error.

M. L. Felts, Sol. Gen., of Warrenton, R. A. Denny, Atty. Gen., and Graham Wright, Asst. Atty. Gen., for the State.

FISH, C. J. Judgment reversed, with direction. All the Justices concur, except ATKINSON, J., absent on account of sickness.

(152 Ga. 189)

FLEEMAN v. GAY et al. (No. 2474.)

(Supreme Court of Georgia. Oct. 14, 1921.)

(Syllabus by the Court.)

1. Witnesses \Leftrightarrow 150(3)—Statute prohibiting testimony to transactions with decedent inapplicable to suits instituted or defended by heirs at law.

The provisions of the Civil Code of 1910, § 5858, par. 1, to the effect that the opposite party in a suit instituted or defended by the personal representative of a deceased person shall not be admitted to testify in his own favor against the deceased person as to transactions or communications with such deceased person, has no reference to suits instituted or defended by the heirs at law of the deceased person. Therefore a surviving partner, against whom suit is brought by the heirs at law of the deceased partner, is not incompetent to testify as a witness in his own behalf to transactions between himself and such deceased partner. *Boynton v. Reese*, 112 Ga. 354 (3), 37 S. E. 437; *Oliver v. Powell*, 114 Ga. 592 (5), 40 S. E. 826; *Whitley v. Hudson*, 114 Ga. 668, 40 S. E. 838; *Goddard v. Boyd*, 144 Ga. 18, 85 S. E. 1013; *Rudolph v. Washington*, 146 Ga. 605, 91 S. E. 560; *Hall v. Butler*, 148 Ga. (2), 815, 98 S. E. 549.

2. Witnesses \Leftrightarrow 150(3)—Partner may testify to transactions with deceased partner in action by heirs.

The provision of the Civil Code of 1910, § 5858, par. 2, that "where any suit is instituted or defended by partners, persons jointly liable or interested, the opposite party shall not be admitted to testify in his own favor as to transactions or communications solely with an insane or deceased partner, or person jointly liable or interested," has no application to a suit by the heirs at law of a deceased partner against a surviving partner. Compare *Whitley v. Hudson*, 114 Ga. 668 (2), 670, 40 S. E. 838.

3. Judgment reversed.

The court having erred in refusing to allow the surviving partner, who was defendant in the suit brought by the heirs at law of the deceased partner, to testify in his own behalf as to transactions between himself and the latter, and which evidence was material, a reversal of the judgment denying a new trial necessarily results.

Error from Superior Court, Newton County; J. B. Hutcheson, Judge.

Action by Katherine Gay and others against R. L. Fleeman: Judgment for plaintiffs, and defendant brings error. Reversed.

King & Johnson, of Covington, for plaintiff in error.

A. S. Thurman, of Monticello, for defendants in error.

GILBERT, J. Judgment reversed. All the Justices concur, except ATKINSON, J., absent on account of sickness.

(152 Ga. 199)

HARRIS v. STATE. (No. 2586.)

(Supreme Court of Georgia. Oct. 14, 1921.)

(Syllabus by the Court.)

1. Dying statement properly admitted.

Under the ruling made in this case when it was before this court on a former review (see 149 Ga. 724, 102 S. E. 159), the court did not err in admitting as evidence the statement made by the deceased, which the state offered as a dying statement.

2. Criminal law \Leftrightarrow 823 — Law as to mutual combat to be submitted without written request.

Where the law of mutual combat is essentially for consideration in the case, the charge of the court should submit it to the jury, even though no written request therefor is preferred.

3. Criminal law \Leftrightarrow 1122(5) — Failure to instruct not reviewable where instructions not shown.

Whether the court erred in not charging the jury that "they could not consider the statement of the deceased in making their verdict, unless they found at the time of making such statement he had abandoned all hope of living," was error or not depends upon whether the court gave instructions to the jury in regard to the dying statement, and what those instructions were. The movant having failed to show what the court's instructions were upon this subject, the mere failure to charge in the language here set forth cannot be adjudged to show cause for the grant of a new trial.

(Additional Syllabus by Editorial Staff.)

4. Homicide \Leftrightarrow 300(8)—Law of mutual combat held involved under evidence.

In a prosecution for homicide, held, that the law of mutual combat or mutual intention to fight was involved in the case, under the evidence.

Error from Superior Court, Floyd County; Moses Wright, Judge.

Charlie Harris was convicted of murder, and brings error. Reversed.

Len B. Gillebeau, of Atlanta, and W. H. Ennis, of Rome, for plaintiff in error.

E. S. Taylor, Sol. Gen., of Summerville, R. A. Denny, Atty. Gen., Graham Wright, Asst. Atty. Gen., and Jas. F. Kelly, M. B. Eubanks, and F. W. Copeland, all of Rome, for the State.

BECK, P. J. The plaintiff in error, Charlie Harris, was indicted in Floyd superior court for the offense of murder. He was tried, convicted, and sentenced to death. He made a motion for a new trial upon the general grounds, and thereafter filed an amendment to this motion, alleging as further ground for a new trial that the court failed to charge the law of voluntary manslaughter

as based upon the theory of mutual combat or mutual intention to fight; and also that the judge erred in not charging the jury that they could not consider a statement of the deceased, introduced in evidence by the state, as a dying declaration, unless they believed that at the time this statement was made by the deceased every hope of life with him was extinct, the plaintiff in error contending that the deceased expressed in the statement itself a hope of life, and that the judge in his charge should have submitted to the jury the question of whether or not the expression used by the deceased in his statement amounted to a hope of life.

[1] 1. Under the ruling made in this case when it was here before (*Harris v. State*, 149 Ga. 724, 102 S. E. 159), the court did not err in admitting as evidence the statement made by the deceased, which the state offered as a dying statement.

[2] 2. In the second ground of the motion for a new trial, error is assigned upon the court's failure to charge the jury upon the law of voluntary manslaughter, as based upon the theory of mutual combat or mutual intent to fight. Whether the failure to charge upon this subject was error or not depends upon the question as to whether there was evidence from which the jury may have been authorized to find that there was mutual combat or mutual intention to fight. In the statement of the deceased, which was introduced by the state, we find the following:

"Q. Now just tell in your own way what he shot you with, and why he shot you. A. I wanted him to plow yesterday, and he would not plow; wanted to hire him to plow for me if he would not plow in his own crop, and he would not do that, and he would not feed the mules; and this morning I lacked a couple of hours being done a piece of land, and he came up before breakfast to plow, I guess, and had a pistol in his bosom, and I help him put a land slide on, and told him to go to plowing the other mule, and I would be done directly and he could have the other one also; and somebody turned the mule in the pasture, and he would not plow it.

"Q. What did you say to him, and he to you? A. And I went up on the hill to plow, and went around and came back and told Charlie to get the other mule and to go to plowing, and I would be done in a little while, and he could take both and go to plowing, and he said 'No,' that if he could not get both then he would not plow none; and I says, 'You are working for contrariness,' and he says, 'That's a lie'—he was not, and I throwed a rock at him.

"Q. And then what? A. He ran his hand in his bosom and got his pistol out.

"Q. When he got the pistol out, what did you do? A. I ran around the mule, and my pistol was in my pocket, in a corduroy coat, and I tried to get it, and I ran around the mule twice, and he kept shooting as I came around, and I begged him to quit.

"Q. What did you have in your hand when he shot you? A. I was trying to get my gun.

"Q. Was your gun on your person? A. In my pocket.

"Q. And you had your coat on? A. Yes.

"Q. Did you shoot any? A. No; I didn't shoot.

"Q. How many times did the negro shoot? A. And the next time he shot I dropped my pistol, and he shot me through this arm, and I don't know what went with my pistol."

Isabel Spruce, a witness introduced by the defendant, testified in part as follows:

"When I came out Charlie was on his knees knocking on his plow, and when Mr. Pierce got near to him I heard them talking, and I did not pay them any attention until they spoke loud, and I turned around, and when I looked towards them Charlie was around the mule, and when he came around Mr. Pierce came around, and they both ran around the mule, one in front of the other; and Mr. Pierce grabbed at Charlie with his hand, and Charlie jumped back off him, and then Mr. Pierce threw up his hands as if he was going to shoot, and Charlie jumped back and threw his hands up, and when Charlie threw his hands down, and when he came up again he had his gun, and Mr. Pierce had his already. There were two shots as I remember, unless they both fired at once. When I seen them they were going around the mule the last time before the shooting. Mr. Pierce was after Charlie, and when he came around the mule he made at Charlie with his hand this way. When Charlie threw up his hands I could see he did not have anything in them; he just threw his hands up this way, when he jumped back off from Mr. Pierce, with his hands out open like this; when he had his hands up like that Mr. Pierce had something in his hand; looked like he had his gun pointing at Charlie that way, and Charlie throwed his hands down, and when he came up he presented his gun, and they were talking all at the same time, but I could not understand them."

On cross-examination she testified:

"I did not say I didn't see the shooting. I said I heard the talking and turned around. It is true I testified that I looked around when they shot. I heard the shooting and I looked around, and they both looked like they were fixing to shoot; couldn't tell which shot first, and that's right unless they shot at the same time."

And then, in answer to a question as to her testimony at the coroner's inquest, she said:

"I do not remember that the question was asked me at the coroner's inquest, 'The shooting occurred at the plow where Mr. Pierce was plowing?' and that I answered, 'Yes, sir; when I looked around they both brought their hands up that way.' Charles throwed his hands up, and I said that when Mr. Pierce grabbed at Charlie, and Charlie jumped back from him, they both throwed their hands up to shoot, after Charlie throwed his hands up and come down. Mr. Pierce had his already up.

"Q. Wasn't this question asked you on that hearing: 'Did you see a pistol in Mr. Pierce's hand?' and you answered, 'No, sir.' A. I said I couldn't tell whether it was a pistol, but he

had it up like it was a pistol. I suppose I answered, 'It was too far for me to see; I couldn't tell; he had a pistol, though, for they went out and got Mr. Pierce's pistol afterwards. I couldn't see the pistol from my house, and couldn't tell what either had in their hands.'

[4] Under this evidence the law of mutual combat or mutual intention to fight was involved in the case. See *Gann v. State*, 30 Ga. 67; *Findley v. State*, 125 Ga. 579, 583, 54 S. E. 106; *Matthews v. State*, 136 Ga. 125, 70 S. E. 1110. The law of mutual combat being involved in the case, instructions upon that subject should have been given by the court, although no written request therefor was preferred. In the case of *Waller v. State*, 100 Ga. 320, 28 S. E. 77, it was held:

"There being, on the trial of an indictment for murder, evidence which, if credible, would have warranted a finding that the slayer and the deceased, upon a sudden quarrel, each being armed with a deadly weapon, mutually engaged in a mortal combat, each using his weapon and intending to kill the other therewith, it was the duty of the judge, with or without a request, to give in charge to the jury the law of voluntary manslaughter as related to the doctrine of 'mutual combat'; and the omission to do so is cause for a new trial, where the accused was convicted of murder."

In *Findley v. State*, supra, this court said:

"The evidence in this case involved the question of whether or not there was such a mutual combat at the time of the homicide as to reduce the killing from murder to manslaughter. The court omitted entirely any reference to that subject, though charging generally on the subject of manslaughter."

See, also, *Ray v. State*, 15 Ga. 223; *Butt v. State*, 150 Ga. 302, 103 S. E. 466. In the instant case the judge failed to charge upon the subject of voluntary manslaughter as based upon the law of mutual combat; and this was such error as requires the grant of a new trial.

[3] 3. The ruling made in headnote 3 requires no elaboration.

Judgment reversed.

All the Justices concur, except ATKINSON, J., absent on account of sickness.

(152 Ga. 182)

HOLLIS v. STATE. (No. 2420.)

(Supreme Court of Georgia. Oct. 14, 1921.)

(Syllabus by Editorial Staff.)

1. Constitutional law § 83(3)—False pretenses § 2—Act making overdraw of bank account a crime not unconstitutional, as constituting imprisonment for debt.

Laws 1919, p. 220, § 34, making it a crime to overdraw a bank account, or to utter or deliver

an instrument overdrawing an account or credit, is not unconstitutional, as violative of Const. art. 1, § 1, par. 21, prohibiting imprisonment for debt; such statute providing for the punishment of persons practicing the fraud specified therein.

2. Witnesses § 37(2)—One without personal knowledge cannot testify as to facts shown by books.

A person could not testify as to what was shown by records of deposits taken from the proper custodian of the books of a bank, where he did not know of his own knowledge anything about the matter and did not keep the books of the bank.

3. Criminal law § 444—Record of bank improperly admitted in evidence.

In a prosecution for overdrawing an account at a bank, court erred in admitting in evidence a sheet received from the proper custodian of the books of the bank, where it was not shown who kept the books, or that they were correctly kept.

4. False pretenses § 41—Evidence properly excluded as immaterial.

In a prosecution for overdrawing a bank account, where a witness for the defendant was asked by his counsel the question, "Did you during the month of June, 1920, give any checks on the Bank of T. and sign the name of [the defendant] to them?" and counsel informed the court that the witness would answer, "I did," the court properly refused to permit the answer to the question, since the answer "I did," without more, would have been immaterial.

Error from City Court of Tifton; James H. Price, Judge.

W. A. Hollis was convicted of drawing a check on a bank without sufficient funds or credit for its payment, and brings error. Reversed.

H. H. Hargrett and W. B. Bennet, both of Tifton, for plaintiff in error.

R. E. Dinsmore, Sol., of Tifton, for the State.

FISH, C. J. [1] 1. Section 34 of article 20 of the act of the General Assembly entitled "An act to regulate banking in the state of Georgia," etc., approved August 16, 1919 (Georgia Laws 1919, pp. 135, 220), provides:

"Any person who, with intent to defraud, shall make, or draw, or utter, or deliver any check, draft, or order for the payment of money upon any bank, or other depository knowing at the time of such making, drawing, uttering or delivery that the maker or drawer has not sufficient funds in or credit with such bank, or other depository, for the payment of such check, draft or order in full upon its presentation, shall be guilty of a misdemeanor. The making, drawing, uttering, or delivering of such check, draft, or order as aforesaid shall be prima facie evidence of intent to defraud. The word 'credit' as used herein shall be construed to mean an arrangement or understand-

ing with the bank or depository for the payment of such check, draft or order." Section 34.

This section of the act is not unconstitutional, as violative of article 1, section 1, paragraph 21, of the Constitution of this state, which prohibits imprisonment for debt. The section is not designed for punishment for mere nonpayment of debts, but provides for the punishment of persons practicing the fraud specified therein. See *Smith v. State*, 141 Ga. 482, 81 S. E. 220, Ann. Cas. 1915C, 999.

[2] 2. The defendant was charged in an accusation preferred against him in the city court of Tifton, on August 28, 1920, with a violation of the section of the act quoted in the foregoing note, in that he, on June 4, 1920, with intent to defraud, drew a check on the Bank of Tifton, for a certain sum of money, in favor of a designated person (a copy of the check being set out in the accusation), and delivered the same to the payee, knowing at the time the check was drawn and delivered that he did not have sufficient funds in or credit with such bank for its payment. On the trial the defendant was convicted. His motion for a new trial was overruled, and he excepted. A ground of the motion for a new trial complains that the court erred in holding, over defendant's objection, the following evidence of a witness for the state to be admissible:

"This sheet [indicating instrument attached to this brief and marked Exhibit B] came from the proper custodian of the books in the Bank of Tifton. It is the individual deposit sheet of [the defendant]. It shows that [the defendant] had a balance of 70 cents in the bank on April 1, 1920, and had made no deposit there since that time. He might have made a deposit in some other name, but if he had made it in his own name it would have shown on this sheet. I cannot swear positively that he had made no deposit since April 1, 1920, but this sheet does not show that he did."

This ground of the motion states that the witness had testified "that he did not keep the books of the Bank of Tifton"; the objection urged to the admissibility of the testimony being that "it was secondary evidence, it not having been shown that the witness knew of his own knowledge anything about the matter." The "sheet" attached as an exhibit to the motion appears to be a deposit account kept by the defendant with the Bank of Tifton, showing various items of deposit by the defendant, and various checks drawn by him, stating the dates of the month and the amounts of each deposit and each check from January 5, to April 10, but not designating any year. Held, that the court erred in not excluding the testimony on the objection made.

[3] 3. The court also erred in admitting in

evidence against the defendant the "sheet or written instrument referred to in the next preceding note; the evidence being objected to on the ground that" it was not properly identified, because it was not shown who kept the books, nor that they were correctly kept.

[4] 4. A witness for the defendant was asked by his counsel the following question:

"Did you during the month of June, 1920, give any checks on the Bank of Tifton and sign the name of [the defendant] to them?"

Counsel informed the court that the witness would answer, "I did." The court refused to permit the answer to the question. The answer, "I did," without more, would have been immaterial, and the court did not err in excluding it.

5. As a new trial is granted on other grounds, a ruling as to the alleged newly discovered evidence is not required.

6. The court erred in not granting a new trial on the grounds dealt with in the foregoing notes numbers 2 and 3.

Judgment reversed.

All the Justices concur, except ATKINSON, J., absent on account of sickness.

(152 Ga. 210)

JACKSON v. STATE. (No. 2673.)

(Supreme Court of Georgia. Oct. 15, 1921.)

(Syllabus by the Court.)

1. Criminal law \S 1039—Verdict not set aside on ground that person acting as bailiff was not officer where no objection.

If one who had been a constable of a certain militia district in a given county by removal therefrom to another district thereby vacated his office, nevertheless if, while in attendance upon the superior court of that county, he was selected by the sheriff to act as bailiff during the term of court, and while acting in that capacity had charge of a jury after a case had been submitted to them, no objection being made to his acting in that capacity, the verdict made by the jury will not be set aside upon the ground that the jury were in charge of one who was not in fact a constable of the county.

2. Criminal law \S 956(13)—Statement of bailiff held to sufficiently explain charge that he mingled with jury.

The contention that the bailiff while in charge of the jury mingled with them and slept in the same room with them, while they were deliberating in the case, was sufficiently met and explained.

3. Criminal law \S 956(13)—Negative testimony on motion for new trial did not require finding that bailiff was not sworn.

The mere negative testimony of the bailiff himself that he had no recollection of taking

the oath prescribed in section 883 of the Penal Code of 1910, relating to oaths of bailiffs, and of others who were present a part of the time in the courtroom that they had no recollection of seeing him sworn, did not require a finding upon the part of the trial judge, as a matter of fact, that the bailiff did not take the oath prescribed. Nor would the additional fact that there was no record upon the minutes of the court of the bailiff's having been sworn require such a finding.

4. Criminal law \S 761(12), 762(1)—Charge on motive held not objectionable as assuming facts or expressing opinion.

The exception to the charge upon the ground that it contained an expression of opinion by the court is without merit.

5. Homicide \S 304, 309(5)—Evidence held not to warrant charge upon involuntary manslaughter or accidental shooting.

There was no evidence upon which to predicate a charge upon the subject of involuntary manslaughter or upon the theory of accidental shooting.

(Additional Syllabus by Editorial Staff.)

6. Criminal law \S 1160—Credibility of bailiff's statement that he did not mingle with jury matter for trial judge.

Where it was contended in a homicide case that the bailiff mingled with and talked to jurors while considering the case, the trial court was the judge of the credibility of a statement of the bailiff in an affidavit on motion for new trial that he did not mingle with or talk to the jurors while they were considering the case.

Error from Superior Court, Worth County;
R. Eve, Judge.

Joe Jackson was convicted of murder, and brings error. Affirmed.

Perry & Miller, of Sylvester, for plaintiff in error.

R. S. Foy, Sol. Gen., of Sylvester, Geo. M. Napier, Atty. Gen., and Seward M. Smith, Asst. Atty. Gen., for the State.

BECK, P. J. Joe Jackson was tried under an indictment charging him with the offense of murder. The jury returned a verdict of guilty, without a recommendation. The accused made a motion for a new trial, which was overruled, and he excepted. Certain of the grounds of the motion for a new trial relate to misconduct upon the part of the bailiff in charge of the jury while it was in his charge, after the case had been submitted to them; and, in addition to the alleged acts of misconduct upon his part, it is charged in the motion that the bailiff was not sworn; also that he was not a legal constable of the county.

[1] 1. The bailiff referred to, Hiram Stewart, had been a bailiff in a certain militia district in the county, but had removed therefrom. If by his removal from the district

his office was vacated and he was no longer a constable of the county, nevertheless, if, during the term of court at which the accused was tried, he was selected by the sheriff as a bailiff and acted as such, he was a de facto officer, and the fact that he was placed in charge of the jury is not ground for setting aside the verdict, especially as no objection was made to his acting as bailiff and performing the duties of such an officer.

[2] 2. The contention that the bailiff improperly mingled with the jury and conversed with them, and allowed another constable to come into the room where the bailiff was, was sufficiently met and explained by the following statement of the bailiff to whom the improper conduct is imputed:

"That he is the person who served as bailiff of the superior court of Worth county, and as such bailiff had charge of the jury which tried the case of *The State v. Joe Jackson*, charged with murder, at the January adjourned term, 1921; that he has seen the affidavit of S. A. Powell, in which it is stated in substance that affiant slept in the jury room with said jury while they were considering said case. Deponent says the facts are as follows: The case above mentioned was submitted to the jury after arguments of counsel and charge of the court had been concluded, in the afternoon of a day during said term, and said jury then placed in charge of deponent as bailiff of said court. Said jury went immediately to the jury room used by trial juries for deliberations upon cases in said court, the regular jury room, where they remained until 7 or 8 o'clock, p. m., when they were by deponent, in obedience to the direction of the court, carried to the café, after supper had been prepared for them, when and where they ate supper, separated from other persons, and after having eaten their supper were by deponent immediately taken back to the jury room, where they remained an hour or two after supper; and, not having arrived at a verdict in the case, deponent, by direction of the court, carried them to the room in the courthouse prepared for trial juries to sleep in, where they slept during the night. The weather was cool, and fire was needed in their bedroom, and the said S. A. Powell was asked by deponent to carry a turn of wood into the jury bedroom for making a fire, when said Powell and deponent each took therein a turn of wood, and said Powell went immediately out of said room, and did not speak to the jury nor to any member of the jury. Deponent prepared a fire for the comfort of the jury, and occupied a cot prepared for the purpose, which cot obstructed the only door or place of entrance or exit in or from said room. Deponent did not converse with said jury, nor did any other person during the time they were in charge of deponent, nor within his knowledge. Deponent did not mix or mingle or converse or speak with said jury, nor with any member of said jury, except under direction of the court, and said jury did not discuss said case nor any feature of said case in the presence of deponent, nor was said case nor any feature of it mentioned by deponent, nor by

any one else in the presence of said jury, nor by any member of said jury. That deponent did escort said jury, while in his charge, across the courthouse grounds into the streets, down the street to the café, and not the hotel, and back to the jury room, but did so as above stated in obedience to the direction of the court, and for the purpose of said jury getting their meals. And at no time did they mix and mingle with other persons further than was necessary in passing and meeting such persons upon the streets and café, and never at any time did said jury or any member mix and mingle with other persons, further than stated above, and did not discuss said case either among themselves out of the jury room nor in the presence of deponent, nor in the presence of any other person, nor did any other persons mention said case or any feature of said case in the presence or hearing of said jury."

[8] The court was the judge of the credibility of the affiant's statement, and evidently found it to be true. That being so, this court cannot disturb his finding; and the ground of the motion for new trial based upon misconduct of the bailiff and the jury cannot avail the plaintiff in error in the face of the judge's finding.

[3] 3. Failure of a bailiff to take the oath prescribed in section 883 of the Penal Code of 1910, relating to oaths of bailiffs taking charge of juries, is ground for the grant of a new trial. *Roberts v. State*, 72 Ga. 673; *Washington v. State*, 138 Ga. 370, 75 S. E. 253. But, where bailiffs take charge of juries, there is a presumption that they were regularly sworn; and the mere negative testimony of the bailiff himself that he had no recollection of taking the oath, and of others who were present a part of the time in the courtroom that they had no recollection of seeing him sworn, will not require a finding upon the part of the judge, when the question of whether the bailiff was sworn or not is raised in the motion for a new trial, that the bailiff was not sworn. Nor will the fact that there was no record upon the minutes of the court of the oath having been taken by the bailiff, in addition to such negative testimony, require a finding that he was not sworn. Especially is this true where such negative affidavit of the bailiff is taken quite a while after adjournment of the court.

[4] 4. In the trial of the case the judge charged the jury as follows:

"I charge you, as a principle of law for your consideration in this case, that motive or intention is essential to malice, and malice is an essential ingredient of the offense of murder. As before stating, intention is to be arrived at by such proof of the surrounding circumstances connected with the perpetration of the offense and the sound mind and discretion of the person accused. You inquire whether there was any motive on the part of the defendant to induce him to take the life of the deceased, and, if there was any motive, what

that motive was. If you find there was no motive on his part to commit the act, you may consider it, especially if the evidence leave the defendant's guilt at all doubtful, in deciding whether the defendant is guilty or not."

This charge is excepted to upon the ground that "it assumed that the defendant took the life of the deceased." Fairly construed, the charge is not open to this exception.

[5] 5. Several witnesses testified directly and positively that the accused shot the deceased. No witness testified to any circumstance tending to show that the shooting was unintentional or that it was accidental. The accused himself in his statement claimed that he was not present at the scene of the shooting; that he had left the house in which the killing took place, and had gone away from the scene of the homicide. Manifestly the court did not err in not charging the jury upon the theory of accidental shooting or the law of involuntary manslaughter.

Judgement affirmed.

All the Justices concur, except ATKINSON, J., absent on account of sickness.

(152 Ga. 219)

THWEATT v. STATE. (No. 2704.)

(Supreme Court of Georgia. Oct. 15, 1921.)

(Syllabus by the Court.)

1. Criminal law \S 413(1), 695(6) — Declarations of accused held not admissible as self-serving; evidence properly excluded, where part is objectionable.

The court did not err in excluding from evidence certain declarations, made by the accused, that a short time before the homicide and a short distance from the scene thereof the witness met the accused, while the latter was on his way to the home of the deceased, where the killing took place, and that the accused stated to him in part that he had his pistol with him, having put it in his pocket the night before, when the deceased drove him from the home, as he knew that he would have to roam the streets for the remainder of the night, but that now he had no further use for the pistol.

(a) If other parts of the statement made by the accused to the witness at the same time were admissible, they should have been separated from the objectionable part and offered separately. Where evidence is offered in block, and a part of it is objectionable, the ruling of the court excluding it in its entirety will not be cause for a new trial.

2. Homicide \S 285—Court properly instructed on threats.

The court did not err in instructing the jury upon the subject of threats, and in submitting to them the question of whether threats had been made or not, as a circumstance to be considered by them. There was some evidence authorizing the charge.

3. Criminal law §782(6)—Charge on positive and negative evidence held not erroneous.

The court charged the jury in part as follows: "Now, gentlemen, the existence of a fact testified to by one positive witness is rather to be believed than that such fact did not exist, because many witnesses who had the same opportunity of observation swear that they did not see or know of its having transpired. This does not apply when two parties have equal facilities for seeing or hearing a thing, and one swears that it did and the other swears that it did not." And the court added: "With reference to this question of positive and negative testimony, the jury, weighing the testimony of such witnesses, should consider and pass upon the question of their credibility." In view of the fact that the court submitted the credibility of witnesses to the jury, the charge as given was not error.

4. Instructions.

Under the evidence in the case the court did not err in failing to charge the law of voluntary manslaughter.

(Additional Syllabus by Editorial Staff.)

5. Criminal law §828—Request in writing necessary to require charge on theory presented by statement alone.

Failure of court to charge on a theory of the case presented by statement alone is not error, where no request in writing is made therefor.

Error from Superior Court, Muscogee County; Geo. P. Munro, Judge.

Clarence Thweatt was convicted of murder, and brings error. Affirmed.

Love & Fort, of Columbus, for plaintiff in error.

C. F. McLaughlin; Sol. Gen., and T. T. Miller, both of Columbus, Geo. M. Napier, Atty. Gen., and Seward M. Smith, Asst. Atty. Gen., for the State.

BECK, P. J. Upon the trial of Clarence Thweatt, under an indictment charging him with the offense of murder, a verdict of guilty, with a recommendation to mercy, was returned, whereupon he made a motion for new trial, which was overruled, and he excepted.

[1] 1. While one Jones, who was a witness for the defendant, was upon the stand under examination, counsel for the defendant proposed to prove by him the following facts:

"That on the same morning of the fatal encounter between the defendant and the deceased, the witness, Jimmie Jones, met defendant, Clarence Thweatt on the corner of Tenth and Front streets, in Columbus, three blocks from the scene of the homicide, and while Clarence Thweatt was on his way to the home of the deceased; that the defendant then and there told Jimmie Jones that he and his father-in-law

[the deceased] had had a difficulty the night before, and he [defendant] was going back to the home to apologize to him, and to ask his permission to take his [defendant's] wife and child away from there, and take them to the home of the witness, where he had provided a place for them, Jimmie Jones having rented to defendant quarters in which to place his family; that defendant then and there told Jimmie Jones that, if the deceased did not quietly consent for him to take his wife and child away, he intended to grab up his baby and take it away, and that he knew his wife would follow; that at that same time and same place the defendant offered to surrender to Jimmie Jones his pistol, and asked him to take it and take care of it for him; that he had put it in his pocket the night before, when deceased drove him from the home, as he knew that he would have to roam the streets the remainder of the night; and then and there told the witness that he [defendant] had no further use for it."

It is alleged that, if the witness had been allowed to answer the questions propounded, he would have testified to the facts as set forth immediately above, and error is assigned upon the exclusion of this testimony. There was no error in this ruling of the court. Parts of the testimony thus excluded were clearly self-serving declarations, and were not admissible upon the theory that they were part of the *res gestæ*. If any part of the testimony was admissible, it should have been separated from that which was objectionable, and offered in evidence.

[2] 2. The ruling made in the second head-note requires no elaboration.

[3] 3. In the course of his instructions to the jury the court gave the following charge:

"Now, gentlemen, the existence of a fact testified to by one positive witness is rather to be believed than that such fact did not exist, because many witnesses who had the same opportunity of observation swear that they did not see or know of its having transpired. This does not apply when two parties have equal facilities for seeing or hearing a thing, and one swears that it did and the other swears that it did not. With reference to this question of positive and negative testimony, the jury, in weighing the testimony of such witnesses, should consider and pass upon the question of their credibility."

Plaintiff in error contends that this charge was error:

"Because it failed to place upon the instructions the vital and absolutely necessary qualification that the jury must not only believe that the witness had the same opportunity of observation, but must also be of equal credibility."

In the case of *Warrick v. State*, 125 Ga. 133, 53 S. E. 1027, it was said:

"Where the evidence is conflicting as to whether a particular thing did or did not occur, and the presiding judge charges the jury the legal principle that the existence of a fact testified to by one positive witness is rather to be believed than that such fact did not exist, because many witnesses who had the same opportunity of observation swear that they did not see or know of its having transpired, he should also give an instruction to the effect that in weighing the testimony of witnesses the jury should consider and pass upon their credibility."

The same rule is stated and affirmed in several other decisions by this court. See, also, the case of *Helms v. State*, 136 Ga. 799, 72 S. E. 246, where it is said:

"It is erroneous to charge Penal Code 1910, § 1011, that 'the existence of a fact testified to by one positive witness is rather to be believed than that such fact did not exist, because many witnesses who had the same opportunity of observation swear that they did not see or know of its having transpired,' without an instruction, in connection therewith, touching the credibility of witnesses."

There are cases in our reports to be found where the judgment of the trial court refusing a new trial was reversed because in his charge the judge had instructed the jury that the existence of a fact testified to by one positive witness is rather to be believed than that such fact did not exist, because many witnesses who had the same opportunity of observation swear that they did not see or know of its having transpired, and did not charge in connection therewith touching the credibility of witnesses. But in the present case the court, after charging the jury in the language which the plaintiff in error contends is objectionable, added:

"With reference to this question of positive and negative testimony, the jury weighing the testimony of such witnesses should consider and pass upon the question of their credibility."

And it seems that this was sufficient submission to the jury of the question of credibility, and therefore the charge complained of was not error.

There were other criticisms upon the verbiage of the charge, which are not of sufficient importance to merit discussion.

[4, 5] 4. Under the evidence in the case the court did not err in failing to charge the law of voluntary manslaughter. If a charge upon that subject was authorized at all, it was under the statement of the accused; and the failure to charge upon a theory of the case presented by the statement alone is not error, where no request in writing is made therefor.

Judgment affirmed.

All the Justices concur, except ATKINSON, J., absent on account of sickness.

(152 Ga. 195)

GIDDENS v. STATE. (No. 2571.)

(Supreme Court of Georgia. Oct. 14, 1921.)

(Syllabus by the Court.)

1. Indictment and information \S 16, 133(3)—More omission of name of 1 of 18 grand jurors formal error which could be taken advantage of only by special demurrer.

While it is necessary that as many as 18 grand jurors act in returning an indictment, the fact that only 17 names are entered in the face of the indictment is not such a fatal defect in the indictment as to render it void; nor is it a good ground for a motion in arrest. If as a matter of fact only 17 did act in returning the indictment, a plea in abatement should have been filed. The mere omission of 1 of the 18 names should be taken advantage of by special demurrer attacking the indictment for defect in form.

2. Homicide \S 169(2) — Competent to show officer killed was informed by telephone of existence of warrant, which then could be admitted.

Where a constable, without a warrant, attempted to make an arrest of a named person, and the latter resisted, and shot and killed the officer, it is competent to show, upon the trial of the slayer, that the officer had inquired of the sheriff of the county by telephone whether he had a warrant for the arrest of the person whom he afterwards sought to apprehend, and the sheriff replied that he had, and told the constable making the inquiry to arrest the person referred to and to carry him to a designated place, and that he would come after him.

(a) The conversation having been admitted, it was competent to show the existence of the warrant by introducing that document in evidence.

3. Homicide \S 287 — Instruction concerning consideration by jury of motive held proper.

The court did not err in instructing the jury that they might consider the question as to whether motive had been shown, and what that motive was, if any motive was shown by the evidence; and if no motive was shown, that the jury might consider the lack of motive; but that if the evidence satisfied them beyond a reasonable doubt that the defendant committed the crime charged with malice aforethought, either express or implied, then, though no motive was disclosed by the evidence, the jury would be authorized to infer an unlawful motive and to find the defendant guilty.

4. Homicide \S 300(9)—Instruction upon subject of arrest without warrant held not proper under evidence.

Under the evidence in this case the court should not have charged the jury the provisions of section 917, Penal Code 1910, upon the subject of arrests without a warrant, as applicable to the evidence, there being no evidence in the case to show that the offense for which the officer sought to make the arrest had been committed in his presence, or that the offender

was endeavoring to escape, or for other cause there was likely to be a failure of justice.

(Additional Syllabus by Editorial Staff.)

5. Indictment and Information \S 147—Omission of name of grand juror ground for quashing on demurrer.

Where only the names of 17 of the 18 grand jurors acting in returning it appeared on the face of an indictment, there was such a defect in form that upon special demurrer the court would have quashed the indictment, so that one perfect in form might be returned.

6. Arrest \S 63(1)—Rule as to arrest without warrant.

An arrest cannot lawfully be made without a warrant where the offense is not committed in the presence of the officer, unless the offender is endeavoring to escape, or for other cause there is likely to be a failure of justice for want of an officer to issue a warrant; but the mere possibility of there being a failure of justice does not authorize an officer to attempt an arrest for a misdemeanor without a warrant.

7. Homicide \S 340(2)—Charge in homicide case concerning arrest held prejudicial.

In a prosecution for murder of an officer while attempting to make an arrest, a charge which gave the jury the authority to decide that the arrest would have been legal without a warrant was prejudicial as well as erroneous, where there was no evidence showing conditions warranting such arrest.

Error from Superior Court, Worth County; R. Eve, Judge.

Macie Giddens was convicted of murder, and brings error. Reversed.

J. H. Tipton, of Sylvester, for plaintiff in error.

R. S. Foy, Sol. Gen., and Williamson & Williamson, all of Sylvester, and R. A. Denny, Atty. Gen., and Graham Wright, Asst. Atty. Gen., for the State.

BECK, P. J. Macie Giddens was tried under an indictment charging him with the offense of murder; it being alleged that he had killed one W. P. Giddens. The jury returned a verdict of guilty, whereupon the defendant made a motion for a new trial, which being overruled, he excepted.

[1, §] 1. Before judgment and sentence of the court was pronounced and entered against the accused, his counsel presented to the court in writing his motion in arrest of judgment and sentence, which was filed, and a rule nisi was issued, directed to the Solicitor General with the usual order. The motion in arrest was based upon the ground that only 17 jurors constituted the grand jury which returned the indictment in this case, only 17 names appearing in the face of the indictment. The court upon the hearing of this motion permitted evidence to be intro-

duced to show that there were 18 jurors who acted as such in returning the indictment, and that the omission of the name of one of them was a clerical mistake; and the motion was overruled.

The court did not err in overruling the motion. We do not think that the defect in the indictment here pointed out could be raised by a motion in arrest. The defendant might have demurred to the indictment upon the defect appearing on the face of it, or possibly he might have filed a plea in abatement. If as many as 18 grand jurors actually participated in the deliberations of the charge against the accused and took part in returning the indictment, the indictment was good after verdict, and was not rendered void by the clerical omission of one of the names. It was such a defect in form, however, that upon demurrer the court would have quashed the indictment, so that one perfect in form might be returned. The decision in the case of *Williams v. State*, 107 Ga. 721, 83 S. E. 648, is conclusive upon the question here decided. See, also, the case of *Hamilton v. State*, 97 Ga. 216, 23 S. E. 824.

[2] 2. The conversation referred to in the second headnote tended to explain why the constable was at the place where the homicide was committed, to show his motive in going there, and to explain the conduct of the deceased officer. Similar evidence was held to be admissible in the case of *Price v. State*, 72 Ga. 441, upon the ground that the statements there admitted were a part of the act of going, of the *res gestæ*. And in the instant case the jury were distinctly instructed as to the limited purpose for which the evidence was admitted; that is, that it was admitted to explain why the deceased was present at the home of the defendant on the night of the encounter. The conversation having been admitted, it was competent to show the existence of the warrants, by introducing those documents in evidence.

[3] 3. The court charged the jury as follows:

"You may inquire whether there was any motive on the part of the defendant to induce him to take the life of the deceased, and, if there was any motive, what that motive was. If you find there was no motive on his part to commit the act, you may consider it, especially if the evidence leaves the defendant's guilt at all doubtful, in determining whether the defendant is guilty or not. Yet, if the evidence shows the commission of the crime, and you are satisfied beyond a reasonable doubt that the defendant committed it with malice aforethought, either express or implied, and if the circumstances are consistent with his guilt and inconsistent with any other reasonable hypothesis than that of his guilt, then, though the evidence may not disclose a motive, you would be authorized to infer an unlawful motive and find the defendant guilty."

This charge is not open to criticism upon the ground that it is confusing and liable to be misunderstood by the jury, and probably was misunderstood, to the injury of the defendant; nor that it was calculated to mislead the jury; nor that the entire charge upon the subject of motive greatly modified the rule on that subject; nor on the ground that it was not authorized by the evidence.

[4, 6] 4. Error is assigned upon the following charge of the court:

"It is not claimed by the state in this case that the deceased was, at the time he was shot, in possession of a warrant for the arrest of Macie Giddens. It does contend, however, that under the conditions and circumstances existing at the time the jury would be authorized to find that the defendant, Macie Giddens, was a fugitive from justice, and was endeavoring to escape, or for other cause there was likely to be a miscarriage of justice, and that W. P. Giddens, the deceased, was an officer of the state, and therefore authorized to make an arrest without a warrant. Section 917 of the Code of Georgia relating to the subject of arrest I will now read to you: 'An arrest may be made for a crime by an officer, either under a warrant, or without a warrant if the offense is committed in his presence, or the offender is endeavoring to escape, or for other cause there is likely to be a failure of justice for want of an officer to issue a warrant.'"

This charge is excepted to upon the ground that it was not authorized by the evidence. We are of the opinion that the exception to the charge points out a radical and material error. We find no evidence in the case from which the jury would have been authorized to find that the defendant was endeavoring to escape, and the expression used by the court, "fugitive from justice," must be taken in this connection to mean one who is endeavoring to escape. And it is not contended that the offense was committed in the presence of the officer, nor was it likely for any other cause that there would be a miscarriage of justice. Two indictments for misdemeanor had been found by the grand jury of the county against the defendant, some two months before the homicide, and bench warrants had been issued and were at the time of the killing in the hands of the sheriff of the county. There is some evidence that the defendant had left the county, but it does not appear that he had fled to escape arrest under the bench warrants. It seems that he had gone for a while to Americus, Georgia, which is only a short distance from the county of Worth; and several days before the attempted arrest he had returned to Worth county and was staying at his moth-

er's, to whose house certain of his property and effects had been carried. There is no ground upon which it could be contended that the sheriff, who was at the county site, and who, it seems, possessed an automobile or had one at his command, could not have gone from the county site to the place at which the accused was staying, or that he could not have sent the warrant to the officer who endeavored to make the arrest, in the course of two or three hours. An arrest cannot lawfully be made without a warrant, where the offense is not committed in the presence of the officer, unless the offender is endeavoring to escape, "or for other cause there is likely to be a failure of justice for want of an officer to issue a warrant." There could be no failure of justice in this case for want of an officer to issue a warrant. The warrant had already been issued. Nor was it likely that there would be a failure of justice because of any delay in obtaining this warrant. The mere possibility of there being a failure of justice does not authorize an officer to attempt an arrest for a misdemeanor without a warrant. The expression of the law is "likely to be a failure of justice"; that is, probable ground for believing that there will be a failure of justice. Under these facts and circumstances, the court was not authorized under the law to submit to the jury the question as to whether or not the deceased could legally proceed without a warrant to go to the house of the accused, break open the door, and attempt to make an arrest.

[7] Counsel for the state argue that, conceding for the sake of argument the excerpt from the court's charge was not properly adjusted to the facts of this case, it does not appear that the charge was harmful to the defendant. We cannot agree to this contention. It was this charge and other portions of the charge similar in effect which gave to the jury the authority to decide that the arrest would have been legal without a warrant. If we are right in holding that the charge was erroneous, we have no doubt that it was material error and harmful to the accused. What we have said in regard to this particular part of the charge is applicable to other portions of the charge complained of, which could only be proper upon the assumption that there was some evidence to authorize the finding that the circumstances justified an arrest without a warrant.

Judgment reversed.

All the Justices concur, except ATKINSON, J., absent on account of sickness.

(152 Ga. 126)

CROWELL et al. v. AKIN et al. (No. 2323.)

(Supreme Court of Georgia. Sept. 26, 1921.)

(Syllabus by the Court.)

1. Constitutional law \Leftrightarrow 306—Records \Leftrightarrow 2—Land registration act not violative of due process of law provisions.

The sixteenth section of the act of the General Assembly approved August 21, 1917 (Acts 1917, p. 108), known as the land registration act, is not violative of the due process of law clauses of the state and federal Constitutions (Const. U. S. Amend. 14 and Const. Ga. art. 1, § 1, par. 3 [Civ. Code 1910, § 6359]), in that the preliminary examination by the examiner is ex parte and before the parties adversely interested are brought into the proceeding, or in that the preliminary report of the examiner is declared to be "prima facie evidence of the contents thereof," such report not being binding upon the court or conclusive upon the parties adversely interested in the proceeding. The intent of the preliminary report is to furnish to the court and to the parties any information likely to affect the title or the possession, and so that any person interested in or likely to be interested in the result of the suit may be notified. Nor is section 20 of the act violative of the due process of law clauses of the state and federal Constitutions, upon the ground that the section provides for the independent examination of the title by the examiner and for the submission by him of a final report based upon such findings which shall be taken as prima facie true; such report not being conclusive upon the parties, nor binding upon the court until after trial by jury upon exceptions of fact filed thereto.

2. Jury \Leftrightarrow 19(1)—Land registration act does not deny right of trial by jury.

The act is not violative of the guaranty of the state Constitution (article 6, § 18, par. 1 [Civ. Code 1910, § 6545]) that "the right of trial by jury * * * shall remain inviolate;" the act (Laws 1917, p. 108) and the twentieth section thereof expressly providing for trial by jury as a matter of right, upon demand, upon any issues of fact arising upon exceptions to the auditor's report filed by any party to the proceeding. The provisions of the act relating to the trial by jury upon demand of issues of fact arising upon exceptions to the examiner's report, which is to be taken as prima facie true, and restricting the hearing to the evidence reported by the examiner (except as otherwise provided in the act) are not unconstitutional limitations of the right of trial by jury.

3. Jury \Leftrightarrow 19(1)—Land registration act not unconstitutional as permitting judgment without verdict of jury.

The act is not unconstitutional because it confers upon the judge of the superior court the right to render judgment without the verdict of a jury in a civil case other than one founded on an unconditional contract in writing where no issuable defense is filed on oath.

4. Statutes \Leftrightarrow 107(1), 115(2)—Land registration act not violative of constitutional provision as to title and subjects.

The act is not violative of article 3, § 7, par. 8, of the Constitution of this state (Civ. Code 1910, § 6437), which declares: "No law or ordinance shall pass which refers to more than one subject-matter, or contains matter different from what is expressed in the title thereof."

(Additional Syllabus by Editorial Staff.)

5. Records \Leftrightarrow 2—Land registration act liberally construed.

The land registration act (Acts 1917, p. 108) is a remedial statute, and should be liberally construed according to its intent so as to advance the remedy and repress the evil.

6. Jury \Leftrightarrow 10—Cases triable without.

All cases triable without a jury prior to the adoption of the Constitution may still be so tried, and it is competent for the Legislature to provide for a trial without a jury in cases similar to those in which such a trial was in use prior to the adoption of the Constitution.

Error from Superior Court, Wayne County; J. P. Highsmith, Judge.

Action by T. R. C. Crowell and others against L. R. Akin and others under the land registration act. From judgment for defendants plaintiffs bring error. Reversed.

J. L. Sweat, of Waycross, and A. G. Powell, of Atlanta, amici curiæ.

Bennet, Twitty & Reese and C. B. Conyers, all of Brunswick, Walter McElreath, of Atlanta, D. M. Clark, Jas. R. Thomas, R. L. Bennett, Gibbs & Turner, all of Jesup, and J. C. McDonald and Wilson & Bennett, all of Waycross, for defendants in error.

BECK, P. J. On April 13, 1920, Thatcher R. C. Crowell, Calvin D. Christ, and Calvin C. Walkling filed their petition in Wayne superior court, to have their title to 72 tracts of land, containing 1,000 acres each, more or less, and eight lots containing 490 acres each, more or less, as therein described, situated, lying, and being in Wayne county, Ga., and known as "the Williams survey lands," registered under the land registration act. The defendants named in the proceeding, together with all parties in possession over 14 years of age, were served by the sheriff or his deputy, and the lands were duly posted by the sheriff. Copies of the petition and process were mailed by the clerk to all nonresident adverse claimants, and notice of the proceeding was duly published "to all whom it may concern," as provided in the act. The time within which adverse claimants might appear and assert their claims was enlarged from time to time by proper orders of the court, and had not expired when, on August 23, 1920, L. R. Akin

and 35 other persons filed in Wayne superior court their petition against the applicants in the registration proceeding, to enjoin that proceeding, upon the ground that the land registration act is unconstitutional for the reasons set forth in their petition. The petition for injunction alleged that each of the plaintiffs "is in possession of some part of the vast acreage involved in said petition for registration, and claims title thereto adversely to the claim of title asserted by the defendants herein." To the petition for injunction the defendants demurred and answered. Upon the interlocutory hearing the court took the matter under advisement, and subsequently, on October 21, 1920, passed an order granting the injunction as prayed. To this judgment the defendants excepted. The bill of exceptions recites:

"Upon the hearing, it was admitted upon the part of the plaintiffs in the petition for injunction, that, if the land registration act was constitutional, then plaintiffs were not entitled to an injunction."

The plaintiffs' contentions, as summarized in the brief of counsel filed in their behalf, and in the order in which we will consider them, are:

"(1) The scheme of the act, with reference to the examiner's preliminary report and the findings of fact incorporated therein, is violative of the 'due process of law' provisions of the state and United States Constitutions. This is true, too, of the scheme of the act with respect to the examiner's findings of fact incorporated in his final report.

"(2) The act is violative of the guaranty of the state Constitution that 'the right of trial by jury * * * shall remain inviolate.' Article 6, § 18, par. 1; Civil Code of 1910, § 6545.

"(3) The act is unconstitutional, because it confers upon the judge of the superior court the right to render judgment without the verdict of a jury in a civil case other than one founded on an unconditional contract in writing where no issuable defense is filed under oath. Article 6, § 4, par. 7; Civil Code of 1910, § 5660.

"(4) The act is unconstitutional, because it refers to more than one subject-matter, and because it contains matter different from what is expressed in its title." Article 3, § 7, par. 8; Civil Code, § 6437.

[1] The act of the General Assembly approved August 21, 1917 (Acts 1917, p. 108), known as the land registration act, is an adaption of the Torrens system to the Constitution and laws of this state. It follows closely, though differing in some particulars, the registration acts of a number of other states, among them Illinois (Laws 1897, pp. 141-165; Laws 1903, pp. 121-123); California (Statutes 1897, c. 110, pp. 138-167; General Laws 1899, pp. 1219, 1257; Statutes 1915, pp. 1932-1951); Massachusetts (Acts 1898, pp. 682-722; Revised Laws 1902, c. 128); Minnesota (General Laws 1901, pp. 248-378);

Oregon (General Laws 1901, pp. 438-467); Colorado (Laws 1903, pp. 311-352; Rev. Stat. 1908, pp. 334-355); Washington (Session Laws 1907, pp. 693-738); New York (Laws 1908, pp. 1247-1283; Consolidated Laws 1909 [Highway Law], pp. 3459-3494; Laws 1910, c. 627); North Carolina (Pub. Acts 1913, pp. 147-159); Mississippi (Laws 1913, pp. 158-175); Ohio (Laws 1913, pp. 914-960); Nebraska (Laws 1915, pp. 494-526); Virginia (Acts 1916, c. 62, p. 70); South Carolina (Acts 1916, p. 942). The Illinois act of 1895 (Laws 1895, p. 107), perhaps the earliest registration act in the United States, was declared unconstitutional upon the ground that there was a delegation of judicial powers in violation of the Constitution of that state. *People v. Chase*, 165 Ill. 527, 46 N. E. 454, 36 L. R. A. 105. The Ohio act of 1896 (92 Ohio Laws, p. 220) was held unconstitutional by the Supreme Court of that state, upon substantially the same ground, and upon the ground that the act violated the due course of law guaranteed by the Ohio Bill of Rights, in that it provided for inadequate service, especially upon known adverse claimants residing in the state, and upon the further ground that it attempted to authorize the taking of private property for uses not public, without compensation. See *State v. Guilbert*, 56 Ohio St. 575, 47 N. E. 551, 38 L. R. A. 519, 60 Am. St. Rep. 756. In 1897, as noted above, the Legislature of Illinois passed a similar law designed to meet the constitutional tests fixed by the Supreme Court in the *Chase Case*; and the court sustained the latter act, in *People v. Simon*, 176 Ill. 165, 52 N. E. 910, 44 L. R. A. 801, 68 Am. St. Rep. 175. In 1913, after an amendment to the Constitution of Ohio, a registration act was passed which was held not to be objectionable. With the exceptions noted, the validity of land registration acts have been uniformly upheld. See *Tyler v. Judges*, 175 Mass. 71, 55 N. E. 812, 51 L. R. A. 438; *Robinson v. Kerrigan*, 151 Cal. 40, 90 Pac. 129, 121 Am. St. Rep. 90, 12 Ann. Cas. 829; *State v. Westfall*, 85 Minn. 437, 89 N. W. 175, 57 L. R. A. 297, 89 Am. St. Rep. 571; *Peters v. Duluth*, 119 Minn. 96, 137 N. W. 390, 41 L. R. A. (N. S.) 1044; *People v. Crissman*, 41 Colo. 450, 92 Pac. 949. The subject is fully annotated in L. R. A. 1916D, 14. The Supreme Court of the United States, in *American Land Co. v. Zeiss*, 219 U. S. 47, 31 Sup. Ct. 200, 55 L. Ed. 82, upheld an act resting upon the same constitutional basis as the land registration acts.

[5] The object of the land registration acts will be further noticed in a subsequent division of this opinion; but it will be helpful to call attention at this point to some of the essentials of title to land nowhere to be discovered of record under the system of evidencing title heretofore existing in this

state. Among these were: The genuineness of signatures of grantors and of attesting witnesses in recorded deeds; jurisdiction and authority of official witnesses; status and identity of persons professing to be heirs at law; full age of grantors and donees; sanity; the fact and validity of marriage and of divorce; prescription; adverse possession; the power and authority of corporate officers; the validity of tax deeds (depending upon whether the levy was excessive, etc.). Other illustrations might be given. The land registration act is therefore a remedial statute, and should be liberally construed "according to its intent, 'so as to advance the remedy and repress the evil,'" as said by the Supreme Court of North Carolina in *Cape Lookout Co. v. Gold*, 167 N. C. 63, 83 S. E. 3. It is unnecessary to set out at length the act under consideration. We will notice only the provisions of the act necessary to a determination of the precise questions made in the present case.

A suit for registration of title is commenced by petition by the applicant "against the world" as well as against the land in rem. "All persons who by the petition are disclosed to have any lien, interest, equity or claims, adverse to the petitioner or otherwise, vested or contingent, upon said land or any interest therein," and all other persons "whom it may concern," are defendants in the proceeding. All known defendants resident in the state must be served as in ordinary actions. Service by publication is provided on adverse nonresident and unknown claimants. Jurisdiction in rem is obtained by the sheriff going on the land and posting a notice thereon, and by service of notice upon every occupant of the land above the age of 14 years. Powell on Land Registration, § 15. Section 16 of the act provides:

"Upon the filing of a petition, as provided in this act, the clerk shall at once notify the judge, who shall refer the cause to one of the general examiners or to a special examiner. It shall thereupon become the duty of such examiner to make up a preliminary report containing an abstract of the title to the land from public records and all other evidences of a trustworthy nature than can reasonably be obtained by him, which said abstract shall contain full enough extracts from the records, and other matters referred to therein, to enable the court to decide the questions involved; also a statement of the facts relating to the possession of the lands; also containing the names and addresses, so far as he is able to ascertain, of all persons interested in the land, as well as all adjoining owners, showing their several apparent or possible interests, and indicating upon whom and in what manner process should be served or notices given, in accordance with the provisions of this act. The preliminary report of the examiner shall be filed in the office of the clerk of the superior court, on or before the return day of the court, as stated in the process, unless the time for filing the same shall be extended by the court;

and the said report shall be prima facie evidence of the contents thereof."

If the preliminary report of the examiner discloses that other persons than those who shall have been notified are entitled to notice, provision is made in the seventeenth section of the act for service of a copy of the petition upon such persons. By the eighteenth section of the act any person, whether notified or not, may become a party to the proceeding, may file objections to the granting of the relief prayed, or any part thereof, by answer asserting some interest in the premises and the grounds of his objection, or he may file a cross-action, praying that the title to the land or some interest therein be decreed to be in him and registered accordingly. The nineteenth section requires the examiner to hear evidence and make his final report to the court, after notice of the time and place of hearing as therein provided. The twentieth section of the act is as follows:

"At the time and place set for the hearing the examiner shall, in like manner as other auditors or masters in chancery, proceed with similar powers, as to the compelling of the attendance of witnesses, the production of books and papers, and of adjournment and recessing to hear all lawful evidences submitted. In addition thereto he is empowered to make such independent examination of the title as he may deem necessary. Upon his request the clerk shall issue commission for the taking of testimony of such witnesses as, under the provisions of law on that subject, may have their testimony taken by interrogatories in ordinary actions. He shall also have the powers of a commissioner appointed by the superior court under sections 5910 to 5917, inclusive, of the Civil Code of 1910. Within fifteen days after such hearing shall have been concluded the examiner, unless for good cause the time shall be extended by the judge, shall file with the clerk a report of his conclusions of law and of fact, setting forth the state of the title, any liens or incumbrances thereon, by whom held, the amounts due thereon, together with the abstract of title to said land, and any other information affecting its validity, and a brief or a stenographic report of the evidence taken by him. He shall mail to each of the parties who have appeared in the cause notice of the filing of his report. Any of the parties to the proceeding may, within twenty days after such report is filed, file exceptions to the conclusions of law or of fact or to the general findings of the examiner. The clerk shall thereupon notify the judge that the record is ready for his determination. If the petitioner, or any contestant of petitioner's right, shall demand a trial by jury upon any issue of fact arising upon exceptions to the examiner's report, the court shall cause the same to be referred to a jury, either at the term of court which may then be in session or at the next term of the court, or at any succeeding term of the court, to which the case may be continued for good and lawful reasons; but it shall be the duty of the judge to expedite the hearing of the case, and not

to continue it unless for good cause shown, or upon the consent of all parties at interest. The issue or issues of fact shall be tried before the jury, in the event jury trial is requested, upon the evidence reported by the examiner, except in cases where, under the provisions of law in this state, evidence other than that reported by the auditor may be submitted to the jury on exceptions to an auditor's report; and except, further, that in the case the examiner has reported to the court findings of fact based on his personal examination, either party may introduce additional testimony as to such facts, provided that he will make it appear, under oath, that he has not been fully heard and given full opportunity to present testimony on the same matter before the examiner. The verdict of the jury upon the questions of fact shall operate to the same extent as it would in the case of exceptions to an auditor's report in an ordinary case in equity. In all matters not otherwise provided for, the procedure upon the examiner's report and the exceptions thereto shall be in accordance with procedure prevailing in this state as to auditor's reports in equity and exceptions thereto. The right to grant a new trial upon any issue submitted to a jury, and right of exception to the Supreme Court, are prescribed. The judge may refer or recommit the record to the examiner in like manner as auditor's reports may be recommitted in any equity cause; or he may, on his own motion, recommit it to the same or any other examiner for further information and report."

The preliminary report of the examiner is to be made upon information gathered by the examiner from his own investigations of the public records, and from all other evidence of a trustworthy nature that can be reasonably obtained by him, without notice and an opportunity to the parties to be heard, and the preliminary report is made "prima facie evidence of the contents thereof." Section 20 of the act contemplates that the independent findings of the examiner may be incorporated in his final report, and the independent findings of the examiner as reported by him are to be taken as prima facie true. This is said to offend the due process of law clauses of both the state and federal Constitutions. It is said that this is against the law of the land. Returns, reports, and certificates of sworn public officers have in many instances been declared to be prima facie evidence of the facts to which such returns, reports, and certificates relate. One example will suffice; Under Civil Code 1910, § 5170, the burden of proof in a claim case is "upon the plaintiff in execution in all cases where the property levied on is, at the time of such levy, not in possession of the defendant in execution." Where the entry of levy made by the officer recites that the defendant in execution was in possession of the property at the time of the levy, the recital is prima facie true, and determines the burden of proof. *Burt v. Rubley*, 113 Ga. 1144, 39 S. E. 409. Though possession of and title to land are involved,

the rule of evidence is undoubtedly within the power of the Legislature. See *Vance v. State*, 128 Ga. 661, 57 S. E. 889. The provisions of section 16 of the act are considered by Judge Powell in his work on "Land Registration" in sections 80-87, inclusive. The purpose of the preliminary report, and how far it is prima facie evidence of the "contents thereof," are pointed out. The provisions of section 20 of the act relating to the functions and duties of the examiner on the hearing, and to the special powers of the examiner, are considered by the author in sections 89-95, inclusive. As said above, it is within the power of the Legislature to make the report of a sworn public officer prima facie evidence of the facts to which the report relates so far as it relates to facts within the scope of the officer's duties. Considering the further provision of the act contained in section 21, that "no judgment or decree shall be rendered by default so as to authorize any decree to be rendered without the necessary facts being shown," sections 16 and 20 of the act, providing for and making the independent findings of the examiner prima facie evidence of the truth of the facts therein asserted, are not violative of the due process of law clause of the state or federal Constitution. The special duties and powers of the examiner in this respect must be regarded as affording not only due process of law, but ample process. The application to register title under the act must proceed upon inquiry; the findings of the examiner are not conclusive; and final judgment can be rendered only after trial. See *People v. Crissman*, 41 Colo. 450, 92 Pac. 949.

[2, 8] This brings us to a consideration of the second ground of attack on the act. Article 6, § 18, par. 1, of the constitution of this state (Civil Code 1910, § 6545) declares that—

"The right of trial by jury, except where it is otherwise provided in this Constitution, shall remain inviolate."

This provision is uniformly construed as not conferring a right to trial by jury in all classes of cases, but merely as guaranteeing the continuance of the right unchanged as it existed either at common law or by statute in the particular state at the time of the adoption of the Constitution. 24 Cyc. 101. Prior to the Constitution certain classes of cases were triable without a jury. All cases triable without a jury prior to the adoption of the Constitution may still be so tried. It will be conceded that it is competent for the Legislature to provide for a trial without a jury in cases similar to those in which such a trial was in use prior to the adoption of the Constitution. *Copp v. Henniker*, 55 N. H. 179, 20 Am. Rep. 194; *Tift v. Griffin*, 5 Ga. 185. The constitutional guaranty of jury trial does not apply to cases in equity. *Mahan v. Cavender*, 77 Ga. 118; *Poullain v.*

Brown, 80 Ga. 27, 5 S. E. 107; Mackenzie v. Flannery, 90 Ga. 590, 16 S. E. 710; Bemis v. Armour Packing Co., 105 Ga. 293, 31 S. E. 173. In a number of cases in this state it has been held that in civil actions the right of jury trial exists only in those cases where the right existed prior to the first Constitution, and that the guaranty does not apply to special proceedings not then known or subsequently created or provided by statute; for examples: Proceedings in the court of ordinary, Davis v. Harper, 54 Ga. 180; contested election cases, Freeman v. State, 72 Ga. 812; proceedings against road defaulters, Haney v. Commissioners, 91 Ga. 773, 18 S. E. 28; Blankenship v. State, 40 Ga. 680; partition proceedings, Rodgers v. Price, 105 Ga. 67, 31 S. E. 126; condemnation proceedings, Savannah, etc., Ry. Co. v. Postal Telegraph Co., 112 Ga. 941, 38 S. E. 353; proceedings to validate bonds, Lippitt v. Albany, 131 Ga. 629, 63 S. E. 33. See De Lamar v. Dollar, 128 Ga. 57, 57 S. E. 85; Pearson v. Wimbish, 124 Ga. 701, 52 S. E. 751, 4 Ann. Cas. 501; Flint River Steamboat Co. v. Foster, 5 Ga. 194, 207, 48 Am. Dec. 248. In Peters v. Duluth, 119 Minn. 96, 137 N. W. 390, 41 L. R. A. (N. S.) 1044, it was held that Torrens laws have the general purpose to clear up and settle land titles, and are nothing more or else than an enlargement of the remedy to quiet title. Hence here is no constitutional right to a jury trial in Minnesota, under article 1, section 4, of the Constitution of that state, which declares that—

"The right of trial by jury shall remain inviolate, and shall extend to all cases of law without regard to the amount in controversy."

In the opinion it was said that—

"There was no such right [to trial by jury] upon the ancient bill to remove cloud and quiet title; and it has been held in this state that the constitutional guaranty does not apply thereto" (citing Yanish v. Pioneer Fuel Co., 64 Minn. 175, 66 N. W. 198).

No provision is made for a jury trial in the acts of California, Colorado, Minnesota, Ohio, Oregon, and Washington. A jury trial is expressly provided for by the acts of Massachusetts, Mississippi, North Carolina, New York, and Georgia. In Weeks v. Brooks, 205 Mass. 458, 92 N. E. 45, it was held that a jury trial, where the title to real property is put in issue is a matter of right, and is not a privilege to be granted in the sound discretion of the court, in view of the constitutional provision that there shall be a right to a trial by jury "in all controversies concerning property." But the same court, in Mead v. Cutler, 194 Mass. 277, 80 N. E. 496, held that the provision of the Land Registration Act of 1904 (St. 1904, c. 488), relating to appeals from the land court, that "no matters shall be tried in the superior court except those specified in the appeal," is a rea-

sonable regulation of the way in which the right to such appeals may be exercised, and is not an unconstitutional limitation of the right to trial by jury. In the opinion, by Morton, J., it is said that the natural effect of the provision "will or may be to eliminate immaterial matters, and thus to facilitate instead of impede the exercise of the right of trial by jury." By reference to the twentieth section, set out at length in the preceding division of this opinion, it will be seen that as soon as the examiner's report is filed it becomes a public record and open to the inspection of any interested person.

"Any of the parties to the proceeding may, within twenty days after such report is filed, file exceptions to the conclusions of law or of fact or to the general findings of the examiner."

Within the same time any party at interest may move to recommit the report for indefiniteness, lack of fullness, failure to separate and classify the findings of law and fact, or other like cause. The right of filing exceptions or of moving to recommit is not confined to those who have appeared before the examiner, but any party to the cause has the right.

"The right to jury trial on exceptions of fact is broader under the act than it is in the general equity practice in this state." Powell's Land Registration, § —.

To quote again from section 20:

"If the petitioner, or any contestant of petitioner's right, shall demand a trial by jury upon any issue of fact arising upon exceptions to the examiner's report, the court shall cause the same to be referred to a jury."

Under the Georgia Act, the right of trial by jury exists as a matter of right and not as a matter of discretion, and the question is whether the trial by jury provided by the act is a constitutional jury trial. It is true that the act provides that the issue or issues of fact shall be tried before the jury, in the event the jury trial is requested, upon the evidence reported by the examiner. But exceptions are made; and under the provisions of the act evidence other than that reported by the auditor may be submitted to the jury, in accordance with proceedings prevailing in this state as to auditor's reports in equity and exceptions thereto. Civil Code 1910, §§ 5144, 5145. Moreover, if the examiner has reported to the court findings of fact based on his personal examination, either party may introduce additional testimony as to the facts, provided that he shall make it appear under oath that he has not been fully heard and given full opportunity to present testimony on the same matter before the examiner. As pointed out in Peters v. Duluth, supra, the relief in ejectment is not coextensive with that which may be had under the land registration act of this state. In ejectment title can never be settled as against the

world. Conversely, relief may be had in ejectment which cannot be had under the act, namely, possession of the premises and judgment for mesne profits, etc. The act is not a substitute for ejectment or for the statutory action for land. It is not an equitable action, but is a statutory proceeding, as held by this court in *Bird v. South Georgia Industrial Co.*, 150 Ga. 420, 104 S. E. 232. A proceeding to register the title may be brought by a person in possession against others not in possession, contrary to the rule in ejectment. As said by Mr. Justice Atkinson in *Lippitt v. Albany*, 131 Ga. 629, 632, 63 S. E. 33, 34 (referring to the statutory proceeding to validate bonds), "if it be sought to analogize such a proceeding to a common-law suit or to an equitable action, it would more nearly approximate the latter." It is, as the act itself declares, an action in rem, but the relief afforded is closely analogous to the equitable relief in an action to remove cloud and quiet title. The Legislature may make a demand for a jury a condition to the enjoyment of the right. It may place restrictions upon the time and manner in which the demand may be made. *Sutton v. Gunn*, 86 Ga. 652, 12 S. E. 979; *Southern Ry. Co. v. Beach*, 117 Ga. 81, 43 S. E. 413. In *Flint River Steamboat Co. v. Foster*, 5 Ga. 194, 195 (7-10) 48 Am. Dec. 248, it was held:

"The provision in the Constitution of Georgia that 'trial by jury, as heretofore used, shall remain inviolate,' means, that it shall not be taken away, in cases where it existed when that instrument was adopted in 1798; and not that there must be a jury in all cases. Trial by jury is a privilege which may be waived. And when the defendant has an opportunity to demand it, and omits to do so, he cannot complain that it is denied. An act of the Legislature, authorizing a judgment to be rendered without the intervention of a jury, is not, on that account, unconstitutional. Trial by jury may be clogged with onerous conditions, yet the act prescribing such terms will not be pronounced unconstitutional, unless it totally prostrates the right, or renders it wholly unavailing to the defendant, for his protection."

The constitutional guaranty of jury trial does not limit the power of the Legislature to prescribe rules of evidence or of procedure. The power of the court to appoint an auditor in a case at law not involving an accounting, and to restrict the hearing to the evidence taken before the auditor, is upheld in *Poullain v. Brown*, 80 Ga. 27, 5 S. E. 107. It is true that in a law case exceptions to the auditor's report must be submitted to a jury, but the power of the court to refer the case to an auditor and to restrict the hearing to the evidence taken before the auditor, even in a case at law, cannot be seriously questioned, in view of the decision above cited. See, also, *Central Trust Co. v. Thurman*, 94 Ga. 735, 736, 20 S. E. 141. In view of our statutes providing for the taking of interrogatories and of depositions, it can hard-

ly be contended that the examination of the witnesses in the presence of the jury is a substantial and indispensable incident of trial by jury, within the constitutional guaranty. In view of the foregoing, we are of the opinion that the land registration act of this state affords a constitutional jury trial.

[3] 3. Section 26 of the act provides as follows:

"After the record shall have been perfected and settled, the judge of the superior court shall thereupon proceed to decide the cause; and if, upon consideration of such record, the title be found in the petitioner, the judge shall enter a decree to that effect, ascertaining all limitations, liens, incumbrances, etc., and declaring the land entitled to registration."

If the judge finds that the petitioner is not entitled to the decree declaring the land entitled to registration, he shall enter judgment accordingly. If title be found to be in any person who has filed a cross-action praying for the registration of the title, the judge shall enter a decree declaring the land entitled to registration accordingly. If separate parties are involved, separate decrees as to each parcel shall be rendered, etc. Section 27 of the act provides that—

"Every decree rendered as herein provided, shall bind the land and bar all persons claiming title thereto or interest therein, quiet the title thereto, and shall be forever binding and conclusive upon and against all persons," including the state.

In the proceeding to register the title, as already indicated, no judgment for money or land is entered against any party; no direct judgment for immediate recovery of the land is entered against any one. In view of what we have said in the next preceding division of the opinion, and of the nature of the decree authorized by the registration act, the act is not violative of the restriction contained in article 6, section 4, paragraph 7, of the Constitution of this state (Civil Code 1910, § 6516), which declares that—

"The court shall render judgment without the verdict of a jury, in all civil cases founded on unconditional contracts in writing, where an issuable defense is not filed under oath or affirmation."

In this connection see *Isaacs v. Tinley*, 58 Ga. 457(2); *Palmer v. Simpson*, 69 Ga. 792(3).

[4] 4. It is finally insisted that the act is violative of article 3, section 7, paragraph 8, of the Constitution (Civil Code 1910, § 6437) because it refers to more than one subject-matter, and because it contains matter different from what is expressed in its title. The caption of the act is:

"An act to provide for the assurance, registration, and transfer of land titles and interests therein, and for other purposes."

In elaboration of the contention that the act refers to more than one subject-matter

it is alleged in the petition for injunction that section 2 of the act in effect creates a new court by designating the superior court of each of the counties of the state as a land registration court; that section 5 of the act creates a new and distinct action for the trial of cases respecting title to land, since it authorizes registration proceedings by one out of possession against an adverse claimant in possession; and section 85 of the act creates and defines a number of crimes, and prescribes the punishment therefor. In elaboration of the contention that the act contains matter different from what is expressed in the title thereof, it is alleged in the petition for injunction that the entire act deals with a subject-matter of which no notice or intimation is given in the title; that section 5 thereof permits one claiming title to land and not in possession thereof to file a proceeding seeking the registration of such land, and thereby make such proceeding a substitute for the common-law action of ejectment or the statutory action of complaint for land; that section 40 of the act amends and in effect repeals the existing laws of the state with reference to the recordation of deeds, mortgages, and other writings relating to land; that sections 42 to 47, inclusive, amend and in effect repeal the existing laws of the state with reference to the title of the personal representative of a deceased person to the land of such deceased and the method by which title is transmitted upon the death of a person testate or intestate, in so far as lands registered under the terms of the act are concerned; that section 66 thereof amends and in effect repeals existing laws of the state with reference to title by prescription and adverse possession; that section 2 creates a land registration court; that section 85 creates and defines a number of felonies, and prescribes the punishment therefor, and that, in short, the effect of the act as a whole is to create two systems of land tenure in Georgia, one governed by the laws of the state existing prior to the adoption of the act and one by the act. There is no elaboration of the point in the brief of counsel for defendants in error, but we do not understand that the point is abandoned. It follows from what we have already said that many, if not all, the contentions stated are untenable; and we are of the opinion that the act does not refer to more than one subject-matter, and that it does not contain matter different from what is expressed in its title, in any of the particulars pointed out. In the brief of counsel for the defendant in error the case of *Morris v. State*, 117 Ga. 1, 43 S. E. 368, where it was held that the title of an act "to regulate dentistry and the practice thereof, * * * and for other purposes," was sufficient to authorize the Legislature to prescribe penalties for violations of its provisions, is referred to and

discussed. It is said that this ruling was made with reference to a police regulation. As we think, the title of the act here involved, viz., "An act to provide for the assurance, registration, and transfer of land titles and interests therein and for other purposes," is broad enough to authorize the Legislature to declare acts in violation of its provisions criminal and to prescribe penalties for violations of its provisions. But whether or not section 85 of the act (providing penalties for the violations of the provisions of the act) contains different subject-matter from that included in the general body of the act and beyond the purview of the caption, the act as a whole is not unconstitutional on that ground, because that section is not so essential a part of the general purpose of the act that its elimination would destroy the legislative scheme and invalidate the act in its entirety.

Having held the land registration act valid as against the objections raised in this case, it follows, in view of the stipulations of counsel and the recitals in the bill of exceptions, that the court erred in granting the injunction.

Judgment reversed. All the Justices concur, except ATKINSON, J., disqualified.

(152 Ga. 142)

SAUNDERS v. STATEN et al. (two cases)
(Nos. 2297, 2298.)

(Supreme Court of Georgia. Sept. 30, 1921.)

(Syllabus by the Court.)

1. Constitutional law \Leftrightarrow 306—Records \Leftrightarrow 2—
Land registration act not void.

The contention that the land registration act (Acts 1917, p. 108) is void because the sixteenth and twentieth sections of said act violate the due process clause of the Constitutions of Georgia (Civ. Code 1910, § 6359) and of the United States (Civ. Code 1910, § 6700), is controlled adversely to the plaintiffs in error by the decision in *Crowell v. Akin*, 108 S. E. 791.

2. Jury \Leftrightarrow 19(1)—Land registration act does not violate constitutional provision as to right of trial by jury.

The contention that section 20 of said act (Laws 1917, p. 116) is void because it violates the provisions of the state Constitution (Civ. Code 1910, § 6545), which declares that "the right of trial by jury, except where it is otherwise provided in this Constitution shall remain inviolate," is also controlled adversely to the plaintiffs in error by the decision just cited.

3. Adverse possession \Leftrightarrow 45—Filing of equitable petition and granting of injunction held not to interrupt adverse possession of lessor.

The filing of an equitable petition against the lessees of one in possession of land, and

the grant, by consent, of an interlocutory injunction as prayed, restraining the defendants from further working timber on said land for turpentine, and also providing that the defendants, upon giving bond in a stated sum, might continue working the timber for turpentine purposes until the trial of the case, but not to cut any new boxes, or, if defendants preferred, upon depositing the net proceeds of the sales of the turpentine products in a stated bank to await the final disposition of the case, said lessees having given the bond and continued to work the timber, and it appearing that said suit has never proceeded to final trial or any other disposition, but remains open on the docket, and the lessors of the defendants in possession of the land at the time of the filing of the suit having continued to occupy the land by their agents and tenants who resided thereon and cultivated a portion of the land, will not be sufficient to interrupt the adverse possession of the lessor who seeks to establish title by prescription under color.

4. Records \S 9(10, 12)—Duty to submit issues of fact to jury mandatory; failure to submit not prejudicial.

"If the petitioner, or any contestant of petitioner's right, shall demand a trial by jury upon any issue of fact arising upon exceptions to the examiner's report, the court shall cause the same to be referred to a jury." Acts 1917, p. 117 (the land registration act). It has been held that this duty of the court is mandatory. *Crowell v. Akin*, supra. Nevertheless, where on the report of the examiner no issue of fact arises, and where there is no conflict in the evidence, and the court renders a judgment in accord with the evidence, instead of impaneling a jury and directing a verdict, the failure to submit such undisputed facts to a jury is not injurious to the losing party, and therefore not cause for a reversal.

5. Prescription—Evidence sufficient.

In these cases the evidence showed, without conflict, that the applicants and those under whom they claimed had, prior to the filing of the petitions for registration, been in public, continuous, exclusive, uninterrupted, and peaceable possession of the land for the time required by statute to perfect a good title by prescription under color; and there was no evidence that such possession was not in good faith, or that it originated in fraud. None of the assignments of error show cause for a reversal of the judgment.

Atkinson, J., dissenting in part.

Error from Superior Court, Echols County; W. E. Thomas, Judge.

Two actions by Eula Staten, executrix, and others against J. G. Saunders. Judgment for plaintiffs, and defendant brings error. Affirmed.

J. L. Sweat and Willson & Bennett, all of Waycross, for plaintiff in error.

J. B. Hicks, of Statenville, and Dan R. Bruce, of Valdosta, for defendants in error.

PER CURIAM. Judgments affirmed. All the Justices concur, except HILL, J., absent, and ATKINSON, J., dissenting as to the ruling in the first and second headnote.

(152 Ga. 168.)

FAUCETT v. ROGERS (No. 2353.)

(Supreme Court of Georgia. Oct. 1, 1921.)

(Syllabus by Editorial Staff.)

1. Reference \S 105—Court not required to submit exception of fact to jury.

Presiding judge is not compelled as a matter of course in an equitable proceeding to submit a finding of fact by an auditor to the jury. under Civ. Code 1910, § 5142.

2. Appeal and error \S 107(1)—Whether auditor had authority to apportion costs held immaterial.

Whether an auditor had authority to make a finding as to costs and a division thereof in a boundary dispute was immaterial, where the court in rendering decree adjudged, as it was authorized to do, that each of parties should pay one-half of all costs in the case.

3. Reference \S 100(4)—Court not required to examine entire evidence under exception.

An exception of law that auditor in boundary dispute improperly admitted a certain instrument as an ancient document was incomplete, where it referred the court to "entire evidence bearing on the location of the line or referring to this plat"; matter attached thereto being composed of 175 pages of what purported to be evidence reported by the auditor, which burden the court was not required to undertake.

4. Evidence \S 258(1)—Admissions of agent held inadmissible.

In a boundary dispute auditor did not err in excluding alleged admission of a third person not interested in the case, although he was brother of plaintiff, and had been looking after the property for her, and represented her when surveys were made; nothing appearing to show that he had authority to make any admissions that would be binding on her.

5. Evidence \S 317(18)—Declarations of decedent held properly excluded as hearsay.

In a boundary dispute, testimony as to sayings of a deceased justice of the peace and notary public, who lived about a mile from the land, and owned land in the neighborhood, and who was about 70 when the statements were made, was properly excluded as hearsay.

6. Reference \S 100(4)—Exception should set forth evidence necessary to be considered in passing thereon.

The neglect of a party excepting to an auditor's report on matters of fact, or matters of law dependent for their decision upon the evidence, to set forth, in connection with each exception of law or of fact, the evidence necessary to be considered in passing thereon, or to point out the same by appropriate reference,

or to attach as exhibits to his exceptions those portions of evidence relied on to support the exceptions, is a sufficient reason, in an equity case, for refusing to approve the exceptions of fact, and for overruling the exceptions of law.

7. Reference \S 100(3)—Exceptions to auditor's report must be filed within 20 days.

Exceptions to an auditor's report must be filed within 20 days after the filing of the report, Civ. Code 1910, \S 5135, being mandatory, and if an amendment can be allowed at all after the 20 days, so as to add a new and distinct exception, it must at least be necessary to show good reason why the exception was not filed with others in due time.

Error from Superior Court, Hall County; J. B. Jones, Judge.

Suit by Lou Rogers against William Faucett. Judgment for plaintiff, and defendant brings error. Affirmed.

H. H. Perry, of Gainesville, for plaintiff in error.

Ed Quillian and W. A. Charters, both of Gainesville, for defendant in error.

FISH, C. J. This is a suit brought by Mrs. Lou Rogers against William Faucett, to enjoin the defendant from trespassing upon certain land to which the plaintiff claims title. The issue is dependent upon the location of the true dividing line between adjacent lands of the parties. The court appointed a surveyor selected by the parties, who by a survey located the line where the plaintiff claims it to be, and made a report of his survey, accompanied by a plat. An auditor was appointed to hear the evidence and to make findings of fact and law in the case. After hearing, the auditor made his report of his findings of fact and of law, which were favorable to the plaintiff, with the conclusion that the plaintiff was entitled to a perpetual injunction as prayed for against the defendant.

[1] 1. The defendant filed an exception of fact to the finding of fact by the auditor that the true line between the adjacent lands of the parties is located where the plaintiff claims it to be, and as particularly described in the report, survey, and plat of the surveyor. The ground of exception is that such finding of the auditor is contrary to the evidence and without evidence to support it. The court refused to approve this exception and to submit the issue sought to be raised thereby to a jury. As the case is an equitable proceeding, the presiding judge was not compelled, as a matter of course, to submit such exception of fact to the jury. Civil Code 1910, \S 5142. Though the evidence is conflicting, it is amply sufficient to sustain the finding of fact by the auditor, and there was no abuse of discretion by the court in refusing to approve the exception.

[2] 2. The defendant filed several exceptions of law to the findings of law made by the auditor. The first is really based upon the finding of fact by the auditor to which the defendant excepted, and our ruling as to that exception of fact is controlling as to this exception of law. The second is to the finding of the auditor that the costs in the case, including the court costs, stenographer's fee, the cost of making the survey ordered by the court, and the auditor's fee "be equally divided between the parties to the case, each to pay half of the same." Whether the auditor did or did not have authority to make a finding as to the costs in the case is immaterial, as the court, in rendering the decree, adjudged, as it was authorized to do, that each of the parties should pay half of all costs in the case.

[3] 3. The third exception of law is that the auditor admitted in evidence as an ancient document a surveyor's plat, made in 1853, of certain land of which one McDaniel then claimed to be the owner; one of the lots in the survey being that to which the plaintiff now claims title. The defendant excepted to this ruling of the auditor, on the grounds that the plat was irrelevant, not shown to be correct, that it does not show that the lots platted are in the county of Hall, and because it does not show the location of the line now in controversy. The following is stated in this exception:

"Turner Quillian did testify that he had known this plat 35 or 40 years, and saw it among his father's papers, which his father got from Samuel Chambers to lot 7 in the twelfth district [the lot now claimed by plaintiff] and 6 in the eleventh district, which his father bought from said Chambers. There was no evidence from any witness as to the correctness of the plat. A copy of said plat is hereto attached, and the entire evidence bearing on the location of the line or referring to the plat is attached to these exceptions, and is here referred to in connection with these exceptions of law, though no witness testified to correctness of this plat."

This exception is not complete in itself. It refers the court to "the entire evidence bearing on the location of the line or referring to this plat." In order to ascertain what portions of the evidence bear on this question, the court would have to examine some 175 pages of what purports to be the evidence reported by the auditor. The court is not required to undertake this burden.

[4] 4. The fourth exception of law is that the auditor erred in excluding certain alleged admissions of Turner Quillian, a third person not interested in the case, as to the land line in question. It appears that he is the brother of the plaintiff, that he had been looking after the property for her, and that "in all these surveys, when he was present,

he represented Mrs. Rogers." Nothing appears showing that he had authority as the agent of the plaintiff to make any admissions in respect of the land line that would be binding on her.

[5] 5. The rulings made by the auditor in excluding as hearsay certain sayings of Squire O'Kelley in reference to the land line in question, and excepted to by the defendant in exceptions 5, 6, 7, and 8, were correct. It is stated in the exception that—

"The following evidence in the record shows that the evidence was admissible under the rules of law; that Squire O'Kelley was dead, that he was a justice of the peace and N. P., and had been 20 or 30 years; that he lived about a mile from the land; that he was an old man, a veteran of the Civil War; that he was in possession of land and owned land in the neighborhood (pages 18 and 19 of the evidence); that it was his custom to write deeds; that he was about 70 when the statements were made; that he always lived in that neighborhood (page 44 of the evidence), all of which was in evidence when this testimony was offered. It also appeared, at the time the evidence was offered, that Squire O'Kelley was in possession of the west half of lot No. 6 in the eleventh district (page 49 of the evidence)."

The west half of lot No. 6 in the eleventh district is not adjacent to either the land of the plaintiff or that of the defendant. That the ruling was proper, see *Aultman v. Hodge*, 150 Ga. 370, 399, 104 S. E. 1; *McAfee v. Newberry*, 144 Ga. 473, 87 S. E. 392.

[6] 6. "The neglect of a party excepting to an auditor's report on matters of fact, or on matters of law dependent for their decision upon the evidence, to set forth, in connection with each exception of law or of fact, the evidence necessary to be considered in passing thereon, or to point out the same by appropriate reference, or to attach as exhibits to his exceptions those portions of the evidence relied on to support the exceptions, is a sufficient reason, in an equity case, for refusing to approve the exceptions of fact and for overruling the exceptions of law. *Orr v. Cooledge*, 125 Ga. 496, 54 S. E. 618; *Winkles v. Simpson Grocery Co.*, 132 Ga. 32, 63 S. E. 627; *McCord v. City of Jackson*, 135 Ga. 176 (4), 177, 69 S. E. 23." *Smith v. Wilkinson*, 143 Ga. 741, 85 S. E. 875. Applying the rulings above stated to exceptions of law Nos. 9, 10, and 11, the court did not err in overruling such exceptions.

[7] 7. Exceptions to an auditor's report must be filed within 20 days after the filing of the report. Civil Code 1910, § 5135. The law as to this is mandatory. *Littleton v. Patton*, 112 Ga. 438 (4), 37 S. E. 755. If an amendment can be allowed at all after the 20 days, so as to add new and distinct exceptions, it must at least be necessary to show good reason why the exception was not filed

with others in due time. *Slizer v. Melton*, 129 Ga. 143 (1) 58 S. E. 1055; *Mohr-Weil Lumber Co. v. Russell*, 109 Ga. 579, 34 S. E. 1005.

8. In view of the rulings above announced, the court did not err in approving the auditor's report, and in decreeing that the defendant below be perpetually enjoined as prayed for in the petition.

Judgment affirmed.

All the Justices concur, except HILL, J., absent.

(152 Ga. 207)

RICHARDS v. STATE. (No. 2663.)

(Supreme Court of Georgia. Oct. 15, 1921.)

(Syllabus by the Court.)

1. Homicide \Leftrightarrow 157(4) — Altercations taking place in remote past immaterial.

Upon the trial of one charged with the offense of murder, evidence that there had been altercations between the accused and the deceased was not of sufficient materiality to make the rejection of the evidence ground for the grant of a new trial, where the times at which such altercations took place were not indicated. If such altercations were in the remote past, the evidence was immaterial; and the ground of the motion complaining of the rejection of this evidence does not indicate in any way the times of the occurrences referred to.

(a) The same ruling applies to the evidence offered as to the display a "violent temper" on the part of the decedent against the accused.

2. Homicide \Leftrightarrow 163(2)—Evidence as to securing of services of party to watch people in town inadmissible to illustrate temperament of deceased.

Evidence that the deceased at some indefinite time in the past had sought to engage the services of a named party to "watch certain people in this town," it not appearing that the people referred to were in any way connected with the commission of the crime, was immaterial; nor was it admissible for the restricted purpose of "illustrating the mental condition and temperament" of the deceased.

3. Criminal law \Leftrightarrow 448(11)—Witness could testify that accused looked mad.

Testimony of a witness, who saw the accused immediately after he had shot the deceased, that the accused "looked mad," is not objectionable on the ground that it was a conclusion of the witness. See 5 Enc. Ev. 674 et seq., and cases there cited.

4. Witnesses \Leftrightarrow 268(3)—Accused entitled on cross-examination to entire conversation, wherein he admitted he fired shot resulting in death of deceased.

Where a witness for the state testified that the accused had admitted that he fired the shot which resulted in the killing of the deceased, counsel for the plaintiff in error should have been permitted upon cross-examination to elicit from the witness all of the statements made by the accused in connection with that admis-

sion, and the refusal of the privilege of a full and complete cross-examination upon this point was error.

Error from Superior Court, Taliaferro County; E. T. Shurley, Judge.

Garnett Richards was convicted of murder, and brings error. Reversed.

J. A. Beazley and Alvin G. Golucke, both of Crawfordville, for plaintiff in error.

M. L. Felts, Sol. Gen., of Warrenton, Geo. M. Napier, Atty. Gen., and Seward M. Smith, Asst. Atty. Gen., for the State.

BECK, P. J. Garnett Richards was tried under an indictment charging him with the offense of murder; it being charged that he did kill and murder one Julian Richards, the brother of the accused. The jury trying the case returned a verdict of guilty, with a recommendation to mercy. Whereupon the defendant made a motion for new trial, which being overruled, he excepted.

[1-3] 1-3. It would not be profitable to discuss or elaborate the rulings made in headnotes 1, 2, and 3.

[4] 4. In another ground of the motion for new trial error is assigned upon a ruling of the court which amounted, the movant contends, to a denial of the privilege of cross-examining a witness for the state in regard to a material issue as to which that witness had given testimony. The witness on direct examination testified that the defendant had admitted to him that he shot Julian Richards, the decedent; and counsel for the plaintiff in error propounded questions by which they sought to elicit from the witness all that the defendant said in connection with his admission that he shot the deceased. This colloquy took place:

Mr. Beazley (Counsel for the Accused): "You stated awhile ago that Garnett admitted shooting Julian. What did he say when he admitted it?"

Mr. Felts (Counsel for the State): "Wait a minute. We object to that."

Mr. Beazley: "It is a part of the res gestæ."

Mr. Felts: "That is not a part of the res gestæ, and no self-serving declaration is admissible here."

Judge Shurley: "How is a declaration in his own interest admissible?"

Mr. Beazley: "If it is a part of the res gestæ, it makes no difference whether it was self-serving or otherwise."

Judge Shurley: "A self-serving declaration would be inadmissible, though it was a part of the res gestæ."

Mr. Beazley: "We insist that the answer to the question is admissible, in the first place, because it is a part of the res gestæ. For the second reason, we insist that it is admissible because this witness has said that Garnett Richards admitted shooting Julian Richards, and we certainly are entitled to the words that Garnett Richards used. * * * We would like to get this in the record, that we are insisting that we have a right to cross-examine this

witness without limit as to how that admission was made and the language it was made in, and we except to the denial of the right to cross-examine the witness on that admission."

The court denied the right to the defendant to cross-examine the witness on how, when, and in what manner Garnett Richards admitted shooting Julian Richards.

It was error for the court to deny to the accused and his counsel the privilege of full and complete cross-examination of the witness who had testified to the admission. The admission, standing alone, tended to fix upon the accused the crime of murder with which he was charged. From an admission of a fatal shooting there follows the inference of guilt, unless in that connection the party making the admission states some matter of excuse or alleviation. And if matters of excuse or alleviation are made as a part of the statement admitting the homicide, then the presumption of guilt does not arise necessarily from the admission, as it does where the bare fact of the homicide is admitted and no facts that palliated its commission are stated. The fact that such matters may have been self-serving declarations would not, if stated in connection with the incriminating admission which was introduced by the state, exclude them from evidence.

"When an admission is given in evidence, it is the right of the other party to have the whole admission and all the conversation connected therewith." Penal Code (1910), § 1030.

"Where one side elicits a part of a conversation, that the other side are entitled to all that was said at the time in the same conversation is too well settled to be doubted or questioned." *Betts v. State*, 66 Ga. 509 (5).

We will not multiply quotations of authorities on this question. We do not rule that anything said in connection with the killing at the time of making the admission by the accused would necessarily have been a part of the res gestæ; but it was admissible, independently of whether it was a part of the res gestæ or not. The error of the court here pointed out is not cured by the fact that in a cross-examination of this witness he did testify:

"He [the accused] just says, 'I'm sorry I done it, but I told you I done it.' That's all the words he used right then, connected with those utterances. That's all I heard him say while I was there. He said, 'I'm sorry I done it, but I told you I would do it.' He didn't state along there, also, that 'you forced me to do it, and you're to blame.' I have told you all he said while I was there, and that's all I know about it. Just like awhile ago, I can't tell you how long I stayed in the room after I first got there without going out; everybody was so excited and coming in there; it might have been four minutes, and it might have been twenty. It wasn't less than four minutes, and it wasn't over twenty."

While this testimony of the witness just quoted apparently shows that cross-examina-

tion would not have elicited anything further in favor of the accused, it cannot be said that upon full cross-examination other matters might not have been elicited. Upon cross-examination the defendant's counsel would have had the right to propound leading questions—questions which would have called attention to matters that had passed out of the witness' mind and which would have refreshed his memory. At any rate the plain statement is certified to by the court, that defendant's counsel by the ruling of the court was denied the right to cross-examine the witness on "how, when, and in what manner Garnett Richards admitted shooting Julian Richards." The right to cross-examine has always been recognized as a most valuable right to the accused upon his trial, and the deprivation of this privilege, where it is properly claimed, as in the present case, is ground for the grant of a new trial.

Having held that a new trial will be granted upon that ground of the motion just disposed of, it is unnecessary to pass upon the question made by the exception to the court's overruling of the motion for a continuance of the case, which was made by the defendant, and also upon the question made by the challenge to the array of the jurors, as these questions are not likely to arise upon another trial. None of the other grounds of the motion show cause for the grant of a new trial.

Judgment reversed.

All the Justices concur, except ATKINSON, J., absent on account of sickness.

(152 Ga. 205)

NEVILLE v. STATE. (No. 2639.)

(Supreme Court of Georgia. Oct. 14, 1921.)

(Syllabus by the Court.)

1. Intoxicating liquors §13, 132—Act prohibiting manufacture not superseded by Eighteenth Amendment and Volstead Act.

The act to amend and supplement the prohibition laws of this state (Acts 1917 [Ex. Sess.] p. 7), which, among other provisions, made "it unlawful to distill, manufacture, or make any alcoholic, spirituous, vinous, or malted liquors or intoxicating beverages in this state," was not superseded and in effect repealed by the Eighteenth Amendment to the Constitution of the United States and the Volstead Act (Act Cong. Oct. 28, 1919, c. 85, 41 Stat. 305). *Smith v. State*, 150 Ga. 755, 105 S. E. 864, and cases cited; *Barbour v. Benton and Raskin v. Dixon*, 151 Ga. —, 108 S. E. 61; *Com. v. Nickerson*, 236 Mass. 281, 128 N. E. 273, 10 A. L. R. 1568; *State v. Fore*, 180 N. C. 744, 105 S. E. 834. See collation of cases on the subject 6 Cornell Law Quarterly, 443, 445, n. 12.

2. Former decision not overruled.

The request to review and overrule *Smith v. State*, supra, and the former decisions of this court there cited, is denied.

3. Criminal law §93—State courts have jurisdiction of prosecution for unlawful manufacture of intoxicating liquors.

In view of the rulings above announced, it was not error to overrule a general demurrer to the indictment charging the defendant with the unlawful manufacture of intoxicating liquors in a given county of the state, nor to strike a plea seeking to set up want of jurisdiction in the state court to try the defendant for the offense charged.

4. Verdict authorized.

The evidence authorized the verdict.

Error from Superior Court, Wilkes County; E. T. Shurley, Judge.

Rufus Neville was convicted of a violation of the prohibitory law, and brings error. Affirmed.

Colley & Colley and W. A. Slaton, all of Washington, Ga., for plaintiff in error.

M. L. Felts, Sol. Gen., of Warrenton, for the State.

FISH, C. J. Judgment affirmed. All the Justices concur, except ATKINSON, J., absent on account of sickness.

(27 Ga. App. 409)

CHATHAM ICE CREAM CO. v. SAKAKEENY. (No. 12361.)

(Court of Appeals of Georgia, Division No. 1. Oct. 6, 1921.)

(Syllabus by the Court.)

1. Demurrer properly overruled.

The petition set out a cause of action, and the demurrer was properly overruled.

(Additional Syllabus by Editorial Staff.)

2. Sales §384(2)—Seller held entitled to recover difference between contract price and market price as of certain date.

Where defendant accepted one carload of ice cream cones in part performance of a contract to take three carloads before August 1, 1919, and requested plaintiff to hold up shipment of the other two carloads until it should receive shipping instructions, and no shipping instructions were given, and on August 11, 1920, defendant refused definitely to accept shipment of the remaining two cars, plaintiff was entitled to recover the difference between the contract price and the market value of the cones on August 11, 1920.

Error from City Court of Savannah, Davis Freeman, Judge.

Action by Gabriel L. Sakakeeny against the Chatham Ice Cream Company. Judgment.

ment for plaintiff, and defendant brings error. Affirmed.

Jacob Gazan, of Savannah, for plaintiff in error.

Connerat & Hunter, of Savannah, for defendant in error.

(27 Ga. App. 452)

PAYNE, Agent, v. JOHNSON, FLUKER & CO.
(No. 12281.)

(Court of Appeals of Georgia, Division No. 2.
Oct. 7, 1921.)

(Syllabus by the Court.)

Carriers \S 88—Delivery to drayman held a delivery to consignee.

This was a suit for the value of certain shipments of freight which had been placed in the hands of the defendant as carrier for delivery to the plaintiff, which it was alleged the defendant failed to deliver to the plaintiff. The defendant claimed delivery to a drayman as the agent of the plaintiff and sought to prove the agency by a course of dealing. The only issue in the case was whether or not the shipments had been delivered to a person (the drayman) authorized by the plaintiff to receive them from the defendant, and whether or not the defendant, by a course of dealing with the plaintiff, had a right to depend upon their delivery to this alleged agent of the plaintiff. There was evidence to support the verdict, and the charge of the court was not erroneous for any of the reasons assigned.

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by Johnson, Fluker & Co. against J. B. Payne, Agent. Judgment for plaintiff, and defendant brings error. Affirmed.

W. O. Wilson, of Atlanta, for plaintiff in error.

Westmoreland & Smith, of Atlanta, for defendant in error.

HILL, J. Judgment affirmed.

JENKINS, P. J., and STEPHENS, J., concur.

(27 Ga. App. 406)

SUTTON v. COLEMAN. (No. 12340.)

(Court of Appeals of Georgia, Division No. 1.
Oct. 6, 1921.)

(Syllabus by the Court.)

1. Petition—No cause of action.

The petition as amended does not set out a cause of action, and the court properly sustained the motion to dismiss the petition.

(Additional Syllabus by Editorial Staff.)

2. Sales \S 176(5)—No recovery of purchase price, in absence of continuing tender of fraudulently substituted automobile.

No recovery of damages in the amount of the entire purchase money paid for an automobile, based on alleged fraudulent substitution of an old car for a new one purchased, could be had in the absence of a tender back of the old car and a continuing tender or holding of the car for the benefit of the defendant seller, and buyer could not continue to use the car for 15

BLOODWORTH, J. Gabriel L. Sakeeny sued the Chatham Ice Cream Company, alleging in part that in April, 1919, the Ice Cream Company entered into a contract with him for three carloads of ice cream cones at \$4.25 per thousand, f. o. b. cars St. Louis, Mo., each car to contain 600 cases, and each case to contain 1,000 cones, the same to be delivered by August 1, 1919, and shipment to be made at any time between the date of the order and August 1, 1919, in carload lots only; that plaintiff shipped in May one carload of cones, as provided for in the contract, which carload was received and accepted by the defendant in part performance of the contract; that on June 9, 1919, the plaintiff communicated with the defendant, informing the defendant that the other two cars were ready for shipment, and desiring to know when defendant wished the shipment to go forward; that the defendant answered by calling attention to the fact that some of its machines had not been installed, that it had no room to store additional cones, and requested that the shipment of the two cars be held up until advice from it as to when they should be shipped; that pursuant to said instructions the plaintiff held the two cars ready for shipment on the defendant's demand; that the plaintiff did not receive shipping instructions during 1919, and did on May 22, 1920, call attention to the two cars it was holding for shipment under the contract; that the defendant then disclaimed any knowledge of said order; that the plaintiff then, through his attorneys, submitted the contracts to the defendant, and on August 11, 1920, the defendant "refused definitely to accept shipment of the remaining two cars, and have refused to make any settlement therefor"; that "during August, 1920, and at the time of [the] aforesaid breach of contract, cones of the kind contracted for were selling for and at [the] market value in St. Louis of \$3 per thousand or \$1.25 per thousand less than the contract price," and that "as a result of the facts herein set forth, * * * petitioner has been specially damaged in the sum of \$1,500, with interest on the same from August 11, 1920."

The petition set forth a cause of action, and the demurrer thereto was properly overruled.

Judgment affirmed.

BROYLES, C. J., and LUKE, J., concur.

months before action, and then attempt to set off cost of repairs against the use.

Error from City Court of Swainsboro; Geo. Kirkland, Jr., Judge.

Action by A. L. Sutton against F. A. Coleman. Judgment for defendant, and plaintiff brings error. Affirmed.

The petition, as amended, alleges that the plaintiff in April, 1918, at night and at his home, bought from defendant a new automobile; that "the trade between plaintiff and defendant was fully executed at the time the trade was made;" that—

"(3) Defendant, after making said sale, told your petitioner that he would deliver the car on the following morning, as he would have to use same to return home that night.

"(4) On the following morning defendant delivered to your petitioner a car of the same make and size, but a different car altogether from the one petitioner had bought. The car delivered was an old car polished over. It was a car that had been much used, and was badly worn and almost useless to your petitioner.

"(5) Petitioner is old, and inexperienced in automobiles, and did not detect that a substitution of cars had been made by defendant until a few days after said car had been delivered to him. He discovered this by parts of the automobile giving away, and upon examination found that the automobile was worn out, and that it would not give service without expensive repairs being made.

"(6) As soon as petitioner discovered that a substitution had been made, as aforesaid, he called to see defendant and insisted that he take the car back, but defendant refused to do so.

"(7) Petitioner avers that the expense of repairs and the purchase price of new parts necessary to put said car in running condition have been of greater value than the value of the service he has received from said automobile, and that he has therefore been damaged in the full amount of the purchase price paid for said car, to wit, \$1,550, for which amount plaintiff sues."

The petition was dismissed on oral motion, and the plaintiff excepted.

T. N. Brown, of Swainsboro, for plaintiff in error.

F. H. Saffold, of Swainsboro, for defendant in error.

BLOODWORTH, J. (after stating the facts as above). [1, 2] This is not a suit for damages because of the breach of an implied warranty, but is one brought to recover the entire purchase money paid for the automobile, and is based upon the alleged fraudulent substitution of the car, which was "an old car polished over," and which "had been much used and was badly worn, and almost useless to" the plaintiff, for the car which he purchased and which was "new and in good condition." In such a case as this,

before the petition would authorize a recovery, it should show that a valid tender of the article purchased was made to the seller upon discovery of the fraud. Granting, but not conceding, that the allegation in the petition, that "as soon as petitioner discovered that the substitution had been made, as aforesaid, he called to see defendant and insisted that he take the car back, but defendant refused to do so," amounted to a tender, yet the plaintiff lost all right he had to rely upon a tender when he did not make it a continuing one and hold the car for the benefit of the seller, but, on the contrary, continued to use it as his own property, and did not bring suit until about 15 months after the date the car was delivered to him, and then attempted to set off the cost of repairs against the use of the car. See *Fortson v. Strickland*, 23 Ga. App. 608 (2), 99 S. E. 147; *Gray v. Angier*, 62 Ga. 596.

The petition as amended does not set out a cause of action, and the court did not err in sustaining a motion to dismiss it. Judgment affirmed.

BROYLES, C. J., and LUKE, J., concur.

(27 Ga. App. 400)

BLAKELY MULE CO. v. LEWIS et al.
(No. 12194.)

(Court of Appeals of Georgia, Division No. 2.
Oct. 6, 1921.)

(Syllabus by the Court.)

1. Instructions—No error.

The charge upon the contention of the plaintiff, as set out in the fourth ground of the motion for a new trial, was not error.

2. Chattel mortgages ~~and~~ 262(3)—Purchase by mortgagee only voidable.

In charging the jury as to a purchase by the plaintiff at its own sale of the defendant's mules for the account of the defendants, the court erred in stating that such a sale would be "void."

A sale of the kind in question would be merely voidable.

3. Instructions—Harmless error.

The excerpts from the charge as to the amount and form of the verdict, which are complained of in the sixth and seventh grounds of the motion for a new trial, are erroneous, but in view of the verdict rendered are harmless.

Error from City Court of Miller County; W. I. Geer, Judge.

Action by the Blakely Mule Company against C. M. Lewis and another. From a judgment for an insufficient amount, plaintiff brings error. Reversed.

J. W. McMullin and C. M. Lewis executed to Blakely Mule Company three promissory notes. After certain payments had been made in cash on one of the notes the company gave notice of intent to sue upon the notes and for attorney's fees provided for therein, and suit was accordingly brought. By amendment all reference to one of the notes was stricken from the petition; the petition was further amended:

"By adding an additional paragraph, immediately following paragraph 6, to be known as paragraph 7 as follows: 'That a credit on the indebtedness evidenced by the two above-described notes of \$275 is hereby admitted, the same being of date January 1, 1915, the said credit arising from the sale by plaintiff of four mules for the account of the defendants, said sale being at auction to the highest bidder and being had by direction of said defendants.'"

Separate pleas were filed, in each of which the defendants admitted that they signed the notes sued on and that the plaintiff was the holder and owner thereof, but denied that the sale of the mules at auction was made by their consent as stated in the amendment to the petition, and alleged that the mules were sold without notice to them, and were bid in by the plaintiff for \$275, and that at the time of the sale the mules were—

"reasonably worth on the market \$590, and that defendant is entitled to a credit of \$590 on said notes for said four mules which he returned."

A verdict was rendered against both defendants for \$132.90 as principal, \$56.60 as interest, and \$13.20 as attorney's fees. The plaintiff made a motion for a new trial, which was overruled, and it excepted.

W. G. Park, of Blakely, for plaintiff in error.

N. L. Stapleton, of Colquitt, for defendants in error.

BLOODWORTH, J. (after stating the facts as above). [2] Only the ruling stated in the second headnote will be discussed. The charge there referred to was as follows:

"On the other hand, I charge you this: If you believe from the testimony in the case that Lewis and McMullen and the Blakely Mule Company, who are the plaintiffs in this case, executed this paper, and that there was a sale made under it, and that the Blakely Mule Company purchased at that sale the property referred to in that paper, that that sale would be void. I charge you, further, that even though you believe that Lewis and McMullen signed that paper, and it should develop on the trial of this case, from the testimony, that under that paper the mules were sold that are referred to therein, and that the Blakely Mule Company purchased these mules, that the sale would be void."

This charge was error, and requires the grant of a new trial. Such a sale would not

be void, but voidable only. In *Payton v. McPhaul*, 128 Ga. 511, (4), 58 S. E. 50, 11 Ann. Cas. 163, it was held that—

"The general rule is that the mortgagee cannot be a purchaser at his own sale under the power in the mortgage, but a purchase by him is not absolutely void, but voidable only, at the instance of the mortgagor or the owner of the equity of redemption."

In *Standback v. Thornton*, 106 Ga. 81, on page 82, 31 S. E. 805 on page 806, Judge Cobb said:

"While the general rule is that no trustee can purchase trust property at his own sale, and therefore a mortgagee cannot purchase property at a sale which is held under an execution of the power authorizing such sale, unless the mortgage expressly authorizes him to become a bidder and purchaser at the sale, still an unauthorized purchase by the mortgagee will not render the sale void, but only voidable at the instance of the mortgagor, who has a right to elect to set aside the sale, provided he offer to redeem at the time that he so elect."

See, also, *Palmer v. Young*, 96 Ga. 246 (2), 22 S. E. 928, 51 Am. St. Rep. 136.

It does not appear that prior to the filing of the suit in this case, or in their pleadings, the defendants offered to redeem the property. Under the facts and the pleadings in this case, the general rule above referred to is applicable. The court erred in overruling the motion for new trial.

Judgment reversed.

BROYLES, C. J., and LUKE, J., concur.

(27 Ga. App. 419)

FLYNN-HARRIS-BULLARD CO. v. BUTLER. (No. 12480.)

(Court of Appeals of Georgia, Division No. 1. Oct. 6, 1921.)

(Syllabus by the Court.)

1. Limitation of actions \S 199(1) — Whether mutual accounts exist is a question of fact.

The controlling question presented in this record is whether mutual accounts existed between the parties, and it was a question of fact for determination by the jury. See *Gunn v. Gunn*, 74 Ga. 555, 58 Am. Rep. 447, and cases cited; *Hardin v. Stanton*, 14 Ga. App. 299, 80 S. E. 698; Civil Code 1910, \S 4363.

2. Appeal and error \S 1005(2) — Approved verdict, supported by evidence, not disturbed.

The charge of the court was full and fair. The evidence authorized the verdict, which has the approval of the trial judge. The court did not err in overruling the motion for new trial.

Error from Superior Court, Bryan County; W. W. Sheppard, Judge.

Action between the Flynn-Harris-Bullard Company and H. R. Butler. From an ad-

verse judgment, the former brings error. Affirmed.

W. F. Slater, of Eldora, and Edwin A. Cohen, of Savannah, for plaintiff in error.

J. Hartridge Smith, of Savannah, for defendant in error.

LUKE, J. Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(27 Ga. App. 403)

COMMERCIAL SECURITY CO. v. HOOKS PHARMACY. (No. 12225.)

(Court of Appeals of Georgia, Division No. 1. Oct. 6, 1921.)

(Syllabus by Editorial Staff.)

1. Appeal and error ⇨302(3)—Document introduced should be set out in motion for new trial.

A ground of a motion for new trial, assigning error on the admission in evidence, over stated objections of movant, of a document, which is neither set out literally or in substance in the motion, nor attached thereto as an exhibit properly identified, but is merely referred to as set out in the brief of evidence, presents no question for decision.

2. Appeal and error ⇨302(1)—Ground of motion for new trial must be complete.

Grounds of a motion for new trial, which are incomplete and cannot be understood without resorting to an examination of the brief of evidence, fail to present any question for decision.

3. Trial ⇨85—Objection to evidence good in part insufficient.

Where evidence is offered, some of which is admissible and some not, objection to the evidence as a whole is not well taken.

4. Appeal and error ⇨302(3)—Ground of motion for new trial held incomplete.

Nothing was presented for review in the appellate court by a ground of a motion for new trial complaining that certain testimony of a certain person in reference to certain notes and a contract made by him with a certain company was admitted in evidence, where such person was not identified by the ground, further than as a witness for the defendant, and it was not shown what relation he bore to either of the parties to the case, what connection the aforesaid company had with the parties, or in what manner the contract and notes were related to the case.

Error from City Court of Americus; W. M. Harper, Judge.

Action by the Commercial Security Company against the Hooks Pharmacy. From a judgment for defendant, plaintiff brings error. Affirmed.

Moore & Pomeroy and W. P. Coles, all of Atlanta, and T. O. Marshall, of Americus, for plaintiff in error.

W. W. Dykes, of Americus, for defendant in error.

BLOODWORTH, J. [1] "A ground of a motion for new trial assigning error on the admission of evidence, over stated objections of movant, of a document which is neither set out literally or in substance in the motion nor attached thereto as an exhibit properly identified, but is merely referred to as set out in the brief of evidence, presents no question for decision. *Ford v. Blackshear Mfg. Co.*, 140 Ga. 670, 79 S. E. 576." *Perry v. Monroe*, 150 Ga. 26 (2), 102 S. E. 356.

[2] "Grounds of a motion for new trial, which are incomplete, and cannot be understood without resorting to an examination of the brief of evidence, fail to present any question for decision. *Head v. State*, 144 Ga. 383, 87 S. E. 273; *Sims v. Sims*, 131 Ga. 262, 62 S. E. 192; *Smiley v. Smiley*, 144 Ga. 546, 87 S. E. 668; *Daniel v. Schwarzwelss*, 144 Ga. 81, 86 S. E. 239." *Atlantic Coast Line R. Co. v. Stovall-Pace Co.*, 24 Ga. App. 248 (3b), 100 S. E. 657.

[3] "Where evidence is offered, some of which is admissible and some not, objection to the evidence as a whole is not well taken. That which is inadmissible should be pointed out, and objection made to it separately. *Ray v. Camp*, 110 Ga. 818, 36 S. E. 242; *Collins & C. R. Co. v. Ware*, 112 Ga. 663, 37 S. E. 975; *Branch v. Branch*, 139 Ga. 375, 77 S. E. 386." *Fambrough v. De Vane*, 141 Ga. 794 (3), 82 S. E. 249. See, also, *Bacon v. Dannenberg Co.*, 24 Ga. App. 540 (7), 101 S. E. 699.

Applying the above general rules to the amendment to the motion for a new trial, it is evident that this court is not called upon to consider any of them, because—

[4] (a) The first of these grounds complains that certain testimony of W. G. Hooks in reference to certain notes and the contract made by him with the Partin Manufacturing Company was admitted in evidence. Hooks is not identified by this ground further than as a witness for the defendant. It is not shown what relation he bore to either of the parties to the case, what connection the Partin Manufacturing Company had with the parties, or how or in what manner the contract and notes referred to in this ground were related to the case.

(b) The second ground complains of the "admission of all the testimony and evidence of W. G. Hooks, witness for the defendant, as set out in said brief of evidence." The sixth ground alleges error "because all of the evidence and testimony of J. E. Tanner, as shown by the brief of evidence filed herewith, was illegally admitted to the jury by the

court over the objections of movant." To determine what evidence was referred to in these grounds of the motion for a new trial would require reference to the brief of evidence.

(c) The third ground complains that certain letters which were attached to the brief of evidence were "illegally admitted to the jury." Ground 4 alleges error "because the carbon copies of letters, copies of which are attached to said brief of evidence, were illegally admitted to the jury by the court over the objections of movant." Ground 7 alleges that the court erred "because the contract between the Partin Manufacturing Company and the defendant, dated Dec. 9, 1916, copy of which is attached to said brief of evidence, was illegally admitted to the jury by the court over the objections of movant." Neither the contract nor any of the letters referred to in these grounds are "set out literally or in substance in the motion or attached thereto as an exhibit properly identified," but they are "merely referred to as set out in the brief of evidence."

(d) The fifth ground of the motion alleges error in admitting certain evidence of J. E. Tanner relative to a Miss Whallen, and a conversation between her and W. G. Hooks in reference to certain notes which she was attempting to collect for the Partin Manufacturing Company. It is not shown what notes were referred to, or what connection, if any, that company had with this case. To ascertain this would require reference to the brief of evidence.

There was evidence to support the verdict, the trial judge approved it, and this court will not interfere.

Judgment affirmed.

BROYLES, C. J., and LUKE, J., concur.

(27 Ga. App. 448)

CRAWFORD v. JONES. (No. 12174.)

(Court of Appeals of Georgia, Division No. 2.
Oct. 7, 1921.)

(Syllabus by the Court.)

Certiorari \S 70(8)—Landlord and tenant \S 119(1, 2), 120(1)—Tenant becomes tenant at sufferance after expiration of term; no claim that judgment was contrary to evidence where conflicting.

While a tenant for an agreed term after the expiration of his contract or a tenant at will after the two months' statutory notice by his landlord (Civil Code 1910, \S 3709) becomes a tenant at sufferance, and continues as such until there has been some affirmative action by the landlord which has the effect of converting the tenancy into some other form (Willis v. Harrell, 118 Ga. 906, 45 S. E. 794), yet where

the undisputed evidence shows that the tenancy was one at will, and the evidence is in conflict as to whether the statutory notice to vacate was given within the required time before the filing of eviction proceedings under sections 5385 et seq. of Civil Code 1910, the order of a judge of the superior court refusing to sanction a writ of certiorari for the review of a judgment for the tenant will not be reversed, when the sole ground of the petition for certiorari is that the judgment was contrary to the evidence. Little v. City of Jefferson, 9 Ga. App. 878 (1), 72 S. E. 436.

Error from Superior Court, Fulton County; Jno. D. Humphries, Judge.

Action by W. H. Crawford against A. S. Jones. From an order refusing to sanction a writ of certiorari for the review of a judgment for the defendant, plaintiff brings error. Affirmed.

See, also, 107 S. E. 69.

R. R. Jackson and John F. Echols, both of Atlanta, for plaintiff in error.

Jesse L. Moore and S. C. Crane, both of Atlanta, for defendant in error.

JENKINS, P. J. Judgment affirmed.

STEPHENS and HILL, JJ., concur.

(27 Ga. App. 468)

DORSEY v. DORSEY et al. (No. 12391.)

(Court of Appeals of Georgia, Division No. 2.
Oct. 7, 1921.)

(Syllabus by the Court.)

1. Executors and administrators \S 513(12)—Judgment discharging administrator complete bar in absence of fraud.

The judgment of the court of ordinary discharging an administrator is a complete bar to any action either at law or equity, unless the judgment is impeached for fraud. Carter v. Anderson, 4 Ga. 516 (1); Coleman v. Coleman, 113 Ga. 149-151, 38 S. E. 400.

2. Pleading \S 8(15)—Facts upon which fraud is based must be alleged.

"In a suit on an administrator's bond, where the plaintiff alleges the administrator's discharge, in order to escape the effect of that judgment on the ground that it was procured by fraud, he must further allege the facts upon which the charge of fraud is based." Knox v. Raynor, 146 Ga. 146 (2), 90 S. E. 858.

3. Petition properly dismissed.

This case is fully controlled by the decision of the Supreme Court in the case of Knox v. Raynor, supra. There was no error in the judgment sustaining the demurrer and dismissing the petition.

Error from Superior Court, Clayton County; John B. Hutcheson, Judge.

Action by L. J. Dorsey against I. G. Dorsey and others. Judgment for defendants, and plaintiff brings error. Affirmed.

J. Caleb Clarke, of Atlanta, for plaintiff in error.

Blalock, Redding & Stinson, of Waycross, and E. M. Smith, of McDonough, for defendants in error.

HILL, J. Judgment affirmed.

JENKINS, P. J., and STEPHENS, J., concur.

(27 Ga. App. 428)

HEARELL et al. v. VANN. (No. 12532.)

(Court of Appeals of Georgia, Division No. 1.
Oct. 6, 1921.)

(Syllabus by the Court.)

1. Rule not made absolute.

In this case the court did not err in refusing to make the rule absolute.

(Additional Syllabus by Editorial Staff.)

2. Sheriffs and constables §—98(1)—Bailliff delivering property on order under possessory warrant held not liable.

Where justice of the peace issued possessory warrant and passed an order awarding the property to plaintiff, and, acting under such order without any notice of intention on the part of the defendants to apply for a writ of certiorari, the bailliff promptly delivered the property to plaintiff, and nearly 30 days thereafter defendants obtained a writ of certiorari, and judge of superior court reversed decision of justice of the peace, and bailliff was ordered to turn the property over to defendants, and a rule was issued against the bailliff and he made answer thereto, court properly refused to make the rule absolute.

Error from Superior Court, Floyd County; Moses Wright, Judge.

Action by Charlie Johnson against Mrs. M. J. Hearrell and another, wherein property was delivered to plaintiff by the bailliff, K. S. Vann. From a judgment refusing to make absolute a rule issued against the bailliff, defendants bring error. Affirmed.

Porter & Mebane, of Rome, for plaintiffs in error.

James Maddox, of Rome, for defendant in error.

BLOODWORTH, J. [1, 2] A search warrant was issued by a justice of the peace up-

on the affidavit of Charlie Johnson, who swore that Mrs. M. J. Hearrell and Enoch Hearrell were in possession of certain property belonging to him. By virtue of the authority given by the search warrant the property described therein was seized by K. S. Vann, bailliff. The Hearrells defended, and, upon the issue being tried by the justice of the peace, he passed an order awarding the property to Johnson. Acting under this order, and without any notice of the intention on the part of the Hearrells to apply for a writ of certiorari, the bailliff promptly delivered to Johnson the property in dispute. Nearly 30 days thereafter the Hearrells obtained a writ of certiorari, and the judge of the superior court, upon hearing the case, reversed the decision of the justice of the peace awarding the property to Johnson, and the bailliff was ordered to turn it over to the Hearrells. After this judgment of the superior court a rule was issued against the bailliff, Vann, he made answer thereto, and, upon the hearing of the issue thus raised the court refused to make the rule absolute, and the Hearrells excepted. The court did not err in refusing to make the rule against the bailliff absolute. See *Seamans v. King*, 79 Ga. 611, 5 S. E. 53; *Johnson v. Fox*, 51 Ga. 270; *Wilbur v. Stokes*, 117 Ga. 545, 43 S. E. 856; *King v. Haley*, 146 Ga. 85, 90 S. E. 715; *Taylor v. Boynton*, 7 Ga. App. 233(1), 66 S. E. 550.

Judgment affirmed.

BROYLES, C. J., and LUKE, J., concur.

(27 Ga. App. 430)

HEARELL et al. v. VANN. (No. 12533.)

(Court of Appeals of Georgia, Division No. 1.
Oct. 6, 1921.)

Error from Superior Court, Floyd County; Moses Wright, Judge.

Controversy between Mrs. M. J. Hearrell and others and K. S. Vann. From an adverse judgment, the former bring error. Affirmed.

Porter & Mebane, of Rome, for plaintiffs in error.

James Maddox, of Rome, for defendant in error.

BLOODWORTH, J. This is a companion case to that of *Hearrell et al. v. Vann* (No. 12532) 108 S. E. 808, this day decided by this court. The facts in the two cases are the same, and this case is controlled by the ruling in that one.

Judgment affirmed.

BROYLES, C. J., and LUKE, J., concur.

(27 Ga. App. 444)

(108 S.E.)

BRADY et al. v. J. E. PHILLIPS MULE CO.
(No. 12161.)(Court of Appeals of Georgia, Division No. 2.
Oct. 7, 1921.)*(Syllabus by the Court.)*

1. Partnership §217(1)—No burden under plea of payment to prove partner's authority to receive payment on written evidence of debt.

The rule of law that, where payment upon a written evidence of debt is made to one who purports to act as the holder's agent, but fails to produce the writing, the burden is upon the debtor to prove the agent's authority to receive the payment (Civil Code of 1910, § 3578), has no application where payment on a note payable to a partnership is made to one of the partners. In such a case, upon proof of the partnership, the payment is binding against it, even though the paper itself was not produced at the time the payment was made. Civ. Code 1910, §§ 3172, 3179, 3180.

2. Partnership §49—Relation may be established by statements or admissions of partners.

Where, under a plea of payment, the sole issue is that of partnership or no partnership, as pertaining to the person to whom the payment was made, the admissions of the disputed partner, unassented to or unratified, would not of themselves be ordinarily admissible for the purpose of proving the fact of partnership, so as to bind the undisputed partners; yet partnership or no partnership is a fact which may be established by statements or admissions of the undisputed partners, or by statements of the disputed partner made in their presence and not dissented from by them, where the circumstances are such as to impose a duty to make denial. *Flournoy v. Williams*, 68 Ga. 707; *Swygert v. Bank of Haralson*, 13 Ga. App. 640, 79 S. E. 759.

3. Partnership §259—Existence of partnership presumed to continue.

The existence of a copartnership when once established is presumed, as to third persons, to continue until notice of dissolution has been given that the copartnership no longer exists. Civ. Code 1910, §§ 3157, 3179, 3180; *Pursley v. Ramsey*, 31 Ga. 403, 409; *Fleshman v. Collier*, 47 Ga. 253, 256, 257; *Reliance Fertilizer Co. v. Perry*, 23 Ga. App. 580, 583, 99 S. E. 44.

4. Questions for jury.

The evidence for the defendants was such as made a disputed issue upon the question of partnership; and under their plea and proof of payment, whether such disputed partnership was actual or ostensible, the issue was such as should have been submitted to the jury.

Error from Superior Court, Gwinnett County; Andrew J. Cobb, Judge.

Action by the J. E. Phillips Mule Company against H. R. Brady and others. From a judgment for plaintiff, defendants bring error. Reversed.

O. A. Nix and W. L. Nix, both of Lawrenceville, for plaintiffs in error.

L. B. Norton, of Lithonia, and I. L. Oakes, of Lawrenceville, for defendant in error.

JENKINS, P. J. Judgment reversed.

STEPHENS and HILL, JJ., concur.

(27 Ga. App. 428)

MOORE et al. v. WALKER. (No. 12528.)(Court of Appeals of Georgia, Division No. 1.
Oct. 6, 1921.)*(Syllabus by the Court.)*

1. Sales §202(1)—Title does not pass until payment.

Title to agricultural products sold by planters and commission merchants does not pass to the buyer until fully paid for. Civil Code 1910, § 4126.

2. Payment §21—Check not payment until paid.

A check is not payment until it is paid, unless the payee accepts it as such. Civil Code 1910, § 4314; *Butler v. Barnes*, 8 Ga. App. 513, 69 S. E. 923; *Holland v. Mutual Fertilizer Co.*, 8 Ga. App. 714, 70 S. E. 151; *Kirby Planing Mill Co. v. Titus*, 14 Ga. App. 1(1), 80 S. E. 13.

3. Payment §21—Check not payment until paid.

Applying the foregoing principles to the instant case, which was a trover action to recover a carload of melons, the plaintiff had no title to the property sued for, since the undisputed evidence adduced upon the trial shows that the check given by him to the defendant (a farmer) for the purchase price of the melons was neither accepted as payment nor cashed; and therefore the verdict in favor of the plaintiff must be set aside as being contrary to law and the evidence.

Error from City Court of Americus; W. M. Harper, Judge.

Action by C. A. Walker against W. A. Moore and others. Judgment for plaintiff, and defendants bring error. Reversed.

Bradley Hogg, of Americus, for plaintiffs in error.

Shipp & Sheppard, of Americus, and C. R. McCrory, of Ellaville, for defendant in error.

LUKE, J. Judgment reversed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(27 Ga. App. 463)

JOHNSON v. MORRIS. (No. 12481.)(Court of Appeals of Georgia, Division No. 2.
Oct. 7, 1921.)*(Syllabus by the Court.)***1. No error.**

No error of law appears to have been committed by the trial judge, and the order which he passed in the case, following his findings on the plea in abatement, was demanded by the undisputed evidence.

*(Additional Syllabus by Editorial Staff.)***2. Attorney and client \S 74—Trial court could hear evidence on plea of abatement that attorney appearing in firm name did not represent client.**

Where defendant made special appearance and filed plea in abatement on the ground that an attorney, whose name appeared in the firm name signed to the petition, had represented defendant and could not appear against him, court had a right to hear evidence offered to show that the name of such attorney was signed to the petition through mistake, and that the law partnership of such attorney and the attorney representing the plaintiff was not to begin and did not exist until some time thereafter, and to enter an order denying the plea in abatement and ordering the name of such attorney stricken from the petition.

3. Attorney and client \S 21—Attorney on one side of litigation not allowed to represent opponent in subsequent cases.

An attorney who acquires knowledge of the affairs of another pending the relationship of attorney and client between them cannot use such knowledge afterwards to the detriment of his former client.

Error from Superior Court, Floyd County; Moses Wright, Judge.

Action by S. J. Morris against J. L. Johnson. Judgment for plaintiff, and defendant brings error. Affirmed.

Morris sued Johnson for damages on account of personal injuries. The defendant made a special appearance before pleading to the merits, and filed a plea in abatement. This plea in abatement was verified by the oath of the defendant. No responsive pleadings were filed by the plaintiff, and there was no attempt to amend the petition. On the hearing of the plea in abatement the trial judge considered the following evidence: C. H. Porter, of the firm of Porter & Mebane, stated in his place, as an attorney at law of the court, that the name of that firm was signed by him to the petition through mistake; that Mr. Mebane, his partner, had no connection with the case whatever, and that he (Porter) was alone attorney for the plaintiff, S. J. Morris; that the partnership of Porter & Mebane was not to begin and did not exist until January 1, 1921; and that the petition was filed in De-

cember, 1920. W. B. Mebane testified that he had no interest whatever in the case on trial; that the defendant never consulted him, never employed him, and no one ever employed him for the plaintiff; that he did not bring the suit for the plaintiff, did not draft or prepare the petition, knew nothing about the suit going to be brought, did not authorize any one to bring the suit for him or in his name, and had no connection whatever with the suit, and that he first knew of the suit when informed by the defendant that it had been brought; that he then told the defendant that he did not bring the suit and that it was an error for his name to be attached to the suit as counsel, and at the same time he so told Harris, the attorney for the defendant.

The court thereupon entered an order overruling and denying the plea in abatement, and ordered that the name of W. B. Mebane be stricken from the petition and that the case proceed in the name of C. H. Porter. To this order and judgment the defendant excepted on the following grounds: (1) Because the ruling and judgment was contrary to law; (2) because it was contrary to the evidence, strongly and decidedly against the weight of the evidence, and has no evidence whatever to support it; (3) because it was contrary to the principles of equity and justice; (4) because the court erred in admitting in evidence the statement of C. H. Porter and the evidence of W. B. Mebane to the effect that W. B. Mebane was not attorney for the plaintiff, S. J. Morris, and that his name was signed to the petition through inadvertence, the objection of counsel for the defendant being that it was contrary to public policy to allow an attorney who appeared as attorney for the plaintiff to deny his appearance or to avoid the effect of his appearance; (5) because as it appeared from undisputed evidence that W. B. Mebane was not authorized to appear in or to present or prosecute the petition against the defendant, the firm of Porter & Mebane could not appear in or present or prosecute such petition; (6) because the judge of the superior court cannot by his order name parties who appear as attorneys for the parties; and (7) because, as this question is not raised by demurrer but was raised by special appearance for the purpose of pleading in abatement only, it was impossible for the pleadings to be made good, either by amendment or evidence, after it was made to appear that W. B. Mebane was disqualified from appearing in said case.

Nathan Harris, of Rome, for plaintiff in error.

C. H. Porter, of Rome, for defendant in error.

HILL, J. (after stating the facts as above). [1-3] We are of the opinion that there is no merit in any of the foregoing assignments of error. The judge of the trial court clearly had a right to hear the evidence offered, and this evidence clearly established the fact that the foundation upon which all of the assignments of error are based did not in fact exist; in other words, that the relationship of attorney and client between Mebane and the plaintiff did not exist and had never existed as claimed by the plea in abatement. Of course, it is well settled, and based upon the very highest ethical principles, that an attorney who acquires knowledge of the affairs of another pending the relationship of attorney and client between them cannot use such knowledge afterwards to the detriment of his former client, and that an attorney who has been on one side of litigation will not be allowed to take a position in subsequent cases where the knowledge derived from his former client might be used to the prejudice of such client. The inherent weakness of the position of the plaintiff in error is that this well-established principle did not apply under the undisputed facts of this case, and that every objection made to the order of the court is purely technical and entirely without substantial merit. The judgment of the court below is affirmed.

Judgment affirmed.

JENKINS, P. J., and STEPHENS, J., concur.

(27 Ga. App. 425)

JOHNSON v. STAR PIANO CO. (No. 12520.)

(Court of Appeals of Georgia, Division No. 1.
Oct. 6, 1921.)

(Syllabus by the Court.)

Attorney and client § 101(1), 103—Attorney cannot make settlement for less sum than that due, unless ratification is shown.

In this case the defendant sought to avoid the payment of a note by showing settlement with an attorney for less than was due thereon. The principle involved is settled by section 4956 of the Civil Code of 1910. In *Kaiser & Brother v. Hancock*, 106 Ga. 217, 32 S. E. 123, it was held: "Without special authority, an attorney cannot accept anything in discharge of his client's claim, but the full amount thereof in cash. And where a plaintiff introduces evidence which makes out a prima facie case in his favor for the full amount for which he sues, proof by the defendant, in support of a plea filed by him, that he has paid to the attorney of record for the plaintiff a sum less than the amount sued for, as a full settlement of the plaintiff's demand against him, raises no presumption that the attorney was authorized by the plaintiff to make

such a settlement. Consequently, under such circumstances, the burden is upon the defendant to show the authority of the plaintiff's attorney to make the settlement which he sets up as a satisfaction of the plaintiff's claim." Of course, if it were shown that the plaintiff, with a full knowledge of all the facts, received and kept the money paid in settlement, this would be a ratification of the settlement made by their attorney, and would be binding on the plaintiff. See, also, *Sonnebom v. Moore*, 105 Ga. 497(1), 80 S. E. 947; *Evans v. Atlantic National Bank of Jacksonville et al.*, 147 Ga. 621(1), 95 S. E. 219; *Bell & Harrell v. Kwilecki*, 11 Ga. App. 9(1), 74 S. E. 444.

Error from City Court of Albany; Clayton Jones, Judge.

Action by the Star Piano Company against W. A. Johnson, administrator. Judgment for plaintiff and defendant brings error. Affirmed.

Claude Payton, of Albany, for plaintiff in error.

H. A. Peacock, of Albany, for defendant in error.

BLOODWORTH, J. Judgment affirmed.

BROYLES, C. J., and LUKE, J., concur.

(27 Ga. App. 479)

ENNIS v. COSHOCTON NAT. BANK.
(No. 12509.)

(Court of Appeals of Georgia, Division No. 2.
Oct. 7, 1921. Rehearing Denied
Oct. 13, 1921.)

(Syllabus by the Court.)

1. Bills and notes § 327—"Draft" defined; bona fide holder for value protected.

"A draft is an open letter of request from, and an order by, one person on another to pay a sum of money therein mentioned to a third person, on demand or at a future time therein specified. A 'draft' at the present day is the common term for all bills of exchange. The words 'draft' and 'bill of exchange' are used indiscriminately." 3 Words and Phrases, First Series, p. 2196. The fact that a paper in the above form, accepted by the person on whom it is drawn, is called a "trade acceptance" does not affect its character as a draft or bill of exchange. Whatever it may be called, it is in fact and law a negotiable instrument, and, as such, is protected in the hands of a bona fide holder for value, who purchased it before it was due and without notice of any defect or defense by the maker, acceptor, or indorser, except as to the defenses expressly allowed by the statute. Civ. Code 1910, § 4286.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Draft.]

2. Bills and notes \Leftrightarrow 370, 497(1)—Bona fide holder protected against defense of acceptor of lack of consideration; presumed that holder took draft before due for value and without notice.

A bona fide holder of a draft or bill of exchange, accepted by the person on whom it is drawn and indorsed by the payee, and purchased for value and before maturity, is protected against the defense set up by the acceptor that the draft or bill of exchange was without consideration, and when such negotiable paper is payable at a future date and is indorsed by the payee, in the absence of proof to the contrary, the law will presume that the holder took the draft or bill of exchange before due, for value and without notice. Civ. Code 1910, § 4288; Butler v. First National Bank of Greenville, Tenn., 13 Ga. App. 35, 78 S. E. 772; Bothell v. Whitley, 3 Ga. App. 755(2, 3), 60 S. E. 371.

3. Bills and notes \Leftrightarrow 342—Words printed on face held not to impeach title of bona fide purchaser.

The words printed on the face of the draft, "trade acceptance," and "this obligation of the acceptor arises out of the purchase of goods from the drawer," were not sufficient to raise any doubt as to the real character of the instrument or impeach the title of the holder. They emphasized the negotiable character of the instrument and its binding effect upon the acceptor.

4. Drafts—Effect of indorsements.

None of the entries on the face and back of the instrument, made by the officers of the plaintiff bank and other banks through whose hands it had passed in the effort to collect it from the defendant as acceptor, affected the bona fides of the plaintiff's title.

5. Testimony—Admissibility.

The assignments of error on the rulings relating to the admissibility of testimony specifically set out in grounds 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, and 20 of the amended motion for a new trial are without substantive merit.

6. Petition—Demurrers.

The judgment overruling the demurrers to the petition was right.

7. Verdict for plaintiff demanded.

The numerous grounds of the motion for a new trial contain no merit that would have warranted the grant of another trial. The evidence clearly and conclusively proved that the plaintiff had purchased the instrument in good faith, for value, before maturity, and without any notice that it was without consideration. The denial of these facts by the acceptor of the paper as defendant was not sustained by any evidence. A verdict for plaintiff was therefore demanded. Parr v. Erickson, 115 Ga. 873, 42 S. E. 240.

Error from Superior Court, Baldwin County; Jas. B. Park, Judge.

Action by the Coshocton National Bank against T. H. Ennis. Judgment for plaintiff, and defendant brings error. Affirmed.

Sibley & Sibley, of Milledgeville, for plaintiff in error.

D. S. Sanford, of Milledgeville, for defendant in error.

HILL, J. Judgment affirmed.

JENKINS, P. J., and STEPHENS, J., concur.

(27 Ga. App. 417)

NESS v. BARBER. (No. 12448.)

(Court of Appeals of Georgia, Division No. 1, Oct. 6, 1921.)

(Syllabus by the Court.)

1. Principal and agent \Leftrightarrow 89(5)—Petition held to show plaintiff entitled to commission.

The petition sets out a cause of action, and the court did not err in overruling the general demurrer thereto.

(Additional Syllabus by Editorial Staff.)

2. Principal and agent \Leftrightarrow 47—Owner of wood yard held not entitled to sell without paying commissions.

Where defendant gave plaintiff management of wood yard and full control thereof, in consideration of which plaintiff was to receive 15 per cent. of gross proceeds of both wood and lumber, held, that defendant was not entitled to sell wood or lumber without being liable for commissions, notwithstanding Civ. Code 1910, § 3537.

3. Contracts \Leftrightarrow 10(2)—Unilateral contract rendered mutual by performance.

Where plaintiff, under the terms of a contract to take over control of a wood yard and sell wood and lumber for a commission, "took over the active management of said E. wood yard and fully performed the services as required by said contract," the contract was divested of any unilateral character that it possessed, and was made mutual.

Error from City Court of Savannah; Davis Freeman, Judge.

Action by C. W. Barber against E. Ness. Judgment for plaintiff, and defendant brings error. Affirmed.

McIntire, Walsh & Bernstein, of Savannah, for plaintiff in error.

Saussy & Saussy and J. T. Wells, Jr., all of Savannah, for defendant in error.

BLOODWORTH, J. As much of the petition as amended as is necessary to determine the issues involved is as follows:

"(2) On October 31, 1919, your petitioner entered into a written contract with E. Ness, a copy of which is hereto attached, marked Exhibit A, * * * whereby said E. Ness was to turn over to your petitioner the management of a wood yard in Macon, Bibb county, Georgia, known as the E. Ness wood yard, said con-

tract to take effect November 1, 1919. O. W. Barber to have full control and management of said wood yard, and to receive for his services 15 per cent. of the gross proceeds of both wood and lumber sold in any form from above-mentioned wood yard, as long as he, O. W. Barber, devoted his time to same.

"(3) On or about November 1, 1919, under the terms of said contract, your petitioner took over the active management of said E. Ness wood yard, and fully performed all services as required by said contract.

"(4, as amended) Petitioner further shows that on or about December 15, 1919, said E. Ness sold all of the wood and lumber in the said wood yard to one W. T. Morgan for the sum of \$4,000; that under the terms of said contract your petitioner is entitled to 15 per cent. of the gross proceeds of said sale, as commission, to wit, \$600. Said E. Ness has failed and refused, and still fails and refuses to pay said \$600.

"(5) Your petitioner further shows that said E. Ness has broken said contract, in that he has failed and refused to pay said commission of fifteen (15%) per cent., which amounts to \$600, and because of said breach of contract on the part of E. Ness your petitioner has been damaged in the sum of \$600, together with interest from December 15, 1919."

Exhibit A:

"Bibb County, Macon, Georgia,

"October 31, 1919.

"Contract. I hereby agree to turn over management of wood yard known as E. Ness wood yard, to O. W. Barber. Said O. W. Barber to have full control of said wood yard. In consideration of his services said O. W. Barber is to receive 15 per cent. of gross proceeds of both wood and lumber that is sold in any form from above-mentioned wood yard, as long as he devotes his time to said wood yard. Said O. W. Barber to have management of said wood yard until all wood and lumber is disposed of. Contract to take effect November 1, 1919.

"[Signed] E. Ness."

The defendant filed the following demurrer:

"(1) That the said petition sets forth no cause of action in favor of said plaintiff against this defendant.

"(2) That the said petition does not show what portion of said wood yard which was sold to said W. T. Morgan consisted of wood and lumber and what portion consisted of property other than wood and lumber."

[1, 2] The petition, as amended, met the objection urged against it in the second ground of the demurrer, and leaves the general ground only for our consideration. Plaintiff in error insists that under the facts of this case, as shown by the petition and the contract attached thereto, he had a right to sell the property himself, and, if he did so, that he would not be responsible for commissions. It is true that section 3587 of the Code of 1910 provides that "the fact that property is placed in the hands of a broker

to sell, does not prevent the owner from selling, unless otherwise agreed," but the statements of the petition and the contract itself differentiate this case from those covered by the general principle "that the owner may sell without being liable for commissions."

[3] Plaintiff in error urges, also, that the contract, a copy of which is attached to the petition, is unilateral. The petition shows that the plaintiff, under the terms of the contract, "took over the active management of said E. Ness wood yard, and fully performed the services as required by said contract." This action of the plaintiff furnished the consideration contemplated by the contract and divested it of its unilateral character. In *Sivell v. Hogan*, 119 Ga. 171 (3), 46 S. E. 68, the Supreme Court said:

"It is well settled, however, that a unilateral contract, though required by the statute of frauds to be in writing, may be made mutual by the other party's doing some act which would take the case out of the statute, so far as he is concerned."

It is therefore held that the petition in this case set out a cause of action, and the court properly overruled the general demurrer.

Judgment affirmed.

BROYLES, C. J., and LUKE, J., concur.

(27 Ga. App. 469)

GEORGIAN CO. v. BLOOM. (No. 12487.)

(Court of Appeals of Georgia, Division No. 2.
Oct. 7, 1921.)

(Syllabus by the Court.)

1. Damages ⇐22—Sales ⇐22(1)—Error in advertisement held not actionable; advertisement mere invitation and not offer.

A general advertisement in a newspaper for the sale of goods is a mere invitation to enter into a bargain, and is not an offer.

(Additional Syllabus by Editorial Staff.)

2. Sales ⇐1(4)—Identification of thing sold essential.

The first essential of a sale is that there must be an identification of the thing sold under Civ. Code 1910, § 4106.

3. Sales ⇐22(3)—Must be meeting of mind.

To consummate a contract of sale, there must be a meeting of minds.

Error from Superior Court, Fulton County: Geo. L. Bell, Judge.

Action by the Georgian Company against Jennie Bloom. Judgment for plaintiff, and from an order sustaining certiorari and ordering a new trial, plaintiff brings error. Reversed.

The Georgian Company sued Jennie Bloom in the municipal court of Atlanta upon an open account for certain advertisements printed in a newspaper published by the company. The defendant filed a counterclaim, alleging:

That the plaintiff was indebted to the defendant; "that on June 9, 1920, she being in the ladies' ready to wear business, including the selling of furs, contracted with plaintiff to run an advertisement on that date as follows: 'Special in furs. Large animal scarfs, taupe, brown and black, satin lined into brush. For three days only. Special price \$15.00'—the said advertisement to be run in plaintiff's newspaper. Plaintiff, in running said advertisement, did not carry out its contract with defendant, and insert the advertisement that she furnished them, but inserted the advertisement as follows: 'Special in furs. Large animal scarfs, taupe, brown and black satin lined into long brush. For three days only. Special price \$5.00.' This advertisement as inserted made the difference \$10 less in price than the advertisement which defendant furnished them and contracted with plaintiff to furnish. Defendant, because of said wrongful advertisement, says she was compelled to sell 48 of said scarfs at a loss of \$10 each, that is, she was compelled to sell them at \$5 instead of \$15 to customers and persons who accepted her offer as made in said advertisement. Defendant says that, by reason of said advertisement published by plaintiff, she incurred a loss of \$480. Plaintiff well knew that the purpose of said advertisement was to sell said scarfs at \$15, but, instead of putting \$15 in the advertisement, plaintiff advertised at \$5 as aforesaid. Wherefore defendant prays judgment against plaintiff for said sum of \$480."

It was admitted by counsel for the defendant that the account of the newspaper company sued upon was correct, subject, however, to the defendant's counterclaim. On the trial in the municipal court the judge thereof struck the counterclaim as being invalid, and a verdict and judgment was rendered for the plaintiff for the amount of the account. The defendant carried the case to the superior court by writ of certiorari, and the judge of the superior court, after a hearing thereon, passed an order sustaining the certiorari and ordered a new trial. The case is before this court on exceptions to this order of the judge of the superior court.

Rosser, Slaton, Phillips & Hopkins, and Jas. J. Slaton, all of Atlanta, for plaintiff in error.

Lowndes Calhoun and J. H. Leavitt, both of Atlanta, for defendant in error.

HILL, J. (after stating the facts as above). [1-3] A general advertisement in a newspaper for the sale of an indefinite quantity of goods is a mere invitation to enter into a bargain, rather than an offer.

"A business advertisement published in newspapers and circulars sent out by mail or distributed by hand, stating that the advertiser has a certain quantity or quality of goods which he wants to dispose of at certain prices, are not offers which become contracts as soon as any person to whose notice they might come signifies his acceptance by notifying the other that he will take a certain quantity of them. They are mere invitations to all persons who may read them that the advertiser is ready to receive offers for the goods at the price stated." 13 C. J. 289, § 97.

"If goods are advertised for sale at a certain price * * * the construction is rather favored that such advertisement is a mere invitation to enter into a bargain, rather than an offer." 1 Williston on Contracts, § 27.

In the instant case the advertisement, which is the basis of the counterclaim, specified no definite quantity of the furs for sale, though there was a more or less indefinite description of the qualities of the goods. The first essential of a sale is that there must be "an identification of the thing sold." Civil Code (1910), § 4106. To consummate a contract there must be "a meeting of minds." There was no merit in the counterclaim filed by the defendant in the municipal court, and the judge of that court committed no error in striking it, and entering up judgment for the plaintiff. He had a right to do so at the trial term of the court, and the judge of the superior court erred in sustaining the certiorari and ordering a new trial.

Judgment reversed.

JENKINS, P. J., and STEPHENS, J., concur.

(27 Ga. App. 386)

PELHAM & H. R. CO. v. WALKER.
(No. 12103.)

(Court of Appeals of Georgia, Division No. 1.
Oct. 6, 1921.)

(Syllabus by the Court.)

1. Damages \S 214—Instructions as to duty to lessen damages proper.

A charge that "the plaintiff was bound to lessen the damages, if he was damaged by the negligence of defendant, as far as possible, by the use of ordinary care and diligence," was not error. Civil Code 1910, § 4398. Nor was it error to refuse to charge as to specified acts which the plaintiff should have done to lessen the damage. Southern Ry. Co. v. Cunningham, 123 Ga. 90 (7), 50 S. E. 979.

2. Appeal and error \S 728(1) — Assignments to admission of evidence must show objection.

"Assignments of error upon the admission of evidence, in order to avail the plaintiff in error here, must show, not only in what respects the evidence admitted was objectionable, but that this objection was urged at the time

of the admission of the evidence; and it is not sufficient, in a ground of a motion for new trial, to state that the court committed error 'in admitting in evidence over objection of movants,' certain specified evidence, and then, after stating the evidence admitted, to allege that it was error to admit this evidence, because it was incompetent for certain specified reasons. Such a recital in a ground of a motion for a new trial does not show that the ground upon which the evidence was objectionable was urged at the time the evidence was offered. The numerous grounds of the motion for a new trial complaining of the admission of testimony are insufficient to raise any question here, for the reason indicated." *Henslee v. Harper*, 148 Ga. 621, 97 S. E. 667. See, also, *Jenkins v. Jenkins*, 150 Ga. 77 (1), 102 S. E. 425. Under this ruling grounds 8 to 9, inclusive, of the amendment to the motion for a new trial, cannot be considered.

3. Appeal and error \Leftrightarrow 1005(2)—Approved verdict, supported by evidence, not disturbed.

The jury passed upon the facts, the judge who tried the case did not see proper to interfere with their finding, and this court will not disturb it, as there is evidence to support it.

Error from Superior Court, Grady County; John R. Wilson, Judge.

Action by W. A. Walker against the Pelham & Havana Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

M. L. Ledford, of Cairo, for plaintiff in error.

S. P. Cain, of Cairo, for defendant in error.

BLOODWORTH, J. Judgment affirmed.

BROYLES, C. J., concurs.

LUKE, J., disqualified.

(27 Ga. App. 148)

RAY v. HUTCHINSON. (No. 12254.)

(Court of Appeals of Georgia, Division No. 2.
Oct. 7, 1921.)

(Syllabus by the Court.)

1. Exception to charge and exclusion of evidence.

The exceptions to certain portions of the charge are without merit, no error of law was committed as complained of by the exclusion of evidence, and the verdict is fully supported by the evidence.

(Additional Syllabus by Editorial Staff.)

2. New trial \Leftrightarrow 41(2)—Not error to exclude evidence subsequently admitted.

Where court excludes evidence at one point of trial, which is admissible, this is not sufficient cause for the granting of a new trial

where the evidence excluded is admitted at some other point in the case, and is permitted to go to jury and be fully considered by it.

3. Brokers \Leftrightarrow 54—Entitled to recover commission on furnishing purchaser ready, able, and willing to buy.

A broker engaged to sell or exchange land within a certain time is entitled to a commission where he procured a purchaser ready, willing, and able to buy, and who offers to buy within the time limits of the contract.

4. Contracts \Leftrightarrow 212(2)—Reasonable time for performance implied.

Where a person enters into a contract to do an act, and no time is designated within which the act is to be performed, the law will imply and read into the contract that it should be performed within a reasonable time.

5. Contracts \Leftrightarrow 230—Reasonable compensation implied.

Where an express agreement is made for services and the amount of payment is not designated, the law will imply a reasonable amount as compensation.

6. Appeal and error \Leftrightarrow 1033(9)—No complaint of recovery for less than proper amount.

Defendant cannot complain of a judgment requiring him to pay less than he had really agreed to pay.

Error from City Court of Valdosta; J. G. Cranford, Judge.

Action by J. A. Hutchinson against J. G. Ray. Judgment for plaintiff, and defendant brings error. Affirmed.

E. K. Wilcox and Patterson, Copeland & Slater, all of Valdosta, for plaintiff in error.

Whitaker & Dukes, of Valdosta, for defendant in error.

HILL, J. This case involves the construction of a written contract made by the owner of the real estate described with a real estate agent or broker. In substance the contract is as follows:

"I authorize you, as my agent, to sell the above-described property, and agree to pay you a brokerage of \$500.00, for negotiating, selling or exchanging the same or any part of same at the above price, or at any other price and terms to which I may hereafter agree. This authority is given for one month from date, and if sold by you or through your instrumentality or by any one else, during this time, I agree to pay \$— brokerage. I further agree that if the above property is sold to any one with whom you have been negotiating, within six months after the expiration of this contract, that I will pay you \$— commissions on sale, together with 10 per cent. as attorney's fees if collected by law."

The contract was duly signed by the owner. Suit was brought on the contract, and the petition contains two counts. The first

count is based upon the first two sentences of the contract, and the cause of action therein laid was that the broker (the plaintiff), within one month from the date of the contract, found a purchaser, namely, J. F. Holmes, who was ready, willing, and able to buy the property and who offered to buy the same, for \$7,000, and upon terms to which the owner, Ray, after the execution of the contract and during the negotiations, agreed to. The second count was based upon the last sentence of the contract, and proceeds upon the theory that the property described was actually sold within six months to the person named, with whom the broker had been negotiating, and that by reason thereof, under the terms of this portion of the contract, no specific amount being designated, but the agreement to pay being positive and definite, the owner was bound to pay the broker a reasonable sum for his services. Upon the trial the jury returned a verdict in favor of the plaintiff for \$250. The defendant's motion for a new trial was overruled.

[1, 2] The first ground of the amendment to the motion for a new trial complains of the exclusion of the testimony of the owner of the property, the maker of the contract, as to his construction of the contract, and as to what was said and done between the two parties to the contract when it was made. As to this it is sufficient to say that, whether erroneous or not, the alleged error was cured by the action of the court in subsequently permitting the introduction of the testimony then excluded, and in instructing the jury as to its effect. It is well settled that where a court excludes evidence at one point in the trial, which is admissible, this is not sufficient cause for the granting of a new trial, where the evidence excluded is admitted at some other point in the case, and is permitted to go to the jury and be fully considered by it. This will also dispose of the argument that as the court had permitted the broker to testify as to the ambiguity of the contract and his construction of it, it was unfair not to permit the defendant to do so also. The record shows that the court permitted both the parties to testify fully on this subject.

[3] The second ground of the amendment to the motion for a new trial assigns error on the following extract from the charge of the court:

"The court charges you that it would not be incumbent upon the plaintiff to show the trade was actually consummated by the passing of title deeds, but it would be incumbent upon him to show that there was an agreement made between the parties, the buyer and seller, and an enforceable agreement, one that either party could enforce, in order for him to recover, and that agreement, gentlemen, must be within the terms stipulated and the time named by the contract. The law places upon him the burden, before he would be entitled to recover, to furnish a buyer who is able, ready, and

willing to buy the property in question; that is to say, that he must furnish a buyer who is able financially to buy and who is ready to buy, on the terms and stipulations named by the seller and who is willing to buy."

It is said that this charge is not adjusted to the issues as made by the pleadings and the evidence. We do not concur in this contention. The gist of the suit in this count is, not that the sale was actually consummated within one month from the date of the contract, but that within this time the broker had found a purchaser who was ready, willing, and able to buy, and who actually offered to buy, upon the terms designated by the seller. It is not a proper or fair construction of the petition that a sale had been actually consummated by the broker, nor was the broker required to show this. By this part of the charge the court imposed upon the broker a heavier burden than he was required to carry under the pleadings and evidence; in other words, to show that he had actually made a sale. He was entitled to recover by showing a purchaser ready, willing, and able to buy within the time limits of the contract. If any error was committed in this part of the charge, it was therefore an error committed against the plaintiff, and not the defendant, for it is well established that a broker's commissions are earned when, during the agency, he finds a purchaser ready, willing, and able to buy, and who actually offers to buy, on the terms stipulated by the owner. Park's Code, § 3587. The failure to actually consummate the sale under the evidence, in view of the conduct of the owner, was not due to the fault of either the broker or the proposed purchaser. Nevertheless, if the broker produced a purchaser ready, willing, and able to buy the property on the terms proposed, and who actually offered to buy, he would be entitled to recover the commissions. *Humphries & Jackson v. Smith*, 5 Ga. App. 340, 63 S. E. 248; *Kesler v. Stultz*, 15 Ga. App. 735, 84 S. E. 201.

[4-5] The third ground of the amendment to the motion complains of the charge of the court touching the liability of the defendant under the last sentence of the contract. This part of the contract fixes no time in which it was to be performed, and leaves blank the amount of commissions that would be paid in the event of its performance. Where a person enters into a contract to do an act, and no time is designated within which the act is to be performed, the law will imply and read into the contract that it should be performed within a reasonable time, and where an express agreement is made to pay for services, and the amount of payment is not designated, the law will imply a reasonable amount as compensation. 13 C. J. 585. The last portion of the contract is specific and definite, except as to the time of the performance and

the amount of compensation. But no other reasonable construction can be placed upon the contract than that, if within a reasonable time the broker performed the services, he was entitled to reasonable compensation for his work. But the jury under the evidence may well have based their verdict upon that part of the contract which is to the effect that, if a sale is made within six months, and the broker has rendered services according to the contract within that time, and has produced a purchaser ready, willing, and able to buy, he is entitled to be paid reasonable compensation. The jury, after finding that the services had been rendered as claimed (as they must have done in view of their verdict), fixed this compensation at \$250. Certainly the broker was entitled to \$500 as definitely fixed by the contract, or he was entitled to reasonable compensation as determined by the evidence as to the value of the services, and the defendant has no right to complain that he was required to pay less than he had really agreed to pay. The objections made to the excerpts from the charge were not well taken. The charge was fully adjusted to the evidence, and there was evidence to support the verdict.

Judgment affirmed.

JENKINS, P. J., and STEPHENS, J., concur.

(27 Ga. App. 402)

CITIZENS' BANKING CO. v. SOUTHERN FERTILIZER & CHEMICAL CO.
(No. 12221.)

(Court of Appeals of Georgia, Division No. 2.
Oct. 6, 1921.)

(Syllabus by the Court.)

Banks and banking §171(3)—Bank turning over notes without payment to solvent makers liable to payee.

The petition in this case consists of two counts, a demurrer to each of which was overruled. The brief of counsel for the plaintiff in error discusses the ruling on the demurrer as to the first count only. So the sole question for us to determine is whether or not the demurrer as to that count is good. That count gives a description of the notes sued for and states the balance due thereon and alleges that the notes were delivered by plaintiff to the defendant, the Citizens' Banking Company, which was to collect them and remit the net proceeds to the plaintiff, that the makers of the notes were solvent, and that the bank negligently and fraudulently converted the notes by delivering the same to the makers thereof without collecting the balance due thereon. The petition sets out a cause of action, and is sufficient to withstand a general demurrer, and a special demurrer on the ground that "it appears affirmatively from the petition in said

case that the makers of said notes are solvent, and that the defendant in this case did not collect the money covered by notes which were delivered to maker by mistake or oversight," and that "plaintiff seems to have selected defendant against whom to bring suit, rather than institute proceedings against one of its customers." In *Hobbs v. Chicago Packing Co.*, 98 Ga. 580 (1), 25 S. E. 586, 58 Am. St. Rep. 320, it was held: "A wrong delivery of goods, either negligently or wilfully made, by one who had been intrusted with the custody of them, is in law a conversion by the latter." See *Savannah, etc., Ry. Co. v. Sloat*, 93 Ga. 803, 20 S. E. 219; 38 Cyc. 2011 (d); *Lowremore v. Berry*, 19 Ala. 180, 54 Am. Dec. 188; *Hicks v. Lyle*, 48 Mich. 448, 9 N. W. 529.

Error from City Court of Eastman; O. J. Franklin, Judge.

Action by the Southern Fertilizer & Chemical Company against the Citizens' Banking Company. Judgment for plaintiff, and defendant brings error. Affirmed.

J. H. Roberts and W. M. Clements, both of Eastman, for plaintiff in error.

J. H. Milner, of Eastman, for defendant in error.

BLOODWORTH, J. Judgment affirmed.

BROYLES, C. J., and LUKE, J., concur.

(27 Ga. App. 408)

MANNING v. DUKES. (No. 12353.)

(Court of Appeals of Georgia, Division No. 1.
Oct. 6, 1921.)

(Syllabus by the Court.)

Appeal and error §1005(2)—Approved verdict, supported by evidence, not disturbed.

No error of law is complained of, "A verdict supported by any evidence, however slight, and approved by the trial judge, cannot be interfered with by this court. The evidence is sufficient in this case." *McCain v. State*, 23 Ga. App. 320 (2), 98 S. E. 191.

Error from City Court of Soperton; W. J. Wallace, Judge.

Action between V. C. Manning and Clarence Dukes. From an adverse judgment, the former brings error. Affirmed.

L. C. Underwood, of Mt. Vernon, A. C. Saffold, of Vidalia, and Will Stallings, of Soperton, for plaintiff in error.

N. L. Gillis, Jr., of Soperton, for defendant in error.

BLOODWORTH, J. Judgment affirmed.

BROYLES, C. J., and LUKE, J., concur.

(27 Ga. App. 406)

HINES, Director General, v. SMITH.
(No. 12335.)(Court of Appeals of Georgia, Division No. 1.
Oct. 8, 1921.)*(Syllabus by the Court.)***1. Appeal and error \S 302(1)—Grounds of motion for new trial should be definite.**

Of the special grounds of the motion for new trial approved by the trial judge none is definite enough to present anything for adjudication by this court.

2. Appeal and error \S 1005(2)—Approved verdict, supported by evidence not disturbed.

"No error of law is pointed out, the verdict has the approval of the trial judge, there is some evidence authorizing the verdict, and, under repeated and uniform rulings of this court and of the Supreme Court, a reviewing court is powerless to interfere. *Bradham v. State*, 21 Ga. App. 510, 94 S. E. 618, and cases cited." *Perdue & Pace v. Hurst*, 24 Ga. App. 239 (2), 100 S. E. 647.

Error from Superior Court, Bryan County; W. W. Sheppard, Judge.

Action by W. K. Smith against W. D. Hines, Director General of Railroads. From a judgment for plaintiff, defendant brings error. Affirmed.

J. P. Dukes, of Pembroke, for plaintiff in error.

J. Hartridge Smith, of Savannah, for defendant in error.

BLOODWORTH, J. Judgment affirmed.

BROYLES, C. J., and LUKE, J., concur.

(27 Ga. App. 406)

MACKLE CONST. CO. v. HART & CROUSE CO. (No. 12233.)(Court of Appeals of Georgia, Division No. 1.
Oct. 8, 1921.)*(Syllabus by the Court.)***1. Appeal and error \S 327(3)—One defendant may move for new trial and bring exceptions, without making other defendants party.**

Where, in a suit against two or more defendants, the verdict and judgment are adverse to the defendants, and one of them makes a motion for a new trial, which is overruled, the movant can except to the judgment overruling his motion, and bring the case to the Supreme Court, without making any of the other defendants a party to the bill of ex-

ceptions, and a failure to do so will not work a dismissal of the writ of error.

2. Rulings on exceptions not erroneous.

The court did not err in any of its rulings on the pleadings as complained of in the exceptions pendente lite.

3. No reversible error.

None of the grounds of the motion for a new trial point out any error which would require a reversal of the judgment of the court below.

Error from Superior Court, Fulton County; W. D. Ellis, Judge.

Action by the Hart & Crouse Company against the Mackle Construction Company and others. Judgment for plaintiff, and the named defendant brings error. Affirmed.

Norman I. Miller, of Atlanta, for plaintiff in error.

Geo. B. Rush, of Atlanta, for defendant in error.

BLOODWORTH, J. [1] Only the ruling stated in the first headnote need be discussed. Hart & Crouse Company sued Mackle Construction Company, Wynne Plumbing Company, and W. H. Wynne. Mackle Construction Company alone defended. There was a verdict and judgment against all the parties. Mackle Construction Company, without joining the other defendants, made a motion for a new trial, which was overruled, and it brought the case to this court for review. The defendant in error filed a motion to dismiss the writ of error—"for the reason that two parties defendant in the lower court, who are interested in the final determination of this cause, are not made parties in this court, and were not served with the bill of exceptions herein."

In *Turner v. Newell*, 129 Ga. 89 (1), 58 S. E. 657, citing *Ruffin v. Paris*, 75 Ga. 653, and *Jordan v. Gauden*, 73 Ga. 191, it was held:

"Where, in a suit against two codefendants, the verdict and judgment are adverse to the defendants, and one of them makes a motion for a new trial, which is overruled, the movant can except to the judgment overruling his motion, and bring the case to the Supreme Court, without making the other defendant a party to the bill of exceptions; and a failure to do so will not work a dismissal of the writ of error."

Under this ruling, the motion to dismiss the writ of error is without merit, and is overruled.

Judgment affirmed.

BROYLES, C. J., and LUKE, J., concur.

(27 Ga. App. 391)

(108 S.E.)

FIRST NAT. BANK OF BAINBRIDGE v. McCASKILL et al. (No. 12205.)(Court of Appeals of Georgia, Division No. 2.
Oct. 6, 1921.)*(Syllabus by the Court.)***Execution §98—Method of preventing dormancy.**

Under the law existing at the time the judgment in this case was obtained, dormancy of an execution could be prevented either by a proper entry thereon every seven years by an officer authorized to execute and return the same and the recording of the said entry on the execution docket of the court in which the judgment was obtained, with the date of recording entered by the clerk (Civ. Code 1910, §§ 4355-4357), or by a bona fide public effort on the part of the plaintiff in *fi. fa.* to enforce his execution in the courts at such times and periods that seven years would not elapse between such attempts, or between such an attempt and a proper entry.

Error from City Court of Bainbridge; H. B. Spooner, Judge.

Action by the First National Bank of Bainbridge against A. L. McCaskill, executor, and others. From judgment of nonsuit, plaintiff brings error. Reversed.

On September 14, 1907, the plaintiff in error obtained judgment against Sam and Will Donalson as principals and W. E. Griffin as indorser. Execution was issued and was entered on the general execution docket on September 17, 1907. On September 8, 1912, this execution was levied, and on September 8, 1912, a claim to the property levied upon was filed and a forthcoming bond given, with J. C. McCaskill as principal and M. E. Nussbaum as security. The claim case was tried September 29, 1914, and a verdict rendered finding the property subject. The property was advertised for sale in June, 1915, and a portion of the property was produced at the sale. J. C. McCaskill died, and A. L. McCaskill qualified as his executor. On February 24, 1920, suit was filed on the forthcoming bond. Pleas were filed by both A. L. McCaskill, as executor, and M. E. Nussbaum. On the trial the court ruled out all the evidence offered by the plaintiff and granted a nonsuit, and the plaintiff excepted.

Jno. R. Wilson, of Bainbridge, for plaintiff in error.

W. V. Custer and T. S. Hawes, both of Bainbridge, for defendants in error.

BLOODWORTH, J. (after stating the facts as above). The bill of exceptions recites that the plaintiff tendered in evidence the *fi. fa.* of the First National Bank of Bainbridge against Sam and Will Donalson, principals, and W. E. Griffin, indorser, dated and

entered on the general execution docket September 17, 1907, with the entry of levy thereon, dated September 8, 1912, together with all other entries on the *fi. fa.* The defendants objected to this evidence "on the ground that the *fi. fa.* was dormant on the date that the property was advertised for sale, to wit, the first Tuesday in June, 1915, and said *fi. fa.* was dead before this suit was filed." The court sustained these objections and excluded the *fi. fa.* and entries thereon from the consideration of the jury. This court is therefore to determine whether or not the judgment was dormant in June, 1915. Were this case of first impression we would say that this question is settled by the plain and unambiguous words of the statute. However, under a number of rulings of the Supreme Court, which have been followed by this court, there are two ways by which a judgment, rendered when this one was, could be prevented from becoming dormant: First, by proper entry thereon every seven years by an officer authorized to execute and return the same and the recording of the said entry on the execution docket of the court in which the judgment was obtained, with the date of recording entered by the clerk, as provided by sections 4355, 4357, of the Civil Code of 1910; or "by a bona fide public effort on the part of the plaintiff in *fi. fa.* to enforce his execution in the courts of the country, at such times and periods that seven years would not elapse between such attempts, or between such an attempt and a proper entry." *Hollis v. Lamb*, 114 Ga. 745, 746, 40 S. E. 751, 754.

The first of these methods is based upon the express language of the statute; the second grows out of an equitable construction thereof. This equitable construction of the dormancy statute has been adhered to by the Supreme Court from the case of *Wiley v. Kelsey*, 3 Ga. 274, to the last pronouncement of that court upon the subject. By keeping in view these different methods, some of the apparent conflicts in the decisions of the Supreme Court can be reconciled. In the *Wiley-Kelsey* Case, *supra*, the Supreme Court held:

"If an execution is not barred under the dormant judgment act, at the time it comes into court to claim money, the statute cannot subsequently attach, pending the litigation respecting the distribution of the fund."

In *Hart v. Evans*, 80 Ga. 330, 5 S. E. 99, Mr. Chief Justice Bleckley said:

"Creditors are never barred by lapse of time whilst the law itself hinders them from proceeding."

And see *Cox v. Montford*, 66 Ga. 62 (2).

In *Fulcher v. Mandell*, 83 Ga. 715 (1), 10 S. E. 582, it was held:

"When judgment was obtained and the execution issuing therefrom was levied upon land, and a claim was interposed, the prosecution of this claim in the courts for over six years was such a public act on the part of the plaintiff in judgment as to prevent the statute of limitations from running pending the litigation, as to all the property of the defendant."

See, also, *Rogers v. Smith*, 98 Ga. 789(2), and cases cited on page 790, 25 S. E. 753, where Mr. Chief Justice Simmons said:

"The statute is satisfied where there is any proceeding by the plaintiff entered of record which notifies the world that he claims his judgment is subsisting."

In *Long v. Wight*, 82 Ga. 431, the Supreme Court (page 434) 9 S. E. 535, said:

"The rule seems to be, according to the decisions rendered by this court, that any bona fide action of the plaintiff which shows that he intends to keep the judgment alive will prevent its dormancy. *Smith v. Rust*, 79 Ga. 519; *Gholston v. O'Kelley*, 81 Ga. 19. As far as appears from this record, the levy was a bona fide attempt on the part of the plaintiff in *fi. fa.* to collect the amount of the execution. It shows action on his part to collect his judgment, and this, as we have seen by the above citations, is sufficient to prevent dormancy of the judgment."

In *Easterlin v. New Home Sewing Machine Co.*, 115 Ga. 305, 41 S. E. 595, Mr. Justice Little, in concluding his opinion, said:

"It clearly appears that the executions were issued upon the judgments within seven years from their date, and that these executions were placed upon the docket within seven years, and that less than seven years elapsed between the time they were so entered and the date they were placed in the hands of the officer to claim the money arising from the sale of the property of the defendant in execution. This being true, they were not dormant, and the trial judge erred in ruling that these *fi. fas.* could not participate in the distribution of the fund."

See, also, *Nelson v. Gill*, 56 Ga. 536; *Stanford v. Connery*, 84 Ga. 731 (1), 11 S. E. 507; and cases cited in *Gholston v. O'Kelley*, 81 Ga. 19, 7 S. E. 107. The first headnote in *Hollis v. Lamb*, *supra*, is as follows:

"Active and bona fide efforts on the part of a plaintiff in *fi. fa.* to enforce his execution by any appropriate legal proceedings are, if duly taken, sufficient to prevent the dormancy of the judgment on which it issued; and in order to have this effect it is not necessary that any entry relating to such efforts, other than those otherwise required or authorized to be made on the execution, shall be entered either on the execution itself or the execution docket of the court in which the judgment was rendered."

In discussing that case Mr. Justice Little reviewed the statutes on the subject of dormancy of judgments and a number of the decisions of the Supreme Court, and concluded his opinion as follows:

"This brings us to a consideration of the act of 1885 (Acts 1884-85, p. 95), on which section 3761 of our Civil Code [Civil Code of 1910, § 4355] is based. That act made practically but one change in the law as it then stood in relation to the dormancy of judgments, and that was that the entries made on an execution by the officer which were sufficient to prevent its dormancy should be entered upon the execution docket of the court from which it issued; and it is now declared, in that section of the Code, that when seven years have elapsed from the time of the record upon the execution docket of the last entry upon the execution, made by an officer authorized to execute and return the same, the judgment shall be dormant. If the provisions of the previous law which required proper entries to be made upon the execution every seven years in order to prevent dormancy did not, under the construction of that statute by our court, render such judgment dormant in the absence of such entries when the plaintiff in *fi. fa.* was making public attempts to enforce his execution within the limitation, it would be inconsistent to now rule that the mere addition of a requirement that such entries should be placed upon the execution docket has abrogated the rule of equitable construction which has invariably been given to statutes in relation to the dormancy of judgments. In harmony with the spirit of the rulings heretofore made, and under the unbroken precedent giving to these statutes an equitable construction, it must be again ruled that the dormancy of a judgment is prevented either by proper entries every seven years, duly recorded on the execution docket, or by a bona fide public effort on the part of the plaintiff in *fi. fa.* to enforce his execution in the courts of the country, at such times and periods that seven years will not elapse between such attempts, or between such an attempt and a proper entry; and that a true construction of section 3761 of the Code [Civil Code of 1910, § 4355] is that either proper entries on the execution duly entered on the execution docket, or bona fide attempts to enforce the same against the property of the defendant within the stated period, will be sufficient to prevent dormancy."

See, also, the opinion of Chief Judge Hill in *Smith v. Zachry*, 1 Ga. App. 344,¹ and opinion of Justice Beck in *Craven v. Martin*, 140 Ga. 652, 79 S. E. 568.

Section 4355 of the Civil Code of 1910, which is construed above, is the law under which this case must be decided. Under the express terms of this statute the judgment which was rendered September 14, 1907, would become dormant within seven years from that date unless the judgment was entered upon the execution docket of the court in which it was rendered, but not having been so entered, and no other entry on the execution docket having been made, under the foregoing ruling was the dormancy prevented by "any bona fide action of the plaintiff which shows that he intends to keep the judgment alive"? On September 8, 1912, the execution was levied and a claim filed. This claim was tried September 29, 1912, the exe-

¹ 57 S. E. 1011.

cution ordered to proceed, and the property advertised for sale in June, 1915. The Supreme Court has held, as shown by its opinions hereinbefore cited, that a levy "was a bona fide attempt on the part of the plaintiff in *fi. fa.* to collect the execution"; that the prosecution of the claim "was such a public act on the part of the plaintiff in judgment as to prevent the statute of limitation from running pending the litigation"; and that "it would be inconsistent to now rule that the mere addition of a requirement that such entries [on executions] should be placed upon the execution docket has abrogated the rule of equitable construction which has invariably been given to statutes in relation to the dormancy of judgments"; that "creditors are never barred by the lapse of time while the law itself prevents them from proceeding"; and that it is only necessary to show effort to collect the execution and that such efforts were made "at such times and periods that seven years will not elapse between such attempts." Applying, to the judgment in this case, the "equitable construction" rule laid down by the Supreme Court, it appearing that seven years did not elapse between efforts to collect the execution, the judgment was not dormant "at the time the property was advertised for sale," and the trial judge erred in treating it as dormant.

All the other rulings complained of in the bill of exceptions were based upon a mistaken idea of the court that the execution was dormant, and, as the case is to be tried again, it is unnecessary to consider the other allegations of error; all of them being controlled by this ruling.

The Supreme Court having so long adhered to the rule of equitable construction laid down in *Hollis v. Lamb*, *supra*, we will not comply with the request of counsel for plaintiff in error and certify this case to the Supreme Court and ask that that case and "all other cases following it be reviewed and overruled."

Judgment reversed.

BROYLES, C. J., and LUKE, J., concur.

(27 Ga. App. 442)

BANK OF LA GRANGE v. RUTLAND.
(No. 12154.)

(Court of Appeals of Georgia, Division No. 2.
Oct. 7, 1921.)

(Syllabus by the Court.)

1. Fraudulent conveyances §47 — "Goods, wares, and merchandise" not taken in restricted sense in Bulk Sales Act.

The words, "goods, wares, and merchandise," as used in the Bulk Sales Act (Civ. Code 1910, § 3226 et seq.), are not to be taken in

such a restricted sense as to exclude the usual and customary fixtures or accessories used in connection with the business to which they are appropriate, whenever their transfer is included in an absolute sale in bulk, out of the usual course of the business or trade, of the entire, or substantially the entire, stock. *Parham v. Potts-Thompson Co.*, 127 Ga. 303 (7), 56 S. E. 460; *Cooney v. Sweat*, 133 Ga. 511, 513, 66 S. E. 257, 25 L. R. A. (N. S.) 758; *Va.-Carolina Chemical Co. v. Bouchelle*, 12 Ga. App. 661 (1), 662, 78 S. E. 51.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Goods.]

2. Fraudulent conveyances §47—Bulk Sales Act strictly construed.

The Bulk Sales Act, being in derogation of the common law, must be strictly construed, and a bill of sale made to secure a debt is not such a transfer as comes within the purview of the act. *Wright v. Cline*, 107 S. E. 593; *Avery v. Carter*, 18 Ga. App. 527, 89 S. E. 1061. However, the provisions of the law apply to a sale of a stock of goods in bulk by a debtor to a creditor, in total or partial extinguishment of his debt secured by a bill of sale, and such a sale made in disregard of this act is fraudulent and void as against other creditors of the common debtor. *Sampson v. Brandon Grocery Co.*, 127 Ga. 454, 56 S. E. 488, 9 Ann. Cas. 331.

3. Execution §37—Judgment creditor must redeem property conveyed as security.

In order for a creditor to levy an execution upon property covered by a valid bill of sale made to secure a debt, the creditors must first redeem the property by paying off in full the security debt, and a levy made without a compliance with such condition precedent is void. Civ. Code 1910, §§ 6038, 3306; *Smith v. Fourth Nat. Bank*, 145 Ga. 741 (2), 743, 89 S. E. 762; *Shumate v. McLendon*, 120 Ga. 396 (4, 5, 6), 48 S. E. 10; *Virginia-Carolina Chemical Co. v. Williams*, 146 Ga. 482, 91 S. E. 543.

4. Attachment §53—Judgment creditor must discharge amount due on valid security bill of sale.

Thus, where the owner of a stock of goods, without complying with the provisions of the Bulk Sales Act, has sought to make an absolute transfer of the goods to the holder of a security bill of sale and for a consideration consisting in part of the extinguishment of the security bill of sale, but where the security bill of sale remains uncanceled of record, another creditor of the seller is not permitted to levy upon the goods in the hands of the transferee, without first discharging the amount due on the valid security bill of sale. Whatever might be the rights of the parties to the attempted transfer in treating it as binding between themselves (see *McDowell v. McMurris*, 107 Ga. 812, 816, 33 S. E. 709, 73 Am. St. Rep. 155, and note to the case of *Escalle v. Mark*, 5 A. L. R. 1517), an attachment creditor, as the moving party, having treated the sale as void as to himself, cannot at the same time be heard to insist upon its validity as between the parties thereto. Under the statute, the rights of such a creditor are to be taken precisely as

if the attempted transfer had not been made. By virtue of the act he is simply restored to what rights he would otherwise have lost. It is not intended to improve his condition by giving him superior rights. Such an attempted sale is merely a legal fraud (*Jaques & Tinsley Co. v. Carstarphen Co.*, 131 Ga. 1, 16, 62 S. E. 82), and it is not the purpose of the statute to impose punitive forfeitures of pre-existing valid liens in favor of other creditors (see *Flash v. Wilkerson* [C. C.] 20 Fed. 257).

Error from Superior Court, Troup County; J. R. Terrell, Judge.

J. T. Rutland sued out an attachment alleging fraudulent sale to the Bank of La Grange. The latter filed a claim. From judgment for plaintiff for part of the amount sued for, the claimant brings error. Reversed.

Rutland sued out a fraudulent debtor's attachment, alleging that the debtor had transferred his stock and fixtures to the Bank of La Grange without first giving the notice to creditors required by the Bulk Sales Act. After the levy, the transferee filed a claim. From the evidence in the claim case it appeared that the stock and fixtures transferred consisted of meat market fixtures and some meat, which constituted "the entire meat market, including all fixtures and stock on hand." It was admitted by the claimant that, while the transfer was made in an attempted settlement and payment of a previous security bill of sale, only \$225 was due on this bill of sale at the time of the transfer. On the trial and in argument to this court the transferee did not seek to defend the legality of the transfer, but based its claim upon a right of title under its original bill of sale, executed by the debtor to secure a debt and recorded more than a year before the transfer. It appears that this bill of sale was not canceled of record. The claimant contended that the levy of the attachment was invalid, because the attaching creditor did not before the levy redeem the property by a payment in full of the debt secured by the bill of sale. The jury found the property subject to the levy "excepting \$225 balance covered by the bill of sale," and the court rendered judgment as follows:

"That the property levied upon by the attachment is subject to the levy made in this case, except that the Bank of La Grange shall receive and be paid from the sale of said property when sold the sum of \$225."

The claimant moved for a new trial upon the general grounds, the motion was overruled, and the movant excepted. The attaching creditor filed no motion for new trial or cross-bill of exceptions as to that part of the verdict and judgment which recognized the validity and priority of the original security bill of sale.

It is not necessary to elaborate the rulings stated in the headnotes.

E. T. Moon, of La Grange, for plaintiff in error.

L. B. Wyatt, of La Grange, for defendant in error.

JENKINS, P. J. Judgment reversed.

STEPHENS and HILL, JJ., concur.

(27 Ga. App. 459)

DICKERSON v. GEORGIA MARBLE FINISHING WORKS. (No. 12403.)

(Court of Appeals of Georgia, Division No. 2. Oct. 7, 1921.)

(Syllabus by the Court.)

Master and servant §177—Fellow-servant's negligence not actionable.

The plaintiff's evidence clearly showing that the act of negligence which caused his injury was solely that of a fellow servant, a nonsuit was properly awarded.

Error from Superior Court, Cherokee County; D. W. Blair, Judge.

Action by W. I. Dickerson against the Georgia Marble Finishing Works. Judgment for defendant, and plaintiff brings error. Affirmed.

Geo. F. Gober, of Atlanta, and E. W. Coleman, of Canton, for plaintiff in error.

Jno. S. Wood, of Canton, and Robt. P. Jones, of Atlanta, for defendant in error.

HILL, J. Judgment affirmed.

JENKINS, P. J., and STEPHENS, J., concur.

(27 Ga. App. 490)

HINSON v. HOOKS. (No. 12243.)

(Court of Appeals of Georgia, Division No. 1. Oct. 7, 1921.)

(Syllabus by the Court.)

Appeal and error §1064(1)—Trial §237 (5)—Court should have charged that jury might consider number of witnesses, and omission was harmful.

It is well settled that, when a judge undertakes to charge the law upon any subject, he must charge all of it upon that subject that is material and applicable to the case. *Rouse v. State*, 2 Ga. App. 184, 58 S. E. 416; *Harper v. State*, 17 Ga. App. 561 (2), 87 S. E. 808. Upon the controlling issue in this case the plaintiff introduced a single witness and the defendant several witnesses. Therefore, when a part of section 5732 of the Civil Code (1910) was given in charge to the jury it was harmful error against the defendant to omit that part of the section which provides that "the

jury may also consider the number of witnesses, though the preponderance is not necessarily with the greater number."

Error from Superior Court, Wheeler County; E. D. Graham, Judge.

Action by B. A. Hooks against J. A. Hinson. Judgment for plaintiff, and defendant brings error. Reversed.

A. C. Saffold, of Vidalia, and W. A. Wooten, of Eastman, for plaintiff in error.

W. C. Davis, of Dublin, for defendant in error.

BLOODWORTH, J. Judgment reversed.

BROYLES, O. J., and LUKE, J., concur.

(27 Ga. App. 476)

WINDER MFG. CO. v. A. S. PENDLETON CO. (No. 12494.)

(Court of Appeals of Georgia, Division No. 2.
Oct. 7, 1921.)

(Syllabus by the Court.)

1. Sales §23(4)—Offer must be accepted unconditionally.

An answer to an offer will not amount to an acceptance, so as to result in a binding contract, unless it be unconditional and identical with the terms of the offer. If there be a variance between the offer and the answer, there is no acceptance, but a counter offer, which, to result in a contract, must be accepted by the original proposer.

2. Sales §23(4)—Offer must be accepted unconditionally.

It being shown by undisputed evidence that the defendant made a proposal with a request for acceptance by telegram, and the plaintiff replied by telegram, but the reply was not an unqualified acceptance of the proposal, but contained substantially a new proposal as to the time when the goods ordered were to be delivered, this amounted in law to a rejection of the defendant's proposal, and the defendant, at its option, had the right so to construe it. A nonsuit was therefore properly awarded.

(Additional Syllabus by Editorial Staff.)

3. Sales §23(4)—Change of time of delivery amounted to rejection of order.

Where order was given for goods, part of which were to be delivered at a certain time in the future, but, by reason of negligence in reading telegram of salesman, seller understood that shipment was to be immediate, and wired an acceptance of the offer for immediate delivery, there was no binding contract of sale; there being a material variance between the order and the acceptance.

4. Sales §23(1)—Offer must be renewed after rejection.

An offer to purchase, when once rejected, loses its legal force, and cannot be accepted

thereafter so as to create a binding agreement, unless it is renewed after the rejection by the original offerer.

5. Sales §23(4) — Attempted acceptance, seeking to modify term, constitutes rejection of offer.

An attempted acceptance of an offer to purchase, which seeks to modify one or more terms of the offer, constitutes a rejection of the offer, and the original offer cannot be accepted thereafter unless renewed.

Error from City Court of Valdosta; J. L. Crawley, Judge.

Action by the Winder Manufacturing Company against the A. S. Pendleton Company. Judgment of nonsuit, and plaintiff brings error. Affirmed.

On April 13, 1920, the defendant placed with the plaintiff two orders for goods, upon terms and conditions expressed in the orders. These orders were wired to the plaintiff by its salesman, with instructions to wire acceptance at once. The orders were that a stated portion of the goods should be shipped to the defendant by the plaintiff on September 1, 1920. The plaintiff's wired acceptance misinterpreted the time of shipment to be immediate. This misinterpretation was caused by no fault or fraud on the part of the defendant, but apparently by a negligent reading of the telegram of the plaintiff's own agent, conveying to it the order of the defendant. This misinterpretation induced the defendant to believe that its orders as to the goods to be shipped the 1st of September were rejected by the plaintiff, who attempted a counter proposition in the acceptance of the orders. This counter proposition was not accepted by the defendant. On the contrary, in a letter written to the plaintiff, the defendant expressed a willingness to take the goods if shipped immediately, and asked for some definite statement as to whether or not they would be shipped promptly, and stated that in view of the misinterpretation of their original orders they had made other arrangements for fall goods. In reply the plaintiff wrote a letter, attempting to accept the original offer. There was no reply to this letter. Nevertheless, the plaintiff, on or about September 1, shipped to the defendant the goods ordered to be shipped on that date. They were rejected, and the plaintiff, relying upon the remedy provided in the last part of section 4131 of the Civil Code of 1910, paid the freight and demurrage charges on the goods, stored them in the city of Valdosta for the use of the defendant, and brought this suit for the entire purchase price. The defendant, by its answer, admitted that goods of the grade and quantity designated by its orders were shipped at the time specified therein, but contended that it was not liable, on the ground

that its orders had not been accepted by the plaintiff according to their terms and conditions, but that the plaintiff's acceptance by wire of the defendant's original orders was a material change of the terms of the orders in reference to the time when the goods ordered were to be shipped, and this misinterpretation was a rejection of the original order, and the defendant had so construed it and ordered the goods from elsewhere. The transactions were by letters and telegrams, and after their introduction a motion to nonsuit was sustained.

G. A. Johns, of Winder, and Whitaker & Dukes, of Valdosta, for plaintiff in error.

Walker, Small & Little, of Valdosta, for defendant in error.

HILL, J. (after stating the facts as above). [1-5] The evidence was not in conflict, and under its only reasonable construction a nonsuit was proper. When the plaintiff wired its acceptance of the offer which had been telegraphed to it by its salesman, in which telegram of acceptance it changed the time for delivery of the goods to immediate delivery, instead of the 1st of September following this was such a material variance between the order and the acceptance as amounted in law to a rejection of the order and a counter offer on the part of the plaintiff as to the time of delivery. The defendant had the right so to regard it, and any attempt to revive this order by the plaintiff could not have been successful without the defendant's consent, which was never given. On the contrary, the defendant's construction of the plaintiff's telegram as being a rejection of its original order was distinctly stated by the defendant in its letter to the plaintiff on the subject. The entire correspondence by letters and telegrams, introduced in evidence, shows that there was no contract between the parties.

"An attempted acceptance which seeks to modify one or more terms of the offer is of no legal effect as an acceptance. It is really a rejection of the offer, and a counter proposition in lieu of the original offer, and must be accepted by the party making the original offer, in order to constitute an agreement." 1 Page on Contracts (1st Ed.) 75, § 46.

"An offer, when once rejected, loses its legal force, and cannot be accepted thereafter so as to create a binding agreement, unless it is renewed after the rejection by the original offerer. No revocation of the offer is therefore necessary to prevent its subsequent acceptance after it has once been rejected." Id. 66, § 37.

"A proposal to accept, or an acceptance, upon terms varying from those offered, is a rejection of the offer, and puts an end to the negotiation, unless the party who made the original offer renews it, or assent to the modification suggested." *Minneapolis & St. Louis Ry. Co. v. Columbus Rolling Mill Co.*, 119 U. S. 149, 151, 7 Sup. Ct. 168, 169, 30 L. Ed. pp. 376-377.

Here the facts show a proposition by the defendant and an acceptance upon terms varying materially from this offer. This amounted to a rejection of the offer; and the negotiation was at an end, because the original party, who made the offer, made no attempt or effort to renew it, and did not assent to any modification suggested nor any attempt to renew the acceptance of the offer made to it by the plaintiff. See, also, *Monk v. McDaniel*, 116 Ga. 108, 113, 42 S. E. 360; Civil Code 1910, § 4230.

Judgment affirmed.

JENKINS, P. J., and STEPHENS, J., concur.

(27 Ga. App. 439)

COLLINS v. HILTON. (No. 12148.)

(Court of Appeals of Georgia, Division No. 2
Oct. 7, 1921.)

(Syllabus by the Court.)

1. Bailment — Tender for services in treatment of cow held unnecessary in view of defense.

A cow, having received certain injuries, was delivered by the owner to another, who withholding possession on demand from the original owner, was sued in trover. On the trial the evidence of the plaintiff and the defendant was in conflict as to what constituted the agreement under which the cow was delivered and received. The plaintiff's contention was that the defendant was to treat the wounds of the cow and, if a recovery should be effected, was to receive proper compensation therefor. The defendant's contention was to the effect that he bought the cow with the understanding that he was to pay \$10 therefor, but only on condition that his treatment of the wounds was successful, and that if the cow died from the wounds he was to bury her at his expense. The evidence, when taken all together, shows that, upon plaintiff's calling for the cow, the defendant refused to deliver her up, but that he offered to pay plaintiff the \$10. It failed to show that the plaintiff ever offered to pay the compensation for the treatment. No motion for nonsuit was made, but at the conclusion of defendant's evidence the trial judge directed a verdict in defendant's favor. *Held:*

While it would be a good defense to an action in trover that the defendant, holding the property as a bailee for hire, has not been paid or tendered the amount due him (*Jeerns v. Lewis*, 13 Ga. App. 456, 79 S. E. 235), yet where such is not the defense, but where the defendant, as the ground of his refusal to deliver the property on demand and as the ground of his defense to the action, sets up and relies solely upon ownership under a contract of purchase alleged to have been made with the plaintiff, the necessity of such a previous tender is dispensed with, and the disputed issue as to whether the property was delivered under a sale or under a bailment for hire should have been left to the determination of the jury.

2. Trover and conversion \Leftrightarrow 9(6) — Demand and refusal unnecessary in view of claim of adverse title.

Not only is there undisputed evidence of a demand and refusal, but the defendant, by setting up in his pleading title adverse to the plaintiff and admitting such refusal, dispenses with such evidence of a conversion. *Moore v. Ramsey*, 144 Ga. 118 (1), 86 S. E. 219.

3. Pleading \Leftrightarrow 36(3) — Defendant estopped by pleadings to claim absence of evidence of plaintiff's title at time of delivery.

The evidence of plaintiff's title, and right of possession and control, at the time of the delivery to the defendant, is likewise clear; and this the defendant cannot be heard to dispute, since the defense is based upon title in the defendant acquired from the plaintiff at that time.

Error from City Court of La Grange; Duke Davis, Judge.

Action by Jamie Collins against W. A. Hilton. Judgment for defendant, and plaintiff brings error. Reversed.

Henry Reeves, of La Grange, for plaintiff in error.

L. B. Wyatt, of La Grange, for defendant in error.

JENKINS, P. J. Judgment reversed.

STEPHENS and HILL, JJ., concur.

(27 Ga. App. 523)

PAYNE, Agent, v. PRINCE. (No. 12638.)

(Court of Appeals of Georgia, Division No. 2, Oct. 24, 1921.)

(Syllabus by the Court.)

Carriers \Leftrightarrow 277(6) — Verdict for \$150 for carrying passenger beyond destination not excessive.

The plaintiff, a woman, bought a ticket from the defendant for passage from Ball Ground to Elizabeth, Ga., and, after getting on board the train, told the conductor that the road was strange to her, and that she wanted him to see that she got off when she arrived at her destination. The station was not called when the train reached Elizabeth, nor was the plaintiff notified in any way, and she did not know that she had arrived at her destination until after the train had passed through the station. When she discovered this fact she requested the conductor to stop the train and let her get off. He refused to do this, and, upon his insistence, she paid the additional fare to Marietta, Ga., where she left the train and secured conveyance back to Elizabeth on a truck. The court charged the jury that if the plaintiff was entitled to recover, she would be entitled to recover nominal damages only. A verdict was rendered for the plaintiff for \$150, and the sole issue before this court is whether this

amount was excessive. We do not think so. *Southern R. Co. v. Johnson*, 8 Ga. App. 654, 70 S. E. 69, citing *Western Union Telegraph Co. v. Glenn*, 8 Ga. App. 168, 68 S. E. 881.

Error from Superior Court, Cobb County; D. W. Blair, Judge.

Action by Rosa Prince against J. B. Payne, Agent. Judgment for plaintiff, and defendant brings error. Affirmed.

Tye, Peeples & Tye, of Atlanta, and Clay & Blair, of Marietta, for plaintiff in error. H. B. Moss, of Marietta, for defendant in error.

HILL, J. Judgment affirmed.

JENKINS, P. J., and STEPHENS, J., concur.

(27 Ga. App. 420)

DADE COUNTY v. LYEMANCE, Clerk of Superior Court, et al. (No. 12514.)

(Court of Appeals of Georgia, Division No. 1, Oct. 6, 1921.)

(Syllabus by the Court.)

1. Bail \Leftrightarrow 96 — **Fines** \Leftrightarrow 20 — Distribution of money arising from fines or forfeited recognizances.

"Money arising from fines, or collected on forfeited recognizances in the superior courts, or for a violation of the penal laws, shall be first applied to the extinguishment of the insolvent lists of the officers bringing it into court and those of justices and constables pro rata, and then to the orders of former officers in proportion to their claims." (Pen. Code 1910, § 1114.)

2. Fines \Leftrightarrow 20 — Priority of officers in distribution of funds.

In the distribution of funds arising from fines and forfeitures in criminal cases, the approved cost bills of the immediate predecessor in office of an incumbent are not entitled to priority over those of former officers, unless such immediate predecessor is the officer bringing the funds into court.

3. Fines \Leftrightarrow 20 — Surplus in funds arising from fines and forfeitures does not belong to county.

After the costs of the officers who bring funds into court have been paid, the surplus does not belong to the county to the exclusion of former officers who have itemized bills of costs approved by the court, even though such officers may not be the immediate predecessors of the incumbents.

4. Fines \Leftrightarrow 20 — Insolvent cost for subpoenas for witnesses paid out of fines and forfeitures fund.

Where a clerk of the superior court has issued subpoenas for witnesses to appear before the grand jury, and has properly presented his account therefor, and the account has been al-

lowed by the judge, as provided in section 1113 of the Penal Code of 1910, this insolvent cost will be paid out of the fines and forfeitures fund as other insolvent costs are paid, and as is provided by section 1114 of the Penal Code of 1910.

Error from Superior Court, Dade County; M. C. Tarver, Judge.

Petition by L. S. Lyemance, clerk of the superior court, and others for distribution of a balance left in the fines and forfeitures fund of Dade County. From the judgment, the county brings error. Affirmed.

After paying all insolvent costs due officers of court for the year 1920, there was left a balance of \$1,406.60 in the fines and forfeitures fund of Dade county. A petition was brought for the distribution of this sum, the parties interested therein being L. S. Lyemance, clerk of the superior court; W. H. Cross, former sheriff; W. N. Tatum, former sheriff; S. J. Hale, former clerk; Lonnie Smith, executor of estate of Martin G. Smith, deceased, former clerk. The case was submitted to the trial judge upon the following agreed statement of facts:

"It is admitted that L. S. Lyemance, clerk of the superior court of Dade county, has in his hands the sum of \$1,406.60, belonging to the fine and forfeiture fund of said county, having accrued in the year 1920. It is further admitted that the minutes of the court show that Joe M. Lang, solicitor general, for the use of Dade county, has still unpaid as insolvent costs, for the term 1917 to 1920, inclusive, the sum of \$122.48; that L. S. Lyemance, clerk for the same term, has due him the sum of \$102.70, and that W. H. Cross, sheriff for same term, has due him \$111.09. It is further admitted that L. S. Lyemance has issued subpoenas for witness to come before the grand jury during the term 1917-1920 to the number of 513, and that there are four no bills returned by the grand jury for which said Lyemance now claims judgment. It is further admitted that L. S. Lyemance, as for former clerk, has due him for the term 1915-1916, inclusive, the sum of \$29.55 for grand jury subpoenas which has not been included in any judgment for insolvent costs, for which sum he is now claiming a judgment. It is further admitted that L. S. Lyemance, former clerk, has due him, according to the minutes of the court, as insolvent costs for the term 1915-1916, the sum of \$215.16, for which judgment has been taken; that W. N. Tatum, former sheriff, has due him for the term 1915-1916, according to the minutes of the court as insolvent costs, the sum of \$302.04, for which judgment has been taken; that Joe M. Lang, former solicitor general (now for the use of Dade county), has due him for the term 1915-1916, as shown by the minutes of the court, as insolvent costs, the sum of \$836.85, for which judgment has been taken; that Lonnie Smith, as executor of M. G. Smith, deceased former clerk of superior court, has due him for insolvent costs for term 1913-1914, as shown by the minutes of the court, \$142.95, for which judgment has been taken; that W. N. Tatum, former sher-

iff, has due him for the term 1913-1914, as insolvent costs, as shown by the minutes of the court, the sum of \$24.37, for which judgment has been taken. That the former solicitor general, for the use of Dade county, for the term 1913-1914, has due as insolvent costs as shown by the minutes of the court the sum of \$268.50, for which judgment has been taken; that S. J. Hale, former clerk, has due him for the terms covering 1903 to 1913, inclusive, for which judgment has been taken in 1912, as shown by the minutes of the court, as insolvent costs, the sum of \$724.89; that W. N. Tatum, former sheriff, has due him for terms 1911-1912, as insolvent costs, for which judgment has been taken, as shown by the minutes of the court, the sum of \$215.08; that the solicitor general for the use of Dade county has due him for terms covering 1903 to 1912, inclusive, for which judgment has been taken in 1912, as shown by the minutes of the court, as insolvent costs, the sum of \$720.18. It is agreed that there has been no lack of diligence of either or any of the above claimants, and that nothing has been left undone towards the collection of said judgments, or keeping them alive, that could have been done. It is further agreed by all parties that all technical pleadings are waived; and that the court shall pass upon the legal priorities of above claims and award the funds to the claimants legally entitled to the same, irrespective of any technicalities or lack of proper pleadings."

The judgment of the court decreed that the fund in question be disbursed and paid among the claimants as follows:

"L. S. Lyemance, clerk, W. H. Cross, sheriff, and Joe M. Lang, solicitor general, for the use of Dade county, in full for all costs accruing during the term 1917 to 1920, inclusive, as set out in the agreed statement of facts, including the amount claimed by L. S. Lyemance, clerk, for grand jury subpoenas issued during that period, which amount is declared a charge against the fine and forfeiture fund and payable therefrom, and judgment for which is hereby given as prayed. * * * The balance of said fund to be divided between the former officers, the claimants herein, in proportion to the amounts of their claims (allowing to the said L. S. Lyemance, former clerk, the amount due for grand jury subpoenas during the term 1915-1916, as a charge against the fine and forfeiture fund, to be added to his other insolvent costs and share pro rata) so that the balance of said fund shall be disbursed as follows," etc.

This judgment was excepted to on the ground that it was contrary to law.

Joe M. Lang, Sol. Gen., of Calhoun, for plaintiff in error.

McClure, Hale & McClure, of Trenton, for defendants in error.

BLOODWORTH, J. (after stating the facts as above). [1] 1. The first contention of the plaintiff in error is that the judgment of the lower court is contrary to law because "no former clerk or sheriff, not the immediate predecessor of present incumbents, is

entitled to share in the distribution of said fund at all." This contention is without any semblance of merit, as section 1114 of the Penal Code of 1910 completely refutes it. That section is as follows:

"Money arising from fines, or collected on forfeited recognizances in the superior courts, or for a violation of the penal laws, shall be first applied to the extinguishment of the insolvent lists of the officers bringing it into court and those of justices and constables pro rata, *and then to the orders of former officers in proportion to their claims.*" (Italics ours.)

[2] 2. The next contention of the plaintiff in error is that the judgment is contrary to law because "no former clerk or sheriff, not the immediate predecessor of present incumbents, is entitled to share in the distribution of said fund until the amount due each of immediate predecessors of present incumbents is paid in full." This contention is also without substantial merit. The law does not entitle the immediate predecessors of present incumbents to priority over former officers, unless such predecessor assisted in bringing the fund into court. In the case of *Freeman v. Hardeman*, 67 Ga. 559, 560, in which a clerk of the court who was his own predecessor in office claimed a priority in the fund in question over an older order of a former solicitor general, the court, speaking through Justice Crawford, said:

"The claim of the clerk for his insolvent costs for previous years, not within his present term of office, was likewise rejected, and preference given to the administratrix of Montfort upon his oldest order. To determine whether that ruling was error, it is only necessary to inquire whether a former clerk of the court could be considered as one of those officers bringing the money into court. That it happened in this case that the individual person was the former clerk does not change the rule of law specifying what officers shall be entitled; its reference is to the officer not the man."

[3] 3. The next contention of the plaintiff in error is that the judgment is contrary to law because—

"when officers bringing the fund into court are fully paid [the present incumbents], the balance of the money belongs to Dade county, and no former officer except the immediate predecessor of present incumbents is entitled to the same, or any part thereof, as against Dade county."

This contention is untenable, in view of the statute law of this state. Section 1114 of the Penal Code of 1910 specifically provides that money arising from fines and forfeiture shall be first applied to the extinguishment of insolvent costs of the officers bringing it into court, and "then to the orders of former officers in proportion to their claims." Section 1116 provides that—

"The officers of the several courts, including the prosecuting officers, shall pay into the county treasury of the county where said court is

held all moneys arising from fines and forfeitures by them collected, and, on failure to do so, shall be subject to rule and attachment, as in case of defaulting sheriffs. But no such officer shall be required to pay into the treasury, as aforesaid, any such moneys, until all the legal claims on such funds held and owned by said officer bringing the money into court, and the costs due the justices and constables in the particular case by which the funds for distribution were brought into court, shall have been allowed and paid."

Section 1118 provides that—

"The moneys, so paid in, shall be kept separate and distinct from the county funds arising from other sources, and distinct and separate accounts of said funds shall also be kept as to what court the same was received from, by the county treasurer, and the same shall be paid only for insolvent costs, and in cases where defendants have been acquitted in the manner hereinafter directed."

And section 1119 provides that—

"Any officer having a claim against said fund for insolvent costs, or in cases where defendant has been acquitted, if the same accrued in the superior court (or a magistrate's court prior to indictment), shall present to the judge of the superior court an itemized bill of costs claimed; and if the same shall be approved by him, he shall order the same entered on the minutes of the court, and the same shall be a warrant on the county treasurer, to be paid by him out of any fines and forfeitures in the treasury received from the superior court."

It is clear even from a casual reading of the above sections that after the costs of the officers bringing funds into court have been paid out of money arising from fines and forfeitures, the surplus does not belong entirely to the county to the exclusion of former officers who have itemized bills of cost approved by the judge, although such officers may not be the immediate predecessors of present incumbents. See *Bartlett v. Brunson*, 115 Ga. 459, 41 S. E. 601, in which it was held:

"The law directing how the solicitor general shall distribute the moneys he collects and where the surplus shall be paid, it follows that where the solicitor general has a surplus in his hands he cannot be ruled by a former solicitor, not his immediate predecessor, and required to pay the surplus to the latter. *Such surplus must be paid to the county treasurer, and the remedy of the former solicitor, if he has orders on the insolvent fund, is to collect his claims out of the county treasurer when the latter has funds available for this purpose.*" (Italics ours.)

See, also, in this connection, *Johnson v. Lastinger*, 148 Ga. 656, 98 S. E. 78.

[4] 4. The next contention of the plaintiff in error is that the judgment is contrary to law because the "issuing of subpoenas for witnesses before the grand jury by the clerk is not a proper charge against the fine and forfeiture fund." This contention is likewise without merit. Section 1133 of the

Penal Code of 1910, in setting forth in the fee bill the fees or costs to be paid the clerk for specified services, and fixing the amount to be paid for such service, provides that—

"The clerks of the superior courts shall be entitled to charge and collect the following fees for official duties performed by them, to wit:
* * * For subpoenas, each 15 cents."

Obviously, the language of this section is broad enough to include all subpoenas issued by the clerk, and it is therefore immaterial whether they be grand jury or petit jury subpoenas. In the case of *Clark v. Clark*, 137 Ga. 189 (2), 73 S. E. 15, it was held that—

"Insolvent criminal costs are costs in criminal cases which the statute provides shall be due sheriffs as fees for services rendered in criminal cases and which are expressly and specifically provided for as to the services rendered, and the amount to be paid therefor, and which are insolvent for the reason that they cannot be collected either on account of the insolvency of the party liable therefor, or otherwise."

The issuing of subpoenas, whether grand jury or petit jury subpoenas, is a service for which provision has been made in the fee bill for clerks, and consequently is properly chargeable as insolvent costs.

It follows from what has been said that the judgment of the lower court in distributing the funds in question, and in holding that the issuance of grand jury subpoenas was a proper charge against the fines and forfeitures fund, was not contrary to law for any reason assigned.

Judgment affirmed.

BROYLES, C. J., and LUKE, J., concur.

(27 Ga. App. 455)

CRAIG v. CAMERON. (No. 12384.)

(Court of Appeals of Georgia, Division No. 2.
Oct. 7, 1921.)

(Syllabus by the Court.)

1. Bankruptcy \S 433(7) — Failure to push plea for stay of proceedings no forfeiture of right to set up final discharge in bankruptcy.

Where the defendant in a suit on a promissory note made a defense by his original plea, and subsequently, by an amendment, set up bankruptcy proceedings pending against him in the federal court, and asked for a stay of the proceeding, under the provisions of Bankruptcy Act, \S 11 (U. S. Comp. St. \S 9595), but on the trial of the case relied solely upon his defense as made by his original plea, and did not bring to the attention of the court the amendment by which he asked for a stay of the proceeding, nor invoke any action of the trial court thereon, but contested only the right to a judgment against him on the merits of the

case, he did not thereby forfeit his right to set up his final discharge in bankruptcy, if, after the judgment against him in the trial court, he obtained such final discharge, and he could produce that discharge and set it up by an affidavit of illegality to the levy of the execution based upon the judgment rendered against him.

(Additional Syllabus by Editorial Staff.)

2. Judgment \S 719 — No issue of bankruptcy before court where defendant abandoned plea.

In an action on a note, where defendant made defense on the merits, and subsequently by amendment set up bankruptcy proceedings pending, and asked for stay of proceedings, but on the trial did not bring the amendment to the attention of the court and relied solely on his defense on the merits, there was no issue before the trial court on the question of bankruptcy, under the rule that a judgment is conclusive as to all matters put in issue, under Civ. Code 1910, \S 4336.

3. Bankruptcy \S 391(3) — Right to stay of proceedings in another court may be waived.

The provision of the Bankruptcy Law (U. S. Comp. St. \S 9565) allowing a defendant to stay the proceedings against him pending the bankruptcy proceedings is primarily for the benefit of the bankrupt, that he may avoid being harassed in both courts at the same time with regard to the same debt, and is therefore a right which he may waive.

4. Bankruptcy \S 421(1) — No levy of execution on property acquired after discharge.

An execution in personam, founded on a debt provable in bankruptcy, where the plaintiff in *fi. fa.* had notice of the proceedings in bankruptcy, cannot be enforced against property of bankrupt acquired subsequently to his discharge.

Error from Superior Court, Walker County; Moses Wright, Judge.

Action by W. R. Craig against G. W. Cameron. From a judgment for defendant, plaintiff brings error. Affirmed.

Shattuck & Shattuck, of La Fayette, for plaintiff in error.

Rosser & Shaw, of La Fayette, for defendant in error.

HILL, J. This case arose on the hearing of an affidavit of illegality interposed to the levy of an execution upon a stock of goods, and the facts, about which there was no dispute, are as follows:

On July 30, 1918, a suit was filed in Walker superior court upon a promissory note, and on August 5, 1918, the defendant filed an answer thereto, in which he set up that he was not indebted to the plaintiff as alleged, and claimed certain items as a set-off against the note. On November 5, 1918, the defendant was duly adjudged a voluntary bank-

(108 S.E.)

rupt by the District Court of the United States sitting in bankruptcy, of which the plaintiff had notice, but the plaintiff did not prove his claim in the bankruptcy court. Subsequently the defendant by an amendment to his plea, set up the bankruptcy proceedings and asked a stay of the proceeding in the state court until his discharge. This amendment, for some reason not apparent, was not allowed by the court, though it was filed with the original answer, nor so far as appears, was the amendment ever brought to the attention of the trial court. On March 6, 1919, the case in the state court was decided against the defendant, and a judgment for the full amount of the suit was rendered. On September 6, 1919, the defendant obtained his discharge in bankruptcy. On December 31, 1919, an execution, based upon the verdict and judgment mentioned was levied upon a stock of goods, which it was admitted had been acquired by the bankrupt after his discharge, and to this levy the defendant interposed the affidavit of illegality, in which was set up his discharge in bankruptcy and the allegation was made that on account of such discharge the execution was proceeding illegally, and further that the property levied upon was not subject to levy and sale, because the defendant had acquired the property subsequent to the bankruptcy proceedings and his discharge. The trial judge, without the intervention of a jury, heard the case and rendered judgment in favor of the defendant, sustaining the affidavit of illegality.

[1, 2] The plaintiff in error insists that as the defendant filed an amendment to his plea in the trial court, in which he set up the bankruptcy proceedings and asked for a stay of the suit, he cannot again be heard to set up his bankruptcy and discharge in an illegality proceeding; in other words, that he is bound by the verdict and judgment against him, rendered in the trial court after he had appeared and filed the amendment, setting up the bankruptcy proceedings and asking of the court a stay of the proceeding against him. This amendment, while apparently filed, was not considered or decided by the court, and was not brought to the attention of the trial court by any proof of the record from the bankruptcy court showing the existence of such bankruptcy proceedings. There was therefore no issue before the trial court on the question of the defendant's bankruptcy or the pendency of the bankruptcy proceedings, and the only judgment rendered against the defendant in favor of the plaintiff was a judgment for the amount due on the note upon which the suit was brought. Of course it is fundamental that—

"A judgment of a court of competent jurisdiction is conclusive between the same parties and their privies as to all matters put in issue, or which under the rules of law might have been put in issue in the cause wherein the

judgment was rendered." Civil Code 1910, § 4336.

It is well settled that—

"If the defendant in a suit in a state court desires a stay of the proceedings therein, because of his having been adjudicated a bankrupt, until the application for his discharge can be heard and decided by the bankruptcy court, or if he desires to set up his discharge as a defense to such suit, he must plead the adjudication or the discharge," and "after judgment has been rendered in the state court he cannot attack the validity of the judgment therein and move the court to set aside the judgment or to treat it as a 'nullity,' either because of the pendency of the bankruptcy proceedings or because of his discharge in bankruptcy from the debt on which the judgment is based. Bankruptcy proceedings must be pleaded and proved, if relied upon. Courts other than a bankruptcy court will not take judicial cognizance of such proceedings." *McDougald v. Chattanooga Medicine Co.*, 10 Ga. App. 653, 73 S. E. 1069.

In the present case, however, it is undisputed that, while an amendment to the plea in the suit in the trial court was filed by the defendant, he failed to rely upon this amendment or to ask for an adjudication of the question there made. In other words, it is apparent that he abandoned this amendment, which, we think, he had a right to do.

[3] The provision of Bankruptcy Act, § 11 (U. S. Comp. St. § 9595), allowing the defendant to stay the proceedings against him pending the bankruptcy proceedings, is primarily for the benefit of the bankrupt, that he may avoid being harassed in both courts at the same time with regard to the same debt. It is therefore a right which he may waive. It is said by the Supreme Court of the United States, in the case of *Boynnton v. Ball*, 121 U. S. 457, 7 Sup. Ct. 981, 30 L. Ed. 985, that—

"He may be willing that the suit shall proceed in the state court for many reasons: First, because he is not sure that he will ever obtain his discharge from the court in bankruptcy, in which case it would do him no good to delay the proceedings at his expense in the state court; in the second place, he may have a defense in the state court which he is quite willing to rely upon there, and to have the issue tried [as he apparently did in the present case]; in the third place, he may be very willing to have the amount in dispute liquidated in that proceeding, in which case it becomes a debt to be paid pro rata with his other debts by the assignee in bankruptcy."

But says the Supreme Court, in the same case:

"If for any of these reasons, or for others, he permits the case to proceed to judgment in the state court, by failing to procure a stay of proceedings under the provisions of this section of the bankrupt law, or the assignee in bankruptcy does not intervene as he may do, * * * he does not thereby forfeit his right to plead his final discharge in bankruptcy, if he shall obtain it, at any appropriate stage of

the proceedings against him in the state court. And if * * * his final discharge is not obtained until after judgment has been rendered against him in the state court, he may produce that discharge to the state court and obtain the stay of execution."

This is exactly what the defendant in this case asked for in the court below, and, according to this ruling, the trial court was correct in sustaining his affidavit of illegality. *Strickland v. Brown*, 19 Ga. App. 73, 90 S. E. 1039.

[4] Even if this were not true, we are of the opinion that the judgment of the trial court should be sustained on another ground. The facts which were admitted to be true showed that the property levied upon was acquired by the defendant in error after his discharge in bankruptcy. In the case of *Peterson v. Oalhoun*, 137 Ga. 799, 74 S. E. 519, it is held that an execution in personam, founded on a debt provable in bankruptcy, where the plaintiff in *fi. fa.* had notice of the proceedings in bankruptcy, cannot be enforced against property of a bankrupt acquired subsequently to his discharge, and an affidavit of illegality setting up this defense should not have been stricken. For these reasons we conclude that the judgment should be affirmed.

Judgment affirmed.

JENKINS, P. J., and STEPHENS, J., concur.

(27 Ga. App. 521)

GIBSON v. McAFEE. (No. 12620.)

(Court of Appeals of Georgia, Division No. 2.
Oct. 24, 1921.)

(Syllabus by the Court.)

1. New trial \Leftarrow 39—Defining preponderance as being the greater weight of evidence not ground for new trial.

The judge, in his charge defined a preponderance of evidence as being "the greater weight of the evidence." Error is assigned on this portion of the charge on the ground that by preponderance of evidence is meant that superior weight of evidence. The trial court did not err in refusing to grant a new trial upon this ground. *Shingler v. Bailey*, 135 Ga. 666 (3), 70 S. E. 563.

2. Assignments of error without merit.

Neither is there any merit in the other assignments of error. The evidence was in conflict but there was evidence to sustain the verdict. The charge of the court was not erroneous for any of the reasons assigned, and the court did not err in overruling the motion for a new trial.

Error from Superior Court, Cobb County;
D. W. Blair, Judge.

Action by Hilliard McAfee against George Gibson. Judgment for plaintiff, and defendant brings error. Affirmed.

This was a suit against the owner and driver of an automobile truck for damages caused the plaintiff by the homicide of his wife. The defendant had been employed to carry the plaintiff and his deceased wife and others on the truck, owned and operated by the defendant, from Marietta to Canton, Ga. On the trip the truck was overturned, and the plaintiff's wife was caught under portions of the overturned truck and severely injured, and her death resulted from the injuries so received. The evidence as to what caused the truck to overturn was in conflict; the evidence for the plaintiff showing that it was caused by the negligence of the defendant, and the evidence for the defendant showing that the defendant was without negligence, and that the overturning of the truck was an unavoidable accident due to an unseen defect in the road. A verdict was rendered for the plaintiff, and a motion for a new trial made, and the case is before this court on exceptions to the judgment of the lower court refusing the grant of a new trial.

Clay & Blair and H. B. Moss, all of Marietta, for plaintiff in error.

Morris & Hawkins and Anderson & Roberts, all of Marietta, for defendant in error.

HILL, J. Judgment affirmed.

JENKINS, P. J., and STEPHENS, J., concur.

(27 Ga. App. 479)

J. C. EDWARDS CO. v. ZEMURRAY.
(No. 12501.)

(Court of Appeals of Georgia, Division No. 2.
Oct. 7, 1921. Rehearing Denied
Oct. 24, 1921.)

(Syllabus by the Court.)

1. Sales \Leftarrow 288(2)—Acceptance waives discovered defects.

It is a settled rule that "where property is bought under an implied warranty that it is reasonably suited to the use intended, an acceptance by the purchaser waives all defects discovered by him, or which by the exercise of ordinary care and prudence, he might have discovered before delivery." *Mansor v. Zemurray*, 22 Ga. App. 441, 96 S. E. 233. And see *Cook v. Finch*, 117 Ga. 541, 44 S. E. 95; *Henderson Elevator Co. v. North Ga. Milling Co.*, 126 Ga. 279, 55 S. E. 50.

2. Verdict properly directed.

The defendants' evidence proved that they had knowledge of the defective condition of the bananas when they received them, and that with such knowledge they accepted them. The direc-

tion of a verdict for the plaintiff was therefore demanded. This case is fully controlled by the decision of this court in *Mansor v. Zemurray*, supra.

Error from City Court of Macon; Will Gunn, Judge.

Action by S. Zemurray against the J. C. Edwards Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Robt. W. Barnes, of Macon, for plaintiff in error.

Jones, Park & Johnston, of Macon, for defendant in error.

HILL, J. Judgment affirmed.

JENKINS, P. J., and STEPHENS, J., concur.

(27 Ga. App. 489)

EMERICK CANDY CO. v. C. E. NEWTON & BRO. et al. (No. 12556.)

(Court of Appeals of Georgia, Division No. 2.
Oct. 7, 1921. Rehearing Denied
Oct. 24, 1921.)

(Syllabus by the Court.)

1. Sales ¶89—Modification of order takes effect from date of sending letter agreeing thereto.

A modification of an order given for goods purchased, growing out of a request from the buyer, takes effect from the date of sending the letter agreeing to such modification, and the buyer is liable for shipments of goods made prior to that date, unless the correspondence was such as to indicate that it was the purpose to rescind the entire contract, including the part which had been executed.

(Additional Syllabus by Editorial Staff.)

2. Sales ¶92—Agreement to cancel took effect only from date of mailing of letter agreeing to request.

Where order for candy was made by letter dated September 26th, order to be duplicated October 15th, November 1st, November 15th, and first shipment was made December 4th, and on November 25th purchasers wrote to discontinue shipments until further advised, but such letter did not reach seller until December 7th, and on that date seller replied that they had the letter "requesting cancellation and that it had been done," there was no cancellation of the entire order, and purchasers were liable for the price on the shipment already made; there being no evidence to show that purchasers objected to the "cancellation."

Error from Superior Court, Bibb County; Malcolm D. Jones, Judge.

Suit by the Emerick Candy Company against C. E. Newton & Bro. and others. Judgment for plaintiff in the municipal court, and defendants brought certiorari. New

trial ordered, and plaintiff brings error. Reversed.

Suit was brought by the Emerick Candy Company against Newton & Bro. in the municipal court of Macon for a shipment of candy. When the case came on for hearing, the defendants assumed the burden of proof and introduced the following evidence:

An order from the defendants to the plaintiff in the form of a letter, dated September 26, 1918, as follows:

"Please ship as soon as possible the following: 200 bxs. fruit and nut loaf, 200 bxs. Coco Cr. bars, 200 bxs. crisp bit, 200 bxs. Nougat bars. Duplicate Oct. 15th, Nov. 1st, Nov. 15th."

The first shipment made on this order was under date of December 4, 1918. On November 25, 1918, Newton & Bro. wrote to the plaintiff as follows:

"Kindly discontinue shipments of 6-cent goods against the orders you have on file for us until further advised."

This letter did not reach the plaintiff until December 7, three days after the first shipment had been made. On that date the plaintiff wrote Newton & Bro. as follows:

"We have your letter of the 25th ult., requesting cancellation of your orders, which has been done."

Afterwards the defendants wrote to the candy company that the shipment had been received by them, and that they would be unable to handle the shipment, and would hold the same subject to the order of the candy company. The suit was entered for this shipment, and, after hearing the evidence, the judge of the municipal court of Macon directed a verdict for the plaintiff for the full amount sued for. The defendants carried the case to the superior court by certiorari, and the judge of that court sustained the certiorari and remanded the case for a new trial, and the case came to this court on exceptions to this judgment.

Robt. G. Plunkett, of Macon, for plaintiff in error.

Strozler & Moore, of Macon, for defendants in error.

HILL, J. (after stating the facts as above). [1, 2] The contention of the defendant in error is that the contract is an entire contract and that there has been a rescission of it, and that therefore the plaintiff in the original suit was not entitled to a judgment for any amount. The evidence introduced, as shown by the record, is very meager, and leaves wide room for inferences. The order for the goods given seems to have been undoubtedly accepted, and apparently there must have been an agreement as to price, as

there seems to have been an understanding as to what was meant by "8-cent goods." Was there a rescission of the contract? Newton & Bro. requested the candy company that they discontinue shipments against the orders "until further advised." The candy company replied that they had the letter "requesting cancellation," and that it had been done. Newton & Bro. had never requested "cancellation." They had requested a discontinuance of the shipments until further advised. This letter was not received by the candy company until three days after the candy company had made the shipment for which the suit was brought.

In our opinion this did not amount to a rescission of the contract. The "cancellation" dated only from the date on which it was agreed to. Under the provisions of the Code, acceptance of a proposition by letter is from the time the written acceptance is sent. Civil Code 1910, § 4231. There is no evidence in the record to show that Newton & Bro. objected to the "cancellation" of the order. As the shipment sued for had been sent by the candy company prior to the date of this "cancellation," and as the shipment was duly received by Newton & Bro., we are of the opinion that it was obligatory upon them to pay for the goods, and that the judge of the superior court erred in sustaining the certiorari and remanding the case to the municipal court for a new trial.

Judgment reversed.

JENKINS, P. J., and STEPHENS, J., concur.

(27 Ga. App. 501)

NICHOLS v. WARD et al. (No. 12167.)

(Court of Appeals of Georgia, Division No. 2.
Oct. 24, 1921.)

(Syllabus by the Court.)

1. Chattel mortgages \S 251—Mortgagor foreclosing before maturity need show only design or intent to improperly dispose of property.

Where a chattel mortgage is foreclosed and levied before its maturity, under sections 3287 and 5055 of the Civil Code of 1910, upon the grounds that the mortgagor is actually disposing or attempting to dispose of the mortgaged property so as to lessen the security, and that he is about to remove from the county of his residence, it is not necessary for the plaintiff to show that the defendant was attempting to dispose of the property, or was about to remove from the county, on the very day upon which the affidavit to obtain the foreclosure was made. It is sufficient to show the existence of such a present design or intention, and the defendant's purpose to carry it into execution, at or about the time of the foreclosure. *Perryman v. Pope*, 102 Ga. 502 (4), 506, 81 S. E. 37; *Stix v. Pump*, 36 Ga. 526 (2), 531.

2. Evidence \S 151(8)—Intent of mortgagor to dispose of property so as to lessen security before maturity may be proved by his testimony.

Where, as in such a case, design or intent is relevant to an issue, it may be proved by the evidence of the person himself testifying directly as to what his intention was in the given instance, although such evidence is not conclusive, but is to be considered with all the facts and circumstances of the case in determining the real intention. *Hale v. Robertson*, 100 Ga. 169, 27 S. E. 937; *Alexander v. State*, 118 Ga. 28 (4), 44 S. E. 851; *Acme Brewing Co. v. Central of Ga. R. & Bkg. Co.*, 115 Ga. 494 (9), 42 S. E. 8; 7 Enc. of Evidence, 596; 1 Wigmore on Ev. 716.

3. Evidence \S 151(8)—Of mortgagor's intent to remove from county held properly excluded.

In the trial of a claim interposed by a third person upon such a foreclosure, the court properly excluded the testimony of the mortgagor in answer to the question, "What did you expect to do, or what had you planned to do, in reference to your half of the crop?" the answer being, "I had planned to dispose of my part of the crop, and put the money in my pocket, and go back to Atlanta without paying off the mortgage." Such testimony, while in principle admissible, failed to show either when the plan existed or was to be executed, so as to connect such intended disposal of the property with any time at or about the date of foreclosure. For the same reason, certain admissions of the mortgagor to a like effect were properly excluded.

4. Chattel mortgages \S 282—Direction of verdict for third person claiming property on foreclosure before maturity held improper under evidence.

Under the rule expressed in the first division of the syllabus, it was error, however, to direct a verdict for the claimant on the theory that the foreclosure of the mortgage before its maturity was premature; since the mortgagor's testimony for the plaintiff showed that just prior to the foreclosure the mortgagor was planning and actually preparing to leave the county of his residence and go to a city in another county as soon as he could get away, that he had engaged work and actually rented a home in that city, that all he had to do was to load his things and go, and that part of his things were already packed. Nor would the mere fact that the mortgagor was arrested and incarcerated in jail for a period extending from three days before the mortgage was foreclosed until four days thereafter so negative the possibility of his forming and executing an intention to remove from the county as to take such issue from the jury; there being no proof that the charge was non-bailable, but the evidence, on the contrary, showing that he was actually released, and that he removed from the county shortly thereafter. The rule stated in *Nussbaum v. Waterman*, 9 Ga. App. 58, 58, 70 S. E. 259, does not appear to have been in any wise invoked.

Error from Superior Court, Barrow County; Andrew J. Cobb, Judge.

Action between W. D. Nichols and J. T. Ward and others. From an adverse judgment, Nichols brings error. Reversed.

W. L. Nix, of Lawrenceville, for plaintiff in error.

G. A. Johns and J. C. Pratt, both of Wind-er, for defendants in error.

JENKINS, P. J. Judgment reversed.

STEPHENS and HILL, JJ., concur.

(27 Ga. App. 485)

DOUGLAS et al. v. STEPHENS.

STEPHENS v. DOUGLAS et al.

(Nos. 12548, 12550.)

(Court of Appeals of Georgia, Division No. 2
Oct. 7, 1921.)

(Syllabus by the Court.)

1. Evidence supporting allegations of petition.

The evidence in support of the allegations of the petition, as set out in the second count of the petition, is sufficient to support the verdict for the plaintiff on that count, and the objection made to the admission of evidence in the amended motion for a new trial is without merit.

2. Evidence supporting allegations of petition.

The evidence in support of the allegations of the first count of the petition proved a prima facie case for the plaintiff, and the judgment of nonsuit as to this count should not have been awarded.

(Additional Syllabus by Editorial Staff.)

3. Work and labor \S 4(2)—Promise to pay for valuable services implied.

Where one performs for another with the other's knowledge a useful service of a character that is usually charged for, and the latter expresses no dissent or avails himself of the service, a promise to pay the reasonable value of the service is implied.

4. Appeal and error \S 719(1), 724(1), 750(1)
—Assignments of error may be on rulings complained of in exceptions.

Under Act approved Aug. 15, 1921, assignments of error need not be taken on exceptions pendente lite, being sufficient if taken only on the rulings therein complained of.

5. Payment \S 59, 65(6)—An affirmative defense.

In an action to recover the reasonable value of services rendered, payment is an affirmative defense which must be set up and proved by the defendant.

Error from City Court of Bainbridge; H. B. Spooner, Judge.

Action by D. S. Stephens, administratrix, against D. Douglas and others. There was a nonsuit as to one count, and a judgment for plaintiff on another count, and defendants bring error, and plaintiff brings cross-error. Affirmed on main bill of exceptions, and reversed on cross-bill.

J. C. Hale and M. E. O'Neal, both of Bainbridge, for plaintiffs in error.

Jno. R. Wilson and H. C. Harrison, both of Bainbridge, for defendant in error.

HILL, J. This was a suit on an implied contract, to recover for the value of services rendered by the husband of the plaintiff. The petition contained two counts. The first count was for services rendered on account of the sale of a milling plant, which it is alleged the decedent sold for and on behalf of the defendants, and the claim is based on a quantum meruit for such services. The second count was for services rendered by the decedent husband of the plaintiff as a caretaker of the mill property before its sale, and the claim is for a quantum meruit on this account. At the conclusion of the evidence the trial court granted a motion to nonsuit the case as to the first count, and submitted the second count to the jury, who found a verdict for \$175 for the plaintiff. The defendants filed a motion for a new trial, based upon the general grounds and upon exceptions as to the admissibility of certain letters as evidence in favor of the plaintiff. The plaintiff preserved exceptions pendente lite to the judgment sustaining the motion for a nonsuit on the first count, and in a cross-bill of exceptions error is assigned on that judgment.

[1, 3] 1. The judgment on the main bill of exceptions is affirmed. The evidence for the plaintiff amply supported, if it did not demand, a verdict for the plaintiff on the second count of the petition. She proved that the services were rendered by her deceased husband as a caretaker of the property in question for the defendants and were accepted by them, and that the reasonable value of such services was from \$40 to \$50 a month. There was no affirmative defense, either by plea or evidence, that such services had been paid for by the defendants.

"It is said that the only difference between an express contract and an implied contract is that in the former all of the terms and conditions are expressed between the parties, while in the latter some one or more of the terms and conditions are implied by law from the conduct of the parties. Thus, where one performs for another, with the other's knowledge, a useful service of a character that is usually charged for, and the latter expresses no dissent or avails himself of the service, a promise to pay the reasonable value of the service is implied." 6 R. C. L. 587.

[2, 4] 2. A motion is made in this court to dismiss the cross-bill of exceptions by virtue of the decision of this court in *Guthrie v. Peninsular Naval Stores Co.*, 107 S. E. 260, on the ground that there is no assignment of error upon the exceptions pendente lite, but only on the ruling therein complained of. There are other decisions by this court and the Supreme Court to the same effect. Evidently to meet these rulings of this court and of the Supreme Court, the Legislature at its late session enacted the following law:

"An act to regulate and prescribe certain matters of review, procedure and practice in the courts of this state, and for other purposes.

"Whereas, it is the policy of the law of this state, as declared in section 6183 of the Civil Code, that no case shall be dismissed by the reviewing courts for want of technical conformity to the statutes or rules of practice, where there is enough in the bill of exceptions and transcript of record to enable the court to ascertain substantially the real question in the case which the parties seek to have decided therein; and whereas the refusal of the court to pass upon any question made is to that extent a dismissal of the case; and whereas useless duplication in records and briefs should be avoided:

"Sec. 2. Be it further enacted, that when the final bill of exceptions shows that exceptions pendente lite were properly filed in the trial court, and where the contents of such exceptions pendente lite are recited in the bill of exceptions, or a copy appears in the transcript of record, an assignment of error in the final bill of exceptions, either upon the exceptions pendente lite or upon the rulings therein excepted to, shall be held to be sufficient."

This act was approved August 15, 1921. The cross-bill of exceptions in the present case, as to the assignment of error therein, is in full compliance with the requirements of the statute, and therefore the motion to dismiss is refused.

[5] The judgment of the trial court on the cross-bill of exceptions is reversed. The evidence in support of the quantum meruit covered by the first count of the petition establishes the plaintiff's claim that the services therein claimed to have been rendered by her deceased husband to the defendants were in fact rendered, that these services were accepted by the defendants, and that the value of the services was 5 per cent., or \$300, on the amount of the sum arising from the sale of the property of the defendants by the decedent. The defendants had filed a plea of general issue, but they introduced no evidence in support thereof, and moved for a nonsuit, which was granted as to the first

count of the petition. The defendants insist that the nonsuit was demanded because the evidence failed to show that the defendants had failed and refused to pay the deceased husband of the plaintiff, or his estate, the reasonable value of such services, and that such allegation, and proof thereof, is necessary before a recovery would be authorized. This seems to be the general rule.

"The breach of the promise in general assumpsit is the neglect and refusal of the defendant to perform it—that is, to pay. As in special assumpsit, it is an essential part of the cause of action, and must in all cases be stated." *Shipman's Common-Law Pleading* (2d Ed.), 225; 40 Cyc. 2841; 5 C. J. 1397.

But a different rule seems to have been announced by the Supreme Court of this state. In *Christian v. Bryant*, 102 Ga. 561, 27 S. E. 666 it is held that—

"Payment is an affirmative defense which should be set up and proved by the defendant."

And in the same case it is further held:

"An action on account for personalty alleged to have been sold and delivered by the plaintiff to the defendant is sufficiently supported by evidence showing the sale and delivery at the price sued for, and it is not incumbent on the plaintiff to show negatively a failure on the part of the defendant to pay." (Italics ours.)

See *Lanier v. Huguley*, 91 Ga. 793, 18 S. E. 39.

"Ordinarily, where suit is brought for goods sold, it would be sufficient, to shift the burden, for the plaintiff to show that the goods were sold and delivered; and in such case payment is an affirmative defense which should be set up and proved by the defendant." *Armour v. Bluthenthal*, 9 Ga. App. 712, 72 S. E. 170.

"A petition that alleges the employment of plaintiff by defendant, performance of stated services, with a general statement of the items of work done, the aggregate value of the same, and the completion of the contract of employment, sets forth a cause of action." *Kilkenny Plantation v. Furber*, 130 Ga. 492 (1), 61 S. E. 14.

By authority of these decisions, the judgment granting the nonsuit as to the claim for services set out in the first count of the petition must be reversed, and as to that count a new trial granted.

Judgment affirmed on main bill of exceptions; reversed on cross-bill.

JENKINS, P. J. and STEPHENS, J., concur.

(27 Ga. App. 459)

(108 S.E.)

BANK OF LUMPKIN v. PEOPLE'S BANK OF ATHENS. (No. 12409.)

(Court of Appeals of Georgia, Division No. 2.
Oct. 7, 1921. Rehearing Denied Oct.
24, 1921.)

(Syllabus by the Court.)

1. Banks and banking §189—Bank, promising to pay another person's draft, held liable as on an original undertaking.

Where a bank, at the request of one of its customers, notifies another bank that it will pay another person's draft upon him with bill of lading attached, and the bank thus notified, acting solely on the faith of this promise, advances to the drawer the money represented by the draft, the bank making the promise is liable to the other bank as on an original undertaking within the scope of its general business, and its status is not that of a mere surety, pledging its credit solely for the benefit of the drawee. In such a transaction the promise of the drawee to protect the draft is not to be taken as made to the drawer, or to the bank making the advance, but as given to his own bank, which, in consideration of credit thus extended by it to its own customer, and in furtherance of the agreement made by and between them, has agreed directly and alone to repay the advance to be made by the other bank.

(Additional Syllabus by Editorial Staff.)

2. Pleading §270—Amended demurrer, claiming that act was ultra vires, could be filed by corporation at any time.

Objections that an amendment to a demurrer, alleging that act of defendant bank was ultra vires, should have been filed at the appearance term, and that the matter was one for a plea in abatement, and not for a demurrer, were without merit; the demurrer being in the nature of a general demurrer, or a motion to dismiss, which could be filed at any time.

3. Evidence §31—Judicial notice taken of charter of bank.

Court may take judicial cognizance of the charter of a bank filed in the office of the secretary of state.

4. Banks and banking §99—Bank cannot lend credit.

A bank cannot lend its credit to another, cannot become indorser for another, and cannot guarantee the payment of the debt of another solely for the benefit of the debtor.

Error from City Court of Athens; J. D. Bradwell, Judge.

Action by the Bank of Lumpkin against the People's Bank of Athens. Judgment for defendant, and plaintiff brings error. Reversed.

The Bank of Lumpkin sued the People's Bank of Athens, alleging, in substance, that the defendant bank was indebted to the plaintiff in the sum of \$5,763.16; this in-

debtedness being based on three drafts, drawn by Frank S. Singer on the Creekmore Company, of Athens, Ga., which drafts were to be honored by the People's Bank of Athens. The drafts were drawn in accordance with a telegram sent by the People's Bank of Athens to the Bank of Lumpkin on February 14, 1918, as follows:

"We will honor drafts with bill of lading attached on Creekmore covering 2,500 bushels of peas at \$3.50 a bushel."

In accordance with this telegram the Bank of Lumpkin paid Frank S. Singer for the drafts and sent them to the People's Bank of Athens, with the bills of lading attached, and the People's Bank of Athens failed and refused to pay the drafts. The People's Bank of Athens, before pleading to the merits, filed a demurrer to the petition, the demurrer was overruled, and no exceptions were taken to this judgment. The defendant thereupon amended the demurrer, and demurred to the amended petition of the plaintiff, and in the amendment to the demurrer contended that the act of the defendant, through its officers, in which the promise was made to honor the drafts on the Creekmore Company, as stated, was ultra vires, being an act of suretyship, and beyond the authority of the bank. This ground of the demurrer was sustained, and the suit dismissed, and the case came to this court on exceptions to this judgment.

T. T. James, of Lumpkin, and Shackelford & Meadow and Thos. J. Shackelford, all of Athens, for plaintiff in error.

H. C. Tuck and Lamar C. Rucker, both of Athens, for defendant in error.

HILL, J. (after stating the facts as above). [2, 3] The amendment to the demurrer contending that the act of the defendant bank was ultra vires, was objected to by the plaintiff on the ground that it came too late, as it should have been filed at the appearance term, being in its nature a special demurrer, and an exception was taken to the overruling of this objection. Objection was also made on the ground that this was a matter for a plea in abatement and not for demurrer. We do not think there is any merit in either of these objections to the filing of the demurrer, as in our opinion the demurrer was in the nature of a general demurrer, or a motion to dismiss, and could be filed at any time, and it was proper to make the question by general demurrer, and not by plea, as the court would have the right to take judicial cognizance of the charter of the defendant bank, filed in the office of the secretary of state. But the view we take of the main question in this case renders immaterial the questions thus made.

[1, 4] The question is whether the promise

of the defendant bank, in its telegram to the plaintiff, was an original undertaking within the scope of its general business, or was a pledging of its credit solely for the benefit of the drawee of the drafts, in which event it would be an ultra vires act, and the bank would not be liable. The principle is well established, especially by the decisions of the courts of this state in the cases of *Bank of Omega v. Wingo, etc., Co.*, 19 Ga. App. 177, 91 S. E. 251, and *First National Bank of Tallapoosa v. Monroe*, 135 Ga. 614, 69 S. E. 1123, 82 L. R. A. (N. S.) 550, that a bank cannot lend its credit to another, cannot become indorser for another, and cannot guarantee the payment of the debt of another solely for the benefit of the debtor. Under the decisions in the case of *Bank of Omega v. Wingo, etc., Co.*, supra, we think it clear that the promise of the Athens bank in the present case constituted an original undertaking and not an act of suretyship. Upon the receipt of the telegram from the Athens bank, agreeing to honor the drafts and pay for the 2,500 bushels of peas at \$3.50 a bushel, and relying upon its promise, the Bank of Lumpkin advanced the money and deposited the drafts with the bills of lading attached, and thereby the peas purchased became the property of the Athens bank, possession of which it was entitled to on the payment of the drafts, and thereafter the Bank of Lumpkin relied solely upon the Athens bank for payment.

The Athens bank's telegram of acceptance to the Bank of Lumpkin was conditioned only upon two things: That the peas should be paid for at \$3.50 per bushel, and that the bills of lading should be attached to the drafts. This was a perfectly legitimate banking transaction. The Bank of Lumpkin had a right to rely upon the promise of the Athens bank. Indeed, it had a right to rely upon the inference that the Athens bank was to pay these drafts out of funds that it had on hand of the Creekmore Company on whom the drafts were drawn. The Bank of Lumpkin had the right to assume that it was a legitimate banking transaction, and that the Creekmore Company had funds in the hands of the Athens bank out of which to pay these drafts. The transaction, tersely stated, is as follows:

Singer, at Lumpkin, had peas to sell. Creekmore Company, a customer of the People's Bank of Athens, desired to buy these peas. These parties had to use the banks to carry out this commercial transaction. If the People's Bank had been at Lumpkin, and had desired to furnish the money to the Creekmore Company to buy these peas, the bank could have taken the bills of lading in its name and given the purchase money over to the Creekmore Company, or to Singer; and if such had been the case, it could not

have been said that the bank, in advancing the money, was acting outside of its charter. But the People's Bank was not at Lumpkin, and could not pay over the money to Singer for the peas for the account of its customer, the Creekmore Company; therefore the People's Bank used the wire and the services of the Bank of Lumpkin. It wired the Bank of Lumpkin to pay for the peas, 2,500 bushels, at \$3.50 a bushel, and to draw the drafts on the Creekmore Company for the amount, with the bills of lading attached.

In our opinion this was an original undertaking in which it was agreed, in effect, to pay back the money to the Bank of Lumpkin, if the Bank of Lumpkin advanced it under the instructions of the People's Bank; and the Bank of Lumpkin carried out the instructions given it by the People's Bank to the very letter and paid for the peas at \$3.50 a bushel, 2,500 bushels, and drew the drafts on the Creekmore Company through the People's Bank, with the bills of lading attached. The transaction between the two banks was a usual and ordinary banking transaction. If such transactions were ultra vires, banks would be crippled and commercial transactions greatly delayed and hindered. We therefore conclude that the learned trial judge erred in sustaining the demurrer to the petition on the ground covered by the amended demurrer, to the effect that the act of the Athens bank was ultra vires, and for that reason not enforceable.

Judgment reversed.

JENKINS, P. J., and STEPHENS, J., concur.

(27 Ga. App. 389)

**SAVANNAH RIVER LUMBER CO. v.
MYERS. (No. 12104.)**

(Court of Appeals of Georgia, Division No. 1.
Oct. 6, 1921.)

(Syllabus by the Court.)

1. Master and servant §30(2) — Refusal to obey order justifying discharge.

In a suit by an employee to recover salary for a period following an alleged wrongful discharge, where the employer pleaded justification because of the refusal of the employee to obey a certain order, the right to recover would depend upon whether it was the duty of the plaintiff to obey the order given, and upon whether or not a refusal authorized the discharge. *Ga. Coast, etc., R. Co. v. McFarland*, 132 Ga. 640, 64 S. E. 897.

(a) The refusal of the servant to perform services not provided for in the contract will not justify a discharge. *Sugg v. Blow*, 17 Mo. 359 (1); *Marx v. Miller*, 134 Ala. 348 (4), 32 South. 765.

2. Certiorari properly denied.

The questions of fact were submitted to the judge of the municipal court of Savannah, his judgment is supported by the evidence, no error of law appears, and the judge of the superior court properly overruled the certiorari.

Error from Superior Court, Chatham County; P. W. Meldrin, Judge.

Action by Alice Myers against the Savannah River Lumber Company. Judgment for plaintiff in the municipal court, certiorari properly overruled, and defendant brings error. Affirmed.

Hitch, Denmark & Lovett, and Alvan B. Rowe, all of Savannah, for plaintiff in error.
Geo. H. Richter, of Savannah, for defendant in error.

BLOODWORTH, J. Judgment affirmed.

BROYLES, O. J., and LUKE, J., concur.

(27 Ga. App. 494)

DAVIS v. CARTER. (No. 12575.)

(Court of Appeals of Georgia, Division No. 2, Oct. 7, 1921.)

(Syllabus by the Court.)

Railroads \S 443(1)—Evidence together with statutory presumption held to sustain recovery for killing stock.

Seven cows, the property of the plaintiff, were killed while on the railroad track by the running of the engines and cars, and a verdict was given to the plaintiff for \$800. The statutory presumption of negligence against the railroad company, which arose on proof of the killing of the cows, was not clearly and completely rebutted by the positive and undisputed evidence of the employees in charge of the running of the trains, and the evidence was in conflict on the subject of negligence. No error of law was committed by the trial judge; consequently the judgment overruling the motion for a new trial must be affirmed.

Error from Superior Court, Stewart County; Z. A. Littlejohn, Judge.

Action by J. H. Carter against J. O. Davis, Agent, etc. Judgment for plaintiff, and defendant brings error. Affirmed.

G. Y. Harrell, of Lumpkin, and W. W. Dykes, of Americus, for plaintiff in error.

R. L. Gillen, of Richland, and W. D. Crawford, of Buena Vista, for defendant in error.

HILL, J. Judgment affirmed.

JENKINS, P. J., and STEPHENS, J., concur.

(27 Ga. App. 489)

MUSE v. JONES. (No. 12553.)

(Court of Appeals of Georgia, Division No. 2, Oct. 7, 1921.)

(Syllabus by the Court.)

Appeal and error \S 1005(3)—Approved verdict on conflicting evidence not disturbed.

This was a suit for commissions alleged to be due on the sale of an automobile. The suit was filed in a justice's court, where a verdict was rendered for the plaintiff, and an appeal was taken to the superior court, where a verdict was again rendered for the plaintiff. The evidence was conflicting, and the sole question is a question of fact. There was sufficient evidence to authorize the verdict, and this verdict has the approval of the trial judge.

Error from Superior Court, Carroll County; F. A. Irwin, Judge.

Suit by H. G. Jones against O. P. Muse. Judgment for plaintiff in circuit court, on appeal from justice court, and defendant brings error. Affirmed.

Emmett Smith, of Carrollton, for plaintiff in error.

Boykin & Boykin, of Carrollton, for defendant in error.

HILL, J. Judgment affirmed.

JENKINS, P. J., and STEPHENS, J., concur.

(27 Ga. App. 428)

BANKS v. NEELY. (No. 12522.)

(Court of Appeals of Georgia, Division No. 1, Oct. 8, 1921.)

(Syllabus by the Court.)

Certiorari \S 68—Affirmance in absence of error, where evidence authorized verdict.

There is no merit in any of the assignments of error in this case. The evidence authorized the verdict, and the judge of the superior court did not err in overruling the certiorari.

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action between O. H. Banks and S. E. Neely. From an adverse judgment, the former brings error. Affirmed.

Hines & Jordan and J. Paul Hinde, all of Atlanta, for plaintiff in error.

Kendrick L. Scott and Harry L. Greene, both of Atlanta, for defendant in error.

LUKE, J. Judgment affirmed.

BROYLES, O. J., and BLOODWORTH, J., concur.

(131 Va. 239)

MILLER et al. v. SOUTHERN RY. CO.

(Supreme Court of Appeals of Virginia. Sept. 22, 1921.)

1. Landlord and tenant ⇨190(2) — Partial eviction excuses liability to pay rent, if entire.

If rent is entire, tenant is released from liability to pay during continuance of a partial eviction, though he continued to occupy the remainder of the premises.

2. Railroads ⇨133(4)—Rent on lease of materials for lessee's spur track held recoverable, though lessor removed its connection track.

Under a contract whereby a railroad company agreed to lease rails and materials to a mining company for its spur track at an agreed rental, fixed at a percentage of the market value, with right to terminate rental payments by acquiring the materials within a certain time, and the railroad company also agreed to furnish the use of a connection track on its right of way at a rental fixed at the cost of maintenance, to be paid so long as the lessee used the connection, the lessor being given the exclusive right to control and operate said connection track, and right to exercise its ownership, held, that the lessor's removal of the connection track on the lessee's discontinuance of the use of its spur did not defeat recovery of rental for the rails and materials; the rent not being entire, and such removal not constituting a partial eviction, the covenants in the contract being independent.

3. Covenants ⇨28—Whether dependent or independent depends on intention.

Covenants are dependent or independent, according to the intention of the parties and the good sense of the case.

Appeal from Circuit Court, Washington County.

Suit by the Southern Railway Company against J. E. Miller, administrator of W. B. Bennett, deceased, and others. From a decree for plaintiff, defendants appeal. Affirmed.

D. T. Stant, of Bristol, for appellants.

Pennington, Price & Jones, of Bristol, for appellee.

SAUNDERS, J. In September, 1919, the Southern Railway Company filed its bill in equity in the circuit court of Washington county against J. E. Miller, administrator of W. B. Bennett, deceased, Carrie I. Luther, Essie Marie Updegraff, and Donald Bennett, to attach the estate of the said Carrie I. Luther, Essie M. Updegraff, and Donald W. Bennett, and thereby enforce the collection of a claim alleged to be due from the estate of the said W. B. Bennett to the said railroad company. This claim arose in this wise:

The Southern Mining & Manufacturing Company entered into a written contract with the Virginia & Southwestern Railway Company on May 20, 1907, relating to a certain short line of railroad leading from Benhams in Washington county, a point on the said Virginia & Southwestern Railway Company's road, to a proposed limestone and marble quarry in the county of Washington, the property of the said manufacturing company. The estate of W. B. Bennett now occupies the place of the Southern Mining & Manufacturing Company, and the Southern Railway Company that of the Virginia & Southwestern Railway Company.

The Southern Railway, plaintiff in the bill, supra, claimed that certain rents were due it from the estate of said Bennett.

The sole question for decision is whether the railway company, under the proper interpretation of the contract supra, is entitled to collect its claim in full. The defendants demurred to the plaintiff's bill. This demurrer was sustained and leave given to amend the bill at bar. This was done. Thereupon the defendants filed their answer to the amended bill, admitting the contract relied upon by the plaintiff, and a portion of the claim for rent, to wit, \$151.53, but denying any further liability. The case was heard upon the bill, answer, exhibits, and an agreement of facts, and a decree entered awarding the plaintiff the full amount of rent claimed. An appeal from said decree by the defendants brings the controversy before this court for review.

The contract between the parties contains a number of covenants, and to reach a proper determination of this controversy it will be necessary to determine whether these covenants are dependent, or independent. There are no controverted facts.

The indenture between the original parties who are represented by the plaintiff and defendant now before the court, recites that:

"Whereas, the first party [i. e., the mining and manufacturing corporation] desires a connection with the second party's main line at Benham's, as shown on the map, and also wishes to lease from the said second party, for use on its said line of railroad, rails, frogs, switches, spikes, bolts, and splices, and the party of the second part has agreed to afford said connection and lease said rails, etc., to the first party on the terms and conditions hereinafter mentioned: Now, therefore, in consideration of the premises, it is agreed between the parties hereto, as follows."

According to paragraph 2, the railroad company agreed to lease to the mining company for the consideration stated in the next succeeding paragraph the necessary rails, spikes, frogs, etc., and to lay and surface the tracks whenever the grading had been done, and the ties and timber furnished as provided by paragraph 1. By the terms of para-

graph 3, the mining company agreed to pay the railway company as a rental 6 per cent. on the total market value of said rails, etc., and the cost of laying and surfacing the tracks as per statement, etc.

With respect to the connection, it was provided by paragraph 10 that the mining company should build its railroad to the right of way of the railroad company, and should furnish for such track all necessary materials, including rails, etc., and do the necessary grading.

By paragraph 11, the railroad company was to lay said track, and the mining company to reimburse it for the cost of same.

By paragraph 15, the mining company agreed, so long as it used said track, to pay to the railroad company the actual cost of maintaining same, bills for the cost of maintenance to be paid annually. Reference will be made hereafter in their appropriate connection to other provisions of this contract. The plaintiff claims that, pursuant to the contract, *supra*, rent was due from November 1, 1917, at the rate of \$42.14 a month up to July 1, 1919; the total being \$884.94 principal and \$44.24 interest.

The defendants admit an indebtedness of \$151.53, but set up as a defense to the balance of the claim that—

"In September, 1917, the plaintiff without giving the notice required by clause twelve of the contract, or any notice, took up the connection track, and removed from the premises the materials used in making said connection, and had not restored or replaced the same up to the bringing of this suit, or until now, in violation of the terms of the contract."

With reference to this charge that the railroad company discontinued the connection track, the following citation is made from the agreed facts:

(3) "For the purpose of additional safety to the complainants on the main track, in September, 1917, without giving notice to the defendants, the complainants removed the connection track referred to in the contract, and have not replaced the same. At that time the defendants' railroad was not being used for any purpose, and had not been used since operations ceased, as stated above, and defendants, after the track was discontinued, not knowing of the disconnection, made no objection thereto, and no request to have the same reconnected."

Paragraph 2 of the agreed facts gives the date when the defendants discontinued the operation of their road, as well as other details:

(2) "W. B. Bennett died June 11, 1916. The estate of W. B. Bennett operated said plant by W. M. Lundy, superintendent, after Bennett's death, but ceased all operations soon after February, 1917, and did not resume, or attempt to resume, operations thereafter, but left the property in charge of a caretaker while not in use, though the machinery and equip-

ment remained at the quarry which the railroad was built to serve."

[1] The contention of the defendants is that, as a condition precedent to recovery of rent for the rails, etc., it was necessary for the plaintiff as a matter of pleading to allege, and as a matter of fact to prove, that the connection track was ready for use at any and all times during the period for which rent was demanded, and the fact that confessedly during that period the said track, due to the voluntary acts of the plaintiff, was not capable of use, is a bar to such recovery. This discontinuance of the connection track the defendants treat as an eviction from a portion of the leased premises, which operates to defeat the recovery of any rent thereafter so long as it continues. In support of this contention various authorities from this and other states are cited.

"An eviction occurs whenever a landlord wrongfully deprives a tenant of any part of the leased premises; and if the rent is entire, the tenant is excused from his obligation to pay during the continuance of the eviction, though he continue to occupy the remainder of the premises. * * * The landlord cannot by his wrong apportion the rent." Williston on Contracts, § 891.

In *Briggs v. Hall*, 4 Leigh (31 Va.) 484, 26 Am. Dec. 326, it appears that the plaintiff leased the defendant a farm for one year, for seventy dollars. During the year the landlord entered upon the leased premises, and mowed and carried away the hay on four acres without the consent and against the will of the tenant. At the end of the year the landlord sued for the entire rent. Upon proof of the foregoing facts the court gave judgment for the lessee, and this was affirmed; this court holding that for such partial eviction the whole rent was extinguished.

See, also, *Tunis v. Grandy*, 22 Grat. (63 Va.) 109, 120, affirming the proposition that if the—

"lessor himself wrongfully deprives the tenant of the whole or any part of the premises, the tenant is discharged from the payment of the whole rent until the possession is restored."

[2, 3] There are two difficulties about the application of the principle announced by these authorities to the facts of the case in judgment:

First, the rent was not entire. A stipulated rent was agreed to be paid for the rails etc. This rent according to paragraph 3, *supra*, was 6 per cent. on the total market value of the rails, etc., delivered on the ground, and the cost of laying and surfacing the track as per statement to be rendered. The defendants did not lease a short line of completed road from the plaintiff. The road was the property of the defendants. Said defendants leased certain personal prop-

erty from the plaintiff, to be used on their road at an agreed rent, with the right under paragraph 4 of the contract, within three years from the date thereof, to terminate the rental payments, and acquire the property by paying to said plaintiff the value of the rails, etc. Further, a special compensation, or rent, was provided for the use of the connection track, by paragraph 15 of said contract, which is as follows:

(15) "The first party, so long as it uses said connection, agrees to pay to the second party the actual cost of maintaining same, bills for the cost of maintaining to be paid annually on or before the 20th day of January, for the year ending December 31st preceding."

Another difficulty in applying the principle cited is that under the facts of this case there has been no eviction in the sense contemplated by *Briggs v. Hall*, and kindred cases. The railroad company did not lease to the mining company a spur track of 3 miles, or more, and a connection track. The spur track, as pointed out *supra*, was the property of the mining company. The connection track was on the right of way of the railroad company, and possession of same was never delivered to the defendants. Paragraph 14 of the contract provides that the railroad company—

"shall have the exclusive right to control and operate said connection track, and the right to exercise its ownership and franchise in and to the same in all respects as if the said track had been constructed at its sole expense."

Paragraph 12 of said contract provides that:

"The ownership of all the materials in said connection track which are situated on the second party's right of way shall be and remain vested in the second party," etc.

In substance, the contract between the parties was a lease on agreed terms of certain personal property for the use of the mining company on its own road, and an agreement on the part of the railroad company to furnish a connection, or liaison, to use a word greatly in vogue at present, between said road and the main line, the compensation or rental for this link, when in use, being specifically fixed at the actual cost of maintenance.

Undoubtedly the railroad company was bound to furnish and maintain this connection track, for the uses and purposes of the mining company when operating its property, and for injury to the said company resulting from its failure to afford this connection, the railroad company would be liable in damages. But it does not follow, from this admitted liability in damages for breach of its contract to furnish a connection, that the contract to afford this connection was

a dependent covenant. If the covenant relating to the personal property, and the rent therefor, and the covenant to afford a connection track, are not dependent covenants, then a breach of the latter would not be a bar to recovery of rent under the former.

There is much law upon the subject of dependent and independent covenants. The following is taken from 13 *Corpus Juris*, p. 587:

"Agreements are mutual and dependent, where performance by one party is conditional on and subject to performance by the other, and a party who seeks performance, must show performance, or a tender or readiness to perform on his part. Covenants, or stipulations, are independent when the consideration of the stipulation on the one side, is the mutual promise on the other, and an actual performance, or tender, is not required, but the remedy on both sides is by *action*. [Italics supplied.] While the earlier cases recognized exceedingly nice and refined distinctions for the purpose of determining the character of the covenants, the rule is now thoroughly settled that the question of whether they are dependent, or independent, rests on the intention of the parties, to be determined from the sense of the entire contract, rather than from any particular form of expression."

To the same effect are the Virginia cases:

"Covenants are dependent or independent, according to the intention * * * of the parties, and the good sense of the case." *Brockenbrough v. Ward's Adm'r*, 4 Rand. (25 Va.) 352.

"Covenants, though dependent in form, will be construed as mutual and independent, when it is necessary to effect justice between the parties thereto. A party having covenanted to do two things, one of which he has done, will be allowed to maintain an action for the part done, as upon an independent covenant." *Todd v. Summers*, 2 Grat. (43 Va.) 163, 44 Am. Dec. 379.

"There is perhaps no branch of the law in which it is to be found a larger number of decisions or a greater apparent conflict of authorities than that in which the effort has been made to define the dependence and independence of covenants, and to designate the class to which any given case in dispute is to be referred. The great effort, however, in the more recent decisions, has been to discard, as far as possible, all rules of construction founded on nice and artificial reasoning, and to make the meaning and intention of the parties, collected from all the parts of the instrument rather than from a few technical expressions, the guide in determining the character and force of their respective undertakings." *Roach v. Dickinson*, 9 Grat. (50 Va.) 153, 157.

See, also, *Allemong v. Banks*, 103 Va. 249, 48 S. E. 897, as follows:

"Courts construe agreements so as to prevent a failure of justice, and hold dependent covenants to be independent when the necessity of the case and ends of justice require it, notwithstanding the form."

An analogous situation to the one revealed in the case in judgment is presented in these contracts in which the landlord leases property and agrees to make repairs, and the lessee takes possession and agrees to pay rent. Such covenants are generally considered to be independent covenants. See cases cited in 16 Ruling Case Law, p. 943, footnote No. 14.

"Under a broad interpretation that the lease as thus amended demised a building to be used for the purposes of a theatre, in connection with which the plaintiff covenanted to provide additional means of exit if called for by the public authorities, a failure to perform the promise does not constitute a defense to this action. When considered as a further covenant, this agreement is strictly analogous to the ordinary undertaking of the landlord to make outside repairs, which is independent of the lessee's obligation to pay the rent reserved, and any neglect by the plaintiff to make the improvements promised, even if by force of the statute the premises without them became unfitted for use as a theatre, did not by reason of the breach so long as the defendant chose to occupy them, give to him any right to decline payment of the rent." *Taylor v. Finnigan*, 189 Mass. 568, 76 N. E. 203, 2 L. R. A. (N. S.) pp. 973, 976.

"The lease does not express or imply that repair is a condition precedent to obligation to pay rent; that repair must be made before payment of rent. The covenant could not apply after the fire. For its breach, if there had been any shown, the defendant could sue for damages in a separate action, or recoup from the rent. The landlord's covenant to repair and the tenant's to pay rent are independent covenants, and at common law a breach of the former is no defense to an action on the latter. And this still remains the law, both in England and the United States." *Arbenz v. Exley Watkins Co.*, 52 W. Va. 476, 44 S. E. 149, 61 L. R. A. 957, 960.

"A breach of a covenant on the part of a lessor is not a legal excuse for the nonpayment of rent. If a landlord fails to keep his part of the agreement, then a tenant can recover such damages as he may show he is entitled to, and when called upon to pay the rent may, as a defense, set up a breach of the lease, and offset the damages which he has sustained against the rent due. * * * A tenant, when called upon to pay rent, must do one of two things—he must either pay the rent due, or else restore possession of the premises to the landlord. He cannot keep both the rent and the possession." *Douglas v. Chesebrough Building Co.*, 56 App. Div. 408, 67 N. Y. Supp. p. 755.

A very complete statement of this rule, or principle, is found in a case cited in a note on page 978, 34 L. R. A.:

"The contract sued on does not belong to that class of covenants called conditional and dependent, in which the performance of one depends upon the prior performance of another, but to that class known in the law as mutual and independent covenants, where either party may recover damages from the other for the injury he may have sustained by a breach of the covenant in his favor, and where it is no

excuse to the defendant to allege a breach of the covenants of the plaintiff in bar of his action. The effect of the charge is to exonerate the defendant from any liability whatever for the slightest breach of the plaintiff's covenants, whether the defendant has been actually damaged or not, and leave him to the use and enjoyment of the plaintiff's property for nothing. If actually damaged by the plaintiff's nonperformance of his covenants, the defendant has the right of separate action, or his right in this action, to prove and recoup his damages, and the jury should have been so instructed. The reason of the rule of the law is that, where a person has received a part of the consideration for which he entered into an agreement, it would be unjust, because he had not had the whole, that he should therefore be permitted to enjoy that part without paying for it. The law, in such case, obliges him to perform the agreement on his part, and leaves to him his remedy, by recoupment or otherwise, to recover any actual damages he may have sustained in not having received the whole consideration. 2 Pars. Cont. 531, 532." *Smith v. Wiley*, 1 Baxt. (Tenn.) 418.

The contract in the case in judgment does not expressly state, or imply, that the maintenance of the connection track, whether it is needed or not for the purposes of the mining company, is a "condition precedent to obligation" to pay the agreed return for the rails, spikes, etc.

A special arrangement of compensation for the use of the connection track is provided by paragraph 15, that compensation being the actual cost of maintaining same. It is not an unreasonable deduction from the wording of this paragraph that it was in the contemplation of the parties that this connection track could be discontinued, certainly that it need not be maintained, when it was not required for the purpose of the mining company. By the very terms used, the mining company is to pay for this connection track "the actual costs of maintaining same," only "so long as it uses said connection." The fair inference from, or implication of, this language, is that during such period, or periods, as the mining company did not use said track, the railroad company could not collect from said mining company the cost of maintaining same. A corollary from this would be that during such periods the railroad would be under no obligation to maintain said track, since maintenance under such circumstances would be a vain thing.

A further indication that the covenants relating to rental for the rails and compensation for the use of the connection track were independent covenants is afforded by paragraph 12 of the contract, which provides that the railroad company may, "at any time when in its judgment the traffic received from the first party's railroad does not justify the maintenance of said track, upon 30 days' written notice to the first par-

ty, abandon said connection, and enter upon and remove from the premises all or any part of the materials thereon," and by paragraph 5 conveying in trust the right of way of the short line to secure the "payment of the rent herein provided, as well as the payment of the value of the rails, etc., hereby leased, and the cost of laying and surfacing the track."

These separate provisions to secure the railroad company, the one in respect of the rental of the rails, etc., and the other in respect of the use of the connection track, are hardly compatible with the theory that the right to recover the rent was dependent upon the maintenance of the connection track, whether there was any occasion for its use or not. There was a clear right on the one hand to demand, and an equally clear obligation on the other to construct and operate, when required for the uses of the mining company, the connection track; but the remedy on both sides, whether for the railroad company seeking payment for the cost of maintenance, or for the mining company complaining of failure to furnish connection, was by action.

The liability of the mining company to pay the agreed rental for the rails, etc., and the right of the railroad company to collect this rent, was not dependent upon the use of these materials. It was a matter of indifference to the railroad company, in one sense, whether these materials were used or not. Such use was the concern of the mining company. A man who lends money is entitled to his interest, whether the borrower uses this money productively, or buries it in a napkin. The mining company could require the railroad company to furnish the connection at any time that same was needed for its purposes, and for any failure to discharge its obligation in this respect the railroad company was liable in damages to the party of the other part. It was perfectly competent in the present proceeding for the Bennett estate to set up and recover any damages that it had suffered by the failure of the railroad company to maintain said track, and its failure to do so was undoubtedly due to the fact that a party which had discontinued its own enterprise, and therefore had no occasion to use the connection track, could not show that it had sustained any damages by reason of the acts of said company in the above respect. Indeed, not only did the defendants cease work at their quarry, and discontinue the operations of their short line, in February, 1917, but this cessation was so complete during the succeeding period that they were not even aware of the discontinuance of the connection line.

Citing the language of the stipulation, the defendants, "not knowing of the disconnec-

tion, made no objection thereto, and made no request to have the same reconnected." The trial court evidently regarded the covenant of the contract relating to rental for the materials furnished by the railroad company and the covenant making provision for the use of the connection track as independent covenants. With that conclusion we concur. The defendants lose no rights by the payment of the rent demanded in this suit, and, if it is so desired, can proceed hereafter against the plaintiff by independent action, or proceeding, to secure any reparation, or enforce any right to which they are entitled under the contract in question.

We find no error in the action of the trial court, and the same is affirmed.

Affirmed.

PRENTIS, and BURKS, JJ., absent.

(120 Va. 639)

BRIZENDINE v. PAITSEL

(Supreme Court of Appeals of Virginia.
Sept. 22, 1921.)

Easements \Rightarrow 17(1)—Right of way as between grantees of common grantor held controlled by the deeds, and not to include way as previously used.

Where owner of a tract of land conveyed a portion, including land being used as a roadway, without reservation as to use of roadway, to one purchaser, and conveyed to second purchaser another portion, including the right of "ingress and egress through and over the road lying between land of B. (first purchaser) and land of a third purchaser," and where description in deed to first purchaser and map filed therewith showed conclusively that grantor intended to convey to first purchaser the bed of such roadway, second purchaser's successor in interest was not entitled to use the old roadway, though first purchaser for 14 years permitted roadway to be used, and though the land between first purchaser's land and third purchaser's land could not be used as roadway until after difficulties and obstructions had been overcome.

Appeal from Circuit Court, Roanoke County.

Bill by F. A. Paitzel against M. Zadok Brizendine. Decree for plaintiff, and defendant appeals. Reversed, and bill dismissed.

Hart & Hart, of Roanoke, for appellant.
Kime & Kime, of Roanoke, for appellee.

SAUNDERS, J. This is an appeal from a decree of the circuit court of Roanoke county, pronounced at its January term, 1921, establishing the right of the appellee (F. A. Paitzel) to the use of a roadway across the lands

of the appellant, Mrs. M. Z. Brizendine, and directing the said M. Z. Brizendine to remove any and all obstructions in and across the roadway referred to in complainant's bill, and to permit said complainant to have the free and unrestrained use of said roadway, as the same appears upon a survey filed with the deposition of R. E. Magee, and made a part of this record.

This decree was entered in a suit brought by F. A. Paitsel (appellee) against the said M. Z. Brizendine (appellant), alleging that he was entitled to the roadway, supra, described as a "right of ingress and egress through and over the road lying between Rowan and Williamson, and also over and through the lands of C. T. Lukens, sold by Mrs. Gertrude Watts to the said Lukens."

Paitsel was the vendee of one Harriet McGeehan, who was the vendee of Mrs. Watts. Rowan is the same as Brizendine, the Brizendine tract having been bought by the former, and conveyed by Mrs. Watts to the latter. Williamson was a contiguous owner to the Watts land, his farm adjoining that portion of the said Watts land which was later conveyed to Mrs. Brizendine. After setting up in detail the grounds on which a roadway was claimed through the Brizendine tract, complaint proceeded to allege that Mrs. Brizendine, or some one acting for her, had obstructed this road by erecting a fence across its course, thereby completely blocking same. An injunction was asked against this interference, and an order directing Mrs. Brizendine to remove the obstructions.

The defendant answered this bill, denying that she had closed, or interfered with, a public roadway, or the private right of way of the complainant, or of any other party. As affirmative matter, the answer alleged that defendant's fence, as shown by her plat, was on her line. The case was heard upon the bill, answer, exhibits, and depositions, and the decree, supra, was awarded. From this decree an appeal was secured by Mrs. Brizendine, and the entire controversy is now before this court for review and determination.

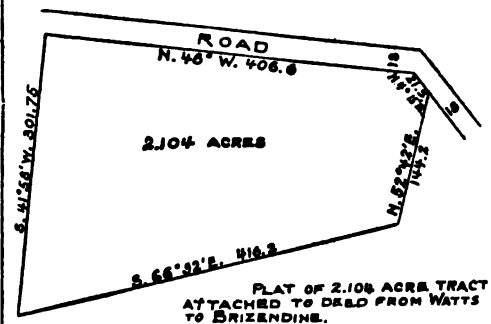
The roadway set out in the bill of complainant lies between the red lines on the survey referred to, supra. This survey will be reproduced later in the appropriate connection. The history of the roadway is as follows:

Some years ago J. Allen Watts owned a large boundary of land north of the village of Big Lick, later to become the city of Roanoke. At the beginning of the year 1906, Mrs. Gertrude Lee Watts, in her own right and as executrix of J. Allen Watts, was seized and possessed of a large part of this Watts land, and in her own right and as executrix she thereafter sold off from the inclusive boundary so held by her various small parcels to successive vendees. The

first of these sales was made as of February 8, 1906. By deed of that date Mrs. Watts conveyed to Mrs. Zadok Brizendine a small parcel of land, containing 2.1 acres, more or less. The metes and bounds of this tract are given in the deed, and the description concludes as follows:

"And containing 2.104 acres, as is shown by the map which is hereto attached, and made a part of this deed."

It will be observed that this tract was not sold subject to a right of way for the benefit of the balance of Mrs. Watts' lands. The map which was referred to and made a part of the above deed shows a road 18 feet wide, north of and entirely outside of Mrs. Brizendine's land, and lying between her land and the Williamson land. This map which was made by McIlwaine & Smith, civil engineers, and identified by Smith in his deposition in this case, is reproduced at this point.



In this connection the following citations are made from the testimony of the witness Smith:

Direct Examination.

"Q. I here hand you a plat, or survey, made by McIlwaine & Smith, and ask if you are the same Smith there mentioned?

"A. I am.

"Q. Did you make that plat, and, if so, did you do the surveying from which the plat was made?

"A. Yes.

"Q. Does that plat correctly show the land of Mrs. Z. Brizendine?

"A. Yes. It does according to the description in the deed."

On February 27, 1906, Mrs. Watts conveyed to Harriet McGeehan a tract of 10 acres, a portion of the Watts land supra. This deed contains the following grant of a right of egress and ingress over the road between Williamson and Rowan (i. e., Mrs. Brizendine):

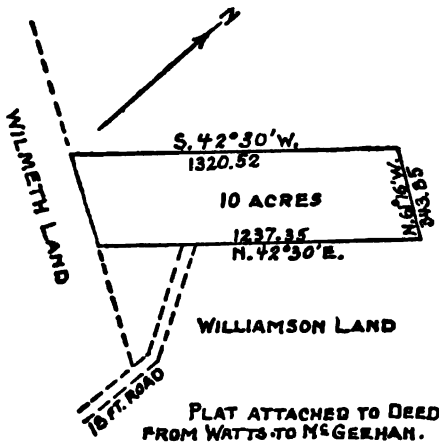
"The said McGeehan is hereby expressly granted the right of ingress and egress through and over the road lying between said Rowan and Williamson; and also over and through the lands of C. T. Lukens, sold by the said Watts to the said Lukens."

This right of egress and ingress is not given, or undertaken to be given, over the land sold to Mrs. Brizendine, but is "through and over the road (italics supplied) between said Rowan and Williamson"; that is to say, through and over the road lying between the lands of said Rowan (i. e., Brizendine) and Williamson.

It seems to have been the practice of Mrs. Watts to make and deliver a map, or plat, of the land sold, as a part of her conveyance. The description of the land sold to Harriet McGeehan concludes with these words:

"As shown by plat hereto attached, and which is made a part of this deed."

This map is herewith reproduced.



It will be noted that this map shows an 18-foot road, but the northern edge, or line, of this road is apparently coincident, for a distance not indicated, with the outside boundary of the Williamson land.

The salient facts relating to the roadway across the land of Mrs. Brizendine are that at one time when the lands afterwards sold to F. A. Paitsel, Mrs. Brizendine, and C. T. Lukens were component parts of the Watts farm, there was a farm road beginning on the said farm, and in its course running successively in the order of the above names, over the lands subsequently sold to said parties. This road was used by Col. William Watts and his successors in title to the Watts lands as an outlet on that side of the farm to the turnpike.

In this connection the following extracts from the testimony of C. T. Lukens will be helpful:

Examination of C. T. Lukens.

"Q. Did the south line of the Williamson estate join the southeastern part of the Watts farm?"

"A. It did, yes.

"Q. Is there an old fence along that line?"

"A. Yes, there is a fence there.

"Q. About how old is that fence?"

"A. I don't know; it has been there ever since I have known that farm. I think, in a more or less condition, it has been there 25 years or longer. It has been there ever since I have known the place. * * *

"Q. Do I understand you to say that that right of way is right up against the Williamson line, or is it off a piece from the Williamson line, and at the bottom of that bank just to the south of the Williamson fence?"

"A. Well, it is along there between the Brizendine fence and the Williamson line. I don't know how close it is to the line. There is no land between the road and the line there that is tillable, or anything like that. It is rough through there.

"Q. What I mean to get clear in the record, does the road run right up against the fence, or is there a bank between the fence and the road?"

"A. I haven't been up there for some time, but I think the road was supposed to be along the line of the Williamson farm, because there is a private road through there, and people simply went through there, as I understand, by permission of the Watts family, and the roadway followed the Williamson line around, but when they sold that piece to me, they reserved the right of way through there, an 18-foot right of way."

The interest in the above road, the title to the fee, and the right to use the same, inhered in the owner of the Watts lands. No authority is needed to support the proposition that so long as this state of facts existed the owners of this estate could shift the location of this road at will. There was no one to gainsay such action, for there was no one, other than the owners, with any right in this road, its use, its establishment, or its discontinuance. When Mrs. Watts, the successor in title to Col. William Watts, and his son, J. Allen Watts, sold the 2-acre tract to Mrs. Brizendine, she owned the lands subsequently sold to Harriet McGeehan, and by the latter in turn, and in part, sold to F. A. Paitsel. Prior to that time, to wit, in December, 1904, Mrs. Watts had sold to C. T. Lukens a tract of land adjoining the Brizendine land on the southeast side of same. This land was sold to Lukens subject to a right of way for the benefit of the residue of the Watts farm, and of the party of the first part (i. e., Mrs. Gertrude Watts), and of any person purchasing all, or any part, of said farm from her. This provision of the Lukens deed, subjecting the Lukens land to a right of way for the benefit of the residue of the Watts farm, is noteworthy, when contrasted with the entire absence of a like provision in the deed to Mrs. Brizendine. Unless Mrs. Watts had access to the Lukens land, it was futile to reserve a right of way across the same, and if it was necessary to cross the Brizendine land to reach the Lukens land, it would seem that for her own protection she would have sold the Brizendine land subject to a right of way. The absence of such a reservation supports the contention of the defendant that

the approach of Paitzel to the Lukens land is by a road outside of the limits of the Brizendine tract. At the time Mrs. Watts sold the land to Lukens, the roadway in controversy undoubtedly ran in part over the land subsequently sold to Mrs. Brizendine. But the Brizendine land and the McGeehan land, later in part the Paitzel land, were then parts of the Watts estate. Hence it was perfectly competent for Mrs. Watts, when she sold to Mrs. Brizendine, to shift the roadway then in use from the tract proposed to be conveyed to the latter to some other portion of her own—that is, Mrs. Watts'—land, and to free the Brizendine tract from this burden. As a matter of fact, it is clear that this is precisely what she did. As noted supra, the map of the Brizendine land, accompanying the deed to the same, indicates an 18-foot road outside of the tract, with the northern outside lines of said tract constituting the southern limits of the road. A third survey filed with the deposition of Robert E. Magee, and herewith reproduced, is a map of a portion of the Brizendine land. This map and the location of the road on same are referred to in the final decree of the court, and the location indicated by the red lines¹ is established by said decree.

At this point the deposition of Magee is reproduced in part:

part survey of that property, and will ask you who made that survey?

"A. I made that survey.

"Q. Does that survey correctly show the present road to the north of that property?

"A. Yes, sir. To the best of my knowledge it does. The red line on the map shows approximately the old road location, and the solid line shows the fence line where it is located now, and where the survey calls for in his deed.

"Q. Was that survey made from his deed, and are the metes and bounds along the road the same as those given in his deed?

"A. They are."

Cross-Examination.

"Q. About how long ago was it that you made the first survey for Brizendine of this property?

"A. May 25, 1918. I made the first survey for Brizendine.

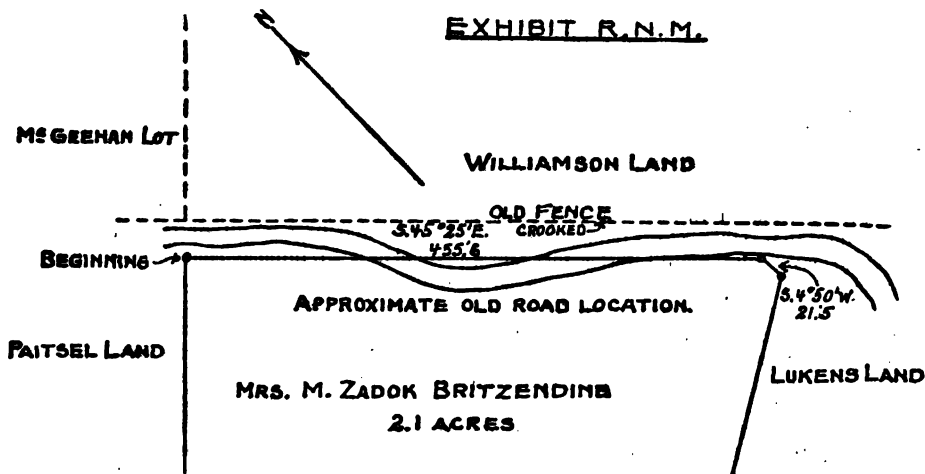
"Q. Did Brizendine tell you at the time why he was having this survey made?

"A. Yes, he did. He wanted to establish his true line, so as to put his fence up by it according to his deed.

"Q. Was the north line of the property that you established the same as the line you recently established?

"A. Yes, sir. * * *

"Q. Mr. Magee, I show you a copy of a deed from Mrs. Gertrude Watts to Mrs. Brizendine,



Direct Examination.

"Q. Mr. Magee, what is your residence and occupation?

"A. Salem. Occupation, farmer, county surveyor of Roanoke county, Va.

"Q. Do you know the property formerly owned by the Watts estate, and afterwards sold to Mrs. Brizendine?

"A. Yes, sir; I do.

"Q. Consisting of how many acres?

"A. 2.1 acres.

"Q. I here hand you and ask you to file as Exhibit 1, R. E. M., what purports to be a

dated February 8, 1906, and acknowledged February 9, 1906, conveying the 2.1-acre tract, and ask you if in the description conveying said tract of land, the south side of an 18-foot road is not called for?

"A. Yes, sir.

"Q. Is this 18-foot road mentioned in said deed the same as the old road in question?

"A. I suppose it is. I wish to make this explanation here. In making this survey of mine, there is no known corner on the place to be found, except an iron pin at the corner of the McGeehan lot, and, taking the iron pin at the corner of said lot, as the north side of the 18 foot road, I measured off 18 feet for the road, for the south side of the road, and thence

¹ The curved parallel lines as shown on plat above.

ran for the south side of the road according to the Brizendine deed.

"Q. Is this McGeehan, Harriet McGeehan?"

"A. I think so. The old pin in the ground that I mentioned is a recognized corner; the said iron pin as shown on the road plat is admitted to be the original corner."

From the third map it appears that the farm road, as it was in use at the time of the sale to Mrs. Brizendine, ran along and within the northern boundary of her tract. Further, if the indicated location is established by a decree of this court, confirming the decree of the trial court, it will be noted that a small strip of land of varying width is left between the northern limit, or boundary, of the road and the Williamson land. The line marked "old fence" is the southern boundary line of the latter tract.

If Mrs. Watts intended to convey to Mrs. Brizendine, and did convey to her, the 2-acre tract, subject to the roadway, as indicated above, then certainly the map accompanying the deed to Mrs. Brizendine was in the highest degree misleading, since it indicates a road entirely outside of the Brizendine tract, with its northern boundary coincident with the Williamson land. Further, if Mrs. Watts intended to grant the Brizendine land subject to a roadway across same, and Mrs. Brizendine was willing to take this land subject to this burden, it is altogether likely that the deed to Mrs. Brizendine would have contained a specific reservation of a right of way for the benefit of the residue of Mrs. Watts' land, like the one noted, *supra*, in her deed to C. T. Lukens, of date December, 1904.

Having in mind that at the date of the deed to Mrs. Brizendine, Mrs. Watts enjoyed the unquestionable right to shift the location of this roadway without liability to any one, it is not likely that when she disposed of this Brizendine land she would have left as a part of her estate a strip of unsold, and with reference to future use, worthless land, between the roadway and the Williamson land. Nor is it likely that Mrs. Brizendine, buying so small an area as she did, would have been willing to take it subject to a roadway which, with reference to the size of the lot appreciably reduced its available use and value. The deed made by Mrs. Watts with the accompanying map is a clear indication in itself that Mrs. Watts was not selling, and Mrs. Brizendine was not buying, the 2-acre lot, subject to a right of way. Mrs. Brizendine did not need this right of way as an outlet. The turnpike was to the east of her land, and she was entitled, for the purposes of ingress and egress in that direction, to use the roadway across the Lukens land, by virtue of the reservation in Mrs. Watts' deed to Lukens. Mrs. Watts, however, did need an outlet, for, unless she could reach the Lukens tract from the balance of her lands, her reservation of a right of way across that tract was valueless. She could reach the

Lukens land either by crossing the Brizendine land, or by utilizing as a road the strip between the Brizendine land and the Williamson land, noted on the Brizendine map. With this choice before her, if she had contemplated the use of the right of way across the Brizendine land, she would doubtless have provided for that right by appropriate reservation in the Brizendine deed, and not indicated a contrary purpose by a misleading map "attached to and made a part of" that deed.

Another indication that Mrs. Watts intended to shift this old road to another location is found in the calls of the deed to Mrs. Brizendine. These calls are made in part with reference to a road, either the road on its old location indicated by the red lines, or a road on the new location indicated by the Brizendine plat. The calls fit the new location, but cannot reasonably be applied to the old. In this connection it will be noted that the old roadway is not referred to in the Watts deeds as a road of definite width. The reservation in the Lukens deed is of "a right of way," not of a road 18 feet wide. Mr. Lukens speaks of this right of way as "an 18-foot right of way reserved," but his deed does not so provide. The first reference in the papers to a road 18 feet wide is in the map accompanying Mrs. Brizendine's deed, referred to *supra*. The plat accompanying the deed to Harriet McGeehan also indicates an 18-foot road, running between straight lines, not a curved and irregular road, as indicated by the red lines on the Magee exhibit. But the McGeehan deed followed the Brizendine deed, and if Mrs. Watts had shifted the road prior to the conveyance of the Brizendine land, and sold that land free of the burden of a right of way, then she was powerless to impose that burden upon said land in her subsequent conveyance to Mrs. McGeehan, whatever might have been her purpose and intent in that respect.

As a matter of fact, the deed to Harriet McGeehan is in harmony with the indications of the deed to Mrs. Brizendine. Mrs. McGeehan is given a right of egress and ingress merely, "through and over," not the land of Mrs. Brizendine, but the "road lying between said Brizendine and Williamson." The implication of this language is that there was at the time of this deed a road *between* these two tracts, not a road *in large part on* the Brizendine tract. The prior map to Mrs. Brizendine indicated such a road, and the map accompanying the deed to Mrs. McGeehan affords a like indication. The deed from H. M. McGeehan to F. A. Paltsel, conveying a portion of her 10-acre purchase, contains the following provision:

"A wagon road is hereby given and granted egress along the said old road above referred to, 18 feet in width, unto the party of the second part."

But Mrs. McGeehan obviously could pass to Paitzel only what she had received from Mrs. Watts. The land sold to said McGeehan is subject to a right of way "for any person owning adjacent lands." Indeed it will be noted that the only deed made by Mrs. Watts that does not subject the land conveyed to a right of way is the deed to Mrs. Brizendine. Recurring now to the calls in the Brizendine deed, as applied to the road therein referred to, we find that the first call is from the corner of the Watts and Lukens land N. 52° 42' E. 144.2 feet to the south side of an 18-foot road (not an old road it will be noted). This call indicates that the line stops at the margin of the road. The next call is "thence N. 4° 15' E. along the road to an angle in the road." As the first call stopped at the southern edge of the road, the second call indicates a straight line coincident with the southern margin of that road to the corner, i. e., the angle in the road. The third call is "thence still along the road N. 46° W. 405.6 feet to a point." The next call leaves the road. These calls fit perfectly with the map filed with the Brizendine deed, indicating an 18-foot road outside and north of the Brizendine land. On the other hand, they cannot be made to fit the road indicated by the red lines. The 18-foot road is indicated in straight, not curving, lines, and if, beginning at the termination of the first call of the deed on the southern margin of a road, it had been intended thereafter to follow the course of a curving road, such intent would have been indicated in the usual language of surveyors, by the words, "thence with the meanders of the road." Moreover, according to the calls of the original map, the terminus of the 405.6 foot line, that is, the corner of the Brizendine line at that point, is on the southern margin of a road. The road indicated by the red lines is slightly above the Brizendine line at its western extremity, and below it towards the middle of the same. This red line road, as heretofore noted, is at no portion of its northern edge, or limit, coincident with the Williamson line, which is the same as the old fence on the Magee map. The evidence is conclusive that Mrs. Watts did not sell the Brizendine land subject to a road, but sold same according to a relocation of this road, which she was fully empowered to make. It appears from the evidence that Mrs. Brizendine allowed the use of the roadway, according to its old location, for some years after her purchase, that is, from February 8, 1906, to some time in the year 1920. But this use was subject to discontinuance at the will and pleasure of the owner of the tract, and no rights superior to the owner's rights were secured by such use. As owner, she had the right to erect a fence along the northern boundary of her

land, and to exclude the complainant, Paitzel, and all others from the use of the same.

It is objected that the presence of trees and banks along the Williamson fence, or line, shows that the Watts farm road did not run along there, but did run on the location indicated by the red lines. This is doubtless true, but it is not material.

Paitzel claims through Mrs. McGeehan, and is successor to the right which she derived from Mrs. Watts. This right, as we have noted upon inspection of the McGeehan deed, is the right of "ingress and egress through and over the road lying between Brizendine and Williamson." If this roadway needs to be put in order for travel, that is the concern of Paitzel and others entitled to its use. Difficulties and obstructions in that roadway furnish no ground of right, or foundation of claim, against Mrs. Brizendine. Having forbidden the use of her land for the purposes of egress and ingress by others, the parties affected by that action, but who are entitled to a right of way to the Lukens land, are remitted to the roadway established for their benefit by their grantor.

For the reasons given, the decree of the trial court, establishing the roadway set up in complainant's bill, and directing the defendant, Mrs. M. Z. Brizendine, to remove the obstructions in same, and allow its free use to complainant, must be reversed, and an order dismissing complainant's bill will be entered by this court.

Reversed.

SIMS and BURKS, JJ., absent.

(131 Va. 38)

FANT v. THOMAS et al.

(Supreme Court of Appeals of Virginia.
Sept. 22, 1921.)

1. Principal and agent \S 123(10)—Evidence held sufficient to show that the agent of payee was authorized to accept overdue interest.

In suit to enjoin foreclosure of deed of trust authorizing foreclosure on default in paying interest, evidence held sufficient to show that payee of note authorized her banker to accept overdue interest.

2. Mortgages \S 335—Acceleration clause held valid.

A condition in a deed of trust that, on default in payment of interest the payee of the note secured could cause land to be sold, does not create a penalty or forfeiture against which a court of equity will relieve.

3. Mortgages \S 335—Payee waiving default in paying interest can proceed to foreclose only on giving notice.

Where a payee of a note secured by deed of trust waives a default in paying interest, he cannot again establish his right to foreclose

thereunder until he has given due notice of his intentions to the other party.

4. Mortgages — 335—Acceptance of past-due interest is a waiver of right to foreclose for default in payment of interest.

Where the payee of a note secured by deed of trust, providing that on default of interest the debt shall become payable, accepts the past-due interest, he waives the right to enforce the collection of the entire debt for such default.

Appeal from Circuit Court, Culpeper County.

Suit by Oliver Fant against Lucy E. Thomas and others. From decree for defendants, plaintiff appeals. Reversed.

Edwin H. Gibson, of Culpeper, for appellant.

Grimsley & Miller, of Culpeper, for appellees.

SAUNDERS, J. This case presents a single question for determination.

In October, 1918, Oliver Fant, the appellant, purchased a farm in Culpeper county from George T. Grimsley and wife. Prior to that time Grimsley and wife had purchased the same farm from Lucy E. Thomas and others, and, having received the deed therefor, conveyed the same in trust to one Burnett Miller, trustee, to secure two notes of \$2,000 and \$2,250, respectively, made by George T. Grimsley, payable to and indorsed by Lucinda Grimsley, at the Culpeper National Bank. These notes were for purchase money due on the land aforesaid, and payable five years after date, with interest from date, payable annually. When Fant purchased said land from Grimsley, he assumed the payment of these notes. The deed of trust made by Grimsley and wife contained, among other provisions, the following stipulation:

"Second. If default is made in the payment of any installment of interest on either note herein secured, when due, then that said note will be immediately due and payable, and the trustee can sell under the same conditions as though said note had become due and payable by lapse of time."

Fant did not pay the first annual installment of interest when it fell due on March 8, 1919, but, according to the answer of Mrs. Lucy Thomas, the owner of said notes, the interest was paid and accepted after that date.

From a letter filed by Burnett Miller, trustee, as an exhibit with his answer, it appears that this interest was paid some time after March 14, 1919, the exact date of payment not appearing in the record. The next annual installment of interest became due on March 8, 1920. Fant was again in default in respect of payment, though he had the necessary money to his credit at the bank.

He failed, however, to direct the officers of bank to apply this money to the payment of said interest on the date supra. This interest was not paid until March 13, 1920. The circumstances under which this payment was made will be given in detail hereafter.

Some time after March 8, 1920, the precise date not appearing, Mrs. Thomas requested the trustee, Burnett Miller, to sell the Grimsley land, on the ground that the first note had become due and payable by reason of the failure of Fant to pay the interest on the day when the same fell due. Pursuant to this request, the trustee advertised the land for sale on Saturday, June 12, 1920. Thereupon Fant filed his bill asking for an injunction forbidding said sale, on the ground that Mrs. Thomas had received the interest due on March 8, 1920, and therefore was not entitled to have said land sold. A preliminary injunction was awarded, and Mrs. Thomas and the trustee answered the bill. Mrs. Thomas denied that she had ever received the interest due on the date ubi supra, and asserted that, when she was informed on March 13, 1920, that the sum of \$255, the amount of the interest due, had been placed to her credit at the Culpeper National Bank, she declined to accept same, and so notified Mr. Davies, the president of the bank. Further, that she had never accepted said interest, or any part thereof. Certain affidavits, styled respectively "evidence of plaintiff" and "evidence of defendant," were filed by the parties. The affidavits for the plaintiff were the affidavits of John J. Davies, president of the Culpeper National Bank, and R. Weir Waters, cashier of same. The affidavit for the defendant was the affidavit of Mrs. Lucy E. Thomas.

The case came on to be heard in vacation on the pleadings and affidavits, and the court, after stating that "in his opinion, under the trust deed, the principal of the debt secured had become due and payable by reason of the failure to pay the same when due, and the trustee therefore had the right to sell," dissolved the preliminary injunction, and awarded costs against the plaintiff.

[1] The evidence relating to the alleged payment of the interest due on March 8, 1920, is contained in the affidavits of the president and cashier of the Culpeper National Bank, and of the defendant, Mrs. Thomas. The affidavits are conflicting. Mr. Davies states positively that he never received notice from Mrs. Thomas that she would not accept the interest due March 8, 1920, before he received said interest and credited same to her account; that if he had had such notification he would not have accepted payment of the interest from Fant.

His account in detail of the entire transaction is as follows: That on or about March 11, Mrs. Thomas was at the bank inquiring whether the interest then due had been paid by Fant; that he told her that Fant had the necessary funds in bank to meet the interest, but had not given instructions to apply said funds to the payment of the same; that he then told her that he would see Fant and have him pay the interest, and that Mrs. Thomas made no objection to this proposition; that, thinking he was acting with Mrs. Thomas' approval, he called Fant's attention to the matter of interest on March 13, and he immediately paid the interest due, and same was credited to Mrs. Thomas' account on that day; that this payment was made out of money then, and for some days past, to Fant's credit at the bank; that he had never been informed by any one and did not know that Mrs. Thomas had decided not to accept the interest due on March 8, when he received the money from Fant and put same to Mrs. Thomas' credit on March 13, 1920.

The affidavit of Mr. Waters, cashier, is to the effect that he had not given notice to Fant of the day when the interest fell due, and that he had never received notice that Mrs. Thomas would not accept the interest due on March 8, 1920; that Mrs. Thomas was in the bank at various times prior to the 13th day of March, and did not notify him not to accept for her the interest due on the Grimsley notes, which at the time were in the bank for collection and credit to her account; that, so far as he had been able to ascertain, Mrs. Thomas had not notified any of the officials of the bank prior to March 13th not to receive the payment of interest due on March 8th preceding.

The affidavit of Mrs. Thomas is in specific opposition to the foregoing statements. After reciting that the installment of interest due on March 8, 1919, was not paid until some time after it was due, and not until Fant was called upon to pay by her counsel, she proceeds to state that she called at the bank on March 9, 1920, and inquired of Mr. Davies whether her interest had been paid, and was told that Fant had been at the bank after the interest was due, but had not paid the same, or left any instructions for its payment; that she called at the bank on the 11th, and was told by both Mr. Davies and Mr. Waters that nothing had been paid on account of her interest; that on March 13th, after Mr. Davies had been notified that affiant would not accept interest, but was going to claim that the principal of her debt was due by reason of the failure to pay said interest, the sum of \$255, the amount of the interest, was placed to her credit at the bank; that she declined to accept this money, and so notified President Davies; that she had never accepted the

payment, and did not intend to accept same.

The weight of these affidavits, having in mind that Davies and Waters are disinterested witnesses, is clearly to the effect that Mrs. Thomas accepted Mr. Davies' offer to collect the overdue interest, and that same was collected and put to her credit in conformity with the understanding between these parties. It may be that, after her conversation with Mr. Davies, Mrs. Thomas, upon consultation with others, determined not to accept the overdue interest from Fant, but evidently she did not advise the officials of the bank of that change of attitude. It was while Davies was acting with authority derived from his understanding with Mrs. Thomas that the interest was collected and placed to the latter's credit, thus completing the transaction. What was the legal effect upon Mrs. Thomas' rights of accepting past-due interest from Fant, first in 1919, and second in 1920.

[2] The deed of trust, *supra*, provides that—

"If default is made in the payment of any installment of interest, on either note herein secured, when due, then that said note will be immediately due and payable, and the trustee can sell under the same conditions as though said note had become due and payable by lapse of time."

Undoubtedly two installments of interest were not paid when due, but were received and receipted for later. This receipt of overdue interest was the voluntary act of the appellee. It was competent for her to stand upon her contract rights, and, upon the failure of the debtor to pay his interest as agreed, to cause the land conveyed to be sold according to the terms of the deed of trust. A contract to the effect that, where there is default in the payment of interest, even for a day, the time of payment of the debt secured is thereby accelerated, and the cestui que trust empowered to enforce deed of trust securing his debt, is a harsh one, and it would seem that equity would have the right to interfere on the ground that the provision accelerating payment is in the nature of a penalty. Such, indeed, was the former attitude of this court (*Mayo v. Judah*, 5 Munf. 495); but the present law in Virginia touching contracts of the nature, *supra*, was announced in the accompanying extract from *Nickels v. People's Building, Loan & Saving Association*, 98 Va. 380, 25 S. E. 8:

"A provision in a contract, not that the amount of the debt shall be increased, but that in a specified event the time for the payment of a certain sum due shall be accelerated, does not create a penalty or forfeiture against which a court of equity will relieve."

The following extract from *Pomeroy's Equity Jurisprudence* is cited approvingly in the foregoing connection:

"It is settled, therefore, by the overwhelming weight of authority, that, if a certain sum is due, and secured by a bond, or bond and mortgage, or other form of obligation, and is made payable at some future day specified, with interest thereon made payable during the interval at fixed times annually, or semiannually, or monthly, and a further stipulation provides that, in case default should occur in the prompt payment of any such portion of interest at the time agreed upon, then the entire principal sum of the debt should at once become payable, and payment thereof could be enforced by the creditor, such a stipulation is not in the nature of a penalty, but will be sustained in equity as well as at law." 1 Pom. Eq. Jur. § 439.

But the very section of Pomeroy which announces the foregoing doctrine, proceeds to say:

"The provision for accelerating the time of payment of the whole debt in this manner may, of course, be waived by the creditor, particularly when it is made to depend upon his election."

In support of this proposition Pomeroy cites the English case of *Langridge v. Payne*, in *Johnson and Hemming's Reports*, p. 423. This case is singularly in point. The following is from the syllabus of that case:

"Agreement in writing not to call in a mortgage for two years, the mortgagor fulfilling his covenants. On one occasion within the two years, interest was not paid on the day, and the mortgagor shortly thereafter gave notice that he was no longer bound by the agreement, demanded and compelled payment of the interest, and costs of notice."

Having thus collected the past-due interest by force of law, the creditor proceeded to enforce his mortgage. The court held that, upon the facts stated, supra, such collection of the interest was a waiver of default, and an injunction was granted. This creditor not only collected past-due interest, but enforced that collection by resort to the courts, at the same time insisting that he was not bound by the agreement not to call in the mortgage. He stood stoutly upon his rights. Nevertheless the court ruled that the mere collection of the past-due interest to which he was certainly entitled, operated to "waive the default." There was certainly no actual or apparent intent on the part of the mortgagor to waive his rights, but the court treated his acts as a waiver.

[3] "Where a party to a contract waives a default in its terms, he cannot again establish his right to proceed strictly thereunder until he has given due notice of his intentions to the other party." *Elliott on Contracts*, § 2050.

In the case of *Belloc v. Davis*, 38 Cal. 242, it was held that a provision in a note that, on default of interest, the whole principal should become due, did not cause the statute of limitations to run from that

date, but at the expiration of the credit fixed by the note. While the court held in this case that the provision that, on default in payment of interest, the whole amount of principal and interest should become due and payable, was in the nature of a penalty, it further held that, by accepting payment of interest made after the default, the creditor waived all benefit from the default, and thereafter the rights and obligations of both parties continued, without regard to the forfeiture. This case was approved and affirmed in the later case of *Mason v. Luce*, 116 Cal. 232, 48 Pac. 72.

[4] It is a fair conclusion that when, in the *Nickels Case*, supra, this court cited Pomeroy as authority for the proposition that a provision in a contract providing that, in a specified event, the time for the payment of a certain sum shall be accelerated, does not create a penalty or forfeiture against which a court of equity will relieve, it approved the companion proposition asserted by Pomeroy in the same section that the provision "for accelerating the time of payment of the whole debt in this manner may, of course, be waived by the creditor." Pomeroy cites the single case of *Langridge v. Payne*, supra, as sufficient authority to show that this waiver may be affected by the bare receipt of past-due interest, even though the creditor at the time insists that he waives no rights by this acceptance.

See, also, on the subject of waiver by the acts of a party, the recent case of *Richmond Leather Co. v. Fawcett*, 130 Va. —, 107 S. E. 800, and cases cited.

In view of the principles announced and authorities cited, it is the conclusion of this court that the decree of the circuit court of Culpeper county should be reversed.

Reversed.

(131 Va. 347)

THOMPSON et al. v. ARTRIP et al.

(Supreme Court of Appeals of Virginia. Sept. 22, 1921.)

1. Appeal and error §173(2)—Objection to notice of termination of lease cannot first be made on appeal.

In unlawful entry and detainer proceedings, the objection that the notice to terminate the lease was defective cannot be urged for the first time on appeal.

2. Landlord and tenant §115(1)—Continuance of possession under supplementary agreement held from month to month.

Where, before the expiration of a two-year lease, the parties made a supplementary agreement to give lessees a month or two after expiration to close out their business, and lessees thereafter paid monthly rent, the tenancy was from month to month.

3. Contracts ¶22(1)—Formal acceptance of offer not necessary.

It is not necessary, in order to make a contract, that a proffer submitted by one party, shall be formally and in terms accepted by the other; an acceptance may be by act.

4. Landlord and tenant ¶114(3)—Presumption of yearly tenancy where tenant for years holds over rebuttable.

The presumption that a tenant for years who holds over after the expiration of his term, with the landlord's permission, is a tenant from year to year, may always be repelled by evidence that the holding over was of another character.

5. Landlord and tenant ¶115(3)—Evidence held to establish tenancy from month to month.

Evidence, that defendants who had been holding under a two-year lease, continued in possession under a supplementary agreement held to establish a tenancy from month to month.

6. New trial ¶71—Verdict on conflicting evidence should not be set aside unless plainly against evidence.

The verdict of a jury, particularly upon conflicting evidence, is entitled to great respect, and should not be set aside unless plainly against the evidence, or without evidence to support it.

7. Landlord and tenant ¶116(7)—Notice of termination held not waived by collecting rent.

Collection of rent to the time at which the lease was terminated held not a waiver of the effect of a notice to terminate the lease, given 30 days prior to the end of the month.

Error to Circuit Court, Russell County.

Action by B. F. Thompson, executor, and others, against N. D. Artrip and another, doing business as the Lewis Creek Mercantile Company. A judgment of dismissal was entered after setting aside a verdict for plaintiffs and granting a new trial, and plaintiffs bring error. Reversed and rendered.

A. T. Griffith, of Honaker, for plaintiffs in error.

Bird & Lively, of Lebanon, and G. B. Johnson, of Honaker, for defendants in error.

SAUNDERS, J. This is an action of unlawful entry and detainer by B. F. Thompson, executor, and others, to recover from N. D. and Fleet Artrip, doing business under the firm name and style of Lewis Creek Mercantile Company, a certain storehouse and lot in Russell county, Va.

It appears from the record that the plaintiffs secured a verdict against the defendants in the above action. Thereupon a motion was made to set aside the verdict on the ground that it was contrary to the law and the evidence. The trial court sustained this motion, and awarded a new trial. To this action of

the court the plaintiffs excepted. At the next calling of the case, the plaintiffs failing to introduce any evidence, the court entered a final order dismissing the case from the docket. To this judgment of the court a writ of error and supersedeas were awarded by one of the judges of this court.

The property leased to the defendants was the property of the plaintiffs. They were represented in the transaction by B. F. Thompson, and no question is raised as to his authority. The lease was a verbal one, and, according to the testimony of Thompson, was for two years, beginning March 20, 1918, and ending March 20, 1920. The Artrips took possession of the property, paying \$9 per month rent therefor. The defense sets up a different contract of leasing, alleging further that the property was rented to N. D. Artrip alone. The monthly rent was collected first by Thompson, and later by C. W. Fuller. B. F. Thompson states that some time in March, 1920, prior to the expiration of the two years lease, Fleet Artrip, who is described by the witness as "the man in actual charge of business at the store," advised him (Thompson) that "they were not going to buy any more goods, and were going to close out, and give the property up. Later, just about the time the lease expired, Fleet Artrip told Thompson that if they would "give them a month, or two, they would close out their goods, and get off the creek." Further, that "he tried to sell the goods back to him," i. e., Thompson.

Proceeding with his testimony, Thompson says:

"They paid us the \$9 a month right on up to July 3, 1920, when we had prepared the notice to them to vacate the property. The possession has been withheld from us since September 1, 1920, and since the end of the contract until now, no other contract was ever made with them; they have continued to hold since the end of their contract. The rent has been paid up to that date, September 1, 1920, and up to July 3, since the end of the contract."

On July 26, 1920, the lessors gave notice to the Lewis Creek Mercantile Company as follows:

"You, and each of you, are hereby notified that the undersigned intend to terminate the lease of that certain store building, etc., * * * and which said property you hold as tenant by the month; and that the said termination shall become effective after the expiration of 30 days from the service of this notice as provided by law."

[1] This notice was served on the same day on Fleet Artrip, the return stating that he was in possession of the premises. The sufficiency of this notice is objected to in this

court by the appellees, but it does not appear from the record, or from the opinion of the learned judge of the trial court which is before us, that a like objection was made at the trial. This notice is not in the usual form, but we are not prepared to say, though we do not so decide, that it is not substantially sufficient. The summons in unlawful detainer was not issued until September 10, 1920. On September 18, the defendant appeared and pleaded not guilty. The case appears to have been tried upon the merits. Jackson, a constable for the New Garden magisterial district, proved without objection, the notice to terminate the lease, and service thereof on July 6, 1920. Conceding that this notice was defective, objection to same should have been made in the trial court. Not having done this, appellees will not be permitted to urge this objection for the first time in this court.

The case of *Shenandoah Valley R. Co. v. Miller*, 80 Va. 821, is one in which a subcontractor sought to give notice, and perfect a mechanic's lien pursuant to the statute. His notice did not conform to the statute, and was not served as required by law, but objection on the ground of these defects was not made at the proper time. This court, passing on the effort to make these objections in the appellate court, said:

"Neither was made in the court below; but both are for the first time raised in the appellate court. If the company desired to rely upon them, it should have brought them to the attention of the circuit court; and, not having done so, clearly it is now too late to raise them here. The object of the notice is to apprise the owner of the subcontractor's claim, and to warn him against making payment to the general contractor. And if the notice be for any reason defective, or if it be not properly served, it is the undoubted privilege of the owner in a suit or action against him by the contractor, to defend on that ground. But these defects or objections he may waive, as in the present case was done by the defendant in not objecting in the circuit court to the introduction in evidence before the jury of a copy of the written notice served by the plaintiff, with the return thereon; and having thus waived them there, the right to insist upon them now is gone." 80 Va. 826.

See, also, cases cited.

"It is a further principle of appellate procedure that an error, to be available on appeal, must have occurred without the express or implied consent of the appellant. A party is held on appeal to the position which he assumed below, and is accordingly estopped to allege error in any action of the trial court which he has recognized as valid by his voluntary acts. Accordingly, when the act assigned as error was done by agreement of the parties, it cannot be availed of on appeal to reverse the judgment, although it is erroneous; so, where a party fails to object below to a proceeding, he is presumed on appeal to waive contention as to its validity." 2 Ency. Pl. & Pr. p. 518.

[2] The real question for determination in this case is the precise nature of the contracts between the parties. The plaintiff set up a definite parol lease to expire on March 20, 1920, followed by a supplementary agreement to give the defendants a month or two in which to close out their business. If this latter contract was made, and at its expiration the defendants continued in possession, paying monthly rent, they would be tenants from month to month. The plaintiffs proceeded in their action upon that theory. The balance of March, and the months of April and May, would certainly be a month or two. Thereafter, if rent was paid and received, the tenancy would be from month to month. The defendants deny both the alleged parol lease for two years, and the supplementary lease for a month or two, and set up an entirely different contract. This contention presented a question of fact which the jury decided adversely to the defendants. If credence had been given to the defendants' version of the contract, the verdict would have been in their favor. That the parties realized that an issue of veracity was presented over the conflicting contentions of the parties, and that it was considered that the case would turn upon the resolution of that conflict, is shown by the fact that, after the parties plaintiff and defendant had testified, witnesses were introduced to establish the general reputation for veracity of both the Artrips and B. F. Thompson.

The jury having found a verdict for the plaintiffs, that verdict should have been followed by judgment, unless it was contrary to the evidence, or without evidence to support it.

It appears from the opinion of the trial court that it concluded that—

The "proof showed that the defendants paid rent for, and held possession of, the premises after the two years had expired," and that "no new conditions have arisen since the original lease, in the case at bar, but the same parties have the title, and the defendants hold the same premises for which they have paid the same rent up to a date after the notice was served in the case. The original lease, by the contention of plaintiffs, was for two years."

Concluding, the court said:

"To hold that a tenancy from month to month existed in this case would be plainly against the undisputed contract between the parties, and, therefore, the notice given in the case was not sufficient."

Of course, if the original lease was for two years, and the defendants held over without any new contract, paying rent as formerly, the nature of the subsequent holding would be a tenancy from year to year. But such a view of the evidence ignores the statements to Thompson by Fleet Artrip, immediately prior to the termination of the two-

year lease in March, 1920, and the action of the parties thereon.

The first statement of Fleet Artrip, the active manager in charge of the business, was that "they were not going to buy any more goods, and were going to close out, and give the property up." This certainly indicated a purpose on the part of the defendants to surrender the premises at the expiration of the lease. A little later, and just about the time the two years expired, the same Artrip said to Thompson that if "we [i. e., the lessors] would give them a month or two, they would close out their goods, and get off the creek, and he tried to sell the goods back to me." Thompson does not state in terms that he accepted this proposition, but the Artrips continued in possession after this offer on their part, they paying and the plaintiffs receiving \$9 a month rent.

If it is considered upon this state of facts that a new contract was made, then a "new condition" arose after the original lease, and the rights of the parties thereafter would be determined with reference to the new contract, and not with reference to the original parol lease for two years.

Apparently the monthly rent was treated as due at the end of each calendar month, the lessors collecting and the lessees paying on that basis. Both the witnesses for the plaintiffs and the defendants state that the rent was paid up to September 1, 1920. N. D. Artrip states that he "paid the rent on the property down to September 1, 1920, and that he has paid the rent on the property in the same way, and in the same amount, ever since he went into possession of the property, down to September 1, 1920." The notice terminating the contract was evidently given with reference to September 1st, for Thompson states that the "possession was withheld from them since September 1, 1920." This notice would not have been sufficient if the defendants had held over under the original two-year lease, paying the agreed rental, for the tenancy in such case would be from year to year. But if the jury was justified in concluding that the request of the defendants, submitted by Fleet Artrip to the plaintiffs, and the subsequent action thereon of the parties, constituted a new contract of lease, then this notice would be sufficient. The holding over, in that event, and payment of monthly rent, would create a tenancy from month to month.

"At any time before the expiration of a lease, the parties may agree as to what shall be the nature of the tenants' holding over." *Blumberg v. Myres*, 32 Cal. 93, 91 Am. Dec. 580.

[3] Furthermore, it is not necessary, in order to make a contract, that a proffer submitted by one party shall be formally and in terms accepted by the other. Certainly all that passed between the parties prior to the

expiration of the lease, as well as their subsequent action thereon, was matter proper for the consideration of the jury for the purpose of ascertaining the nature of the subsequent holding.

"An acceptance of an offer may be by act, as where an offer is made that the offerer will pay, or do something else, if the offeree should do a particular thing. In such a case performance is the only thing needful to complete the agreement, and create a binding promise." 13 *Corpus Juris*, 275, § 73, and cases cited.

Acceptance may be inferred from the acts and conduct of the promisee. *Colgin v. Henley*, 6 Leigh (33 Va.) 85, 86, 104, 105.

It was competent for the jury, under their well-recognized powers, to pass on and determine the credibility of the witnesses, and to conclude from the evidence of Thompson and the action of the parties that prior to March 20, 1920, the Artrips did submit a proposition which was acceded to by the plaintiffs, and which determined the character of the future holding of the premises in question.

[4] The presumption that a tenant for years who holds over after the expiration of his term, with the permission of the landlord, is a tenant from year to year, may always be repelled by evidence showing that such holding over is in another character, or for some other purpose than that of tenant from year to year.

In the instant case this presumption is repelled by evidence of a new contract, to which credence was given by the jury, as shown by their verdict for the plaintiffs.

[5, 6] It was manifest error to set aside this verdict in view of the evidence tending to establish a supplementary agreement between the parties, thereby introducing a new condition, and repelling the implication that would have followed from a mere holding over by the lessees, and payment of monthly rent at the expiration of the two years' lease. The verdict of a jury, particularly upon conflicting evidence, is always entitled to great respect, and should not be set aside, unless, as stated supra, it is plainly against the evidence, or without evidence to support it.

The defense contends that there was no partnership between the Artrips, that none was alleged, and none proved. The summons in unlawful detainer is against N. D. and Fleet Artrip, trading as the Lewis Creek Mercantile Company, and the notice to terminate the lease is against the same concern. After these notices were given, the defendants appeared, pleaded not guilty, and issue was joined. There was no affidavit denying partnership under section 6127, Code of Virginia. All conflicts between the testimony of the plaintiffs and defendants were settled by the verdict of the jury.

[7] A further contention of the defendants

is that by receiving rent to September 1, 1920, the plaintiffs waived the effect of their notice to terminate the lease. The notice to terminate the lease related to the month ending August 31, 1920. It could not relate to the month ending July 31st, for the manifest reason that it was given and served during that month. The Code provides that a tenancy from month to month may be terminated by a 30 days' notice in writing prior to the end of the month. The month in this case was August, 1920, and the plaintiffs were entitled to collect their rent to the time at which the lease was terminated. Hence, collection to that date involved no waiver of rights.

For the reasons heretofore stated, the judgment complained of will be reversed, and a judgment will be entered conforming to the verdict of the jury, and awarding the possession of the premises in controversy to the plaintiffs.

Reversed.

BURKS, J., absent.

(130 Va. 711)

**CLINCHFIELD COAL CORPORATION
v. HAYTER.**

(Supreme Court of Appeals of Virginia.
Sept. 22, 1921.)

1. Trespass \S 46(1)—Verdict for plaintiff for injury to trees sustained by evidence.

In an action by a landowner for cutting and branding trees, injuring them, a verdict for plaintiff held supported by evidence.

2. Appeal and error \S 361(3)—That petition in error complained of a certain, instead of a final, judgment immaterial.

That a petition in error complained of a "certain" judgment, instead of a final judgment, did not constitute ground for dismissal, where the only judgment entered was a final one.

3. Appeal and error \S 1170(3)—Failure to furnish bill of particulars when ordered not ground for reversal.

In an action for damages to plaintiff's trees, that plaintiff failed to furnish a bill of particulars at the time called for by the order was not ground for reversal, when defendant was not taken by surprise, and in view of Code 1919, \S 6331.

4. Evidence \S 358—Correct maps admissible regardless of source.

Where maps and drawings introduced by plaintiff in an action for injury to trees were in fact correct representations of the locus in quo, they were admissible regardless of the source from which plaintiff derived the information upon which they were based.

5. Evidence \S 379—How correctness of maps may be shown.

It is not necessary that the correctness of a map or drawing should be shown by the person who made it; the fact may be shown by any competent witness who knows it.

6. Trespass \S 46(2)—Showing of title held sufficient.

In an action for injuries to plaintiff's trees, plaintiff's showing of common title in the immediate grantors of plaintiff and defendant, respectively, and that plaintiff's deed, duly recorded, was prior in time to defendant's, held a sufficient showing of true title in plaintiff to entitle him to recover.

7. Damages \S 62(1)—When duty to minimize damages arises stated.

The duty to minimize consequential damages from a wrongful act of defendant is not arbitrarily imposed in all cases, but only where it is a reasonable duty, and can be performed at trifling expense or with reasonable exertion, and there is no such duty where the injured party is not chargeable with notice that consequential damages are likely to ensue.

8. Damages \S 62(3)—Owner of injured trees held not bound to hasten their sale to minimize damages.

Where plaintiff's trees had been injured by defendant's wrongful acts in branding them, plaintiff was not bound to hasten their sale to minimize damages where he did not know that consequential damages would arise; defendant having assured him that the branding would do no harm.

9. Trespass \S 2—Branding trees by mistake trespass warranting damages.

Where defendant admitted branding plaintiff's trees by mistake, such evidence alone entitled plaintiff to judgment for some amount, as it was a trespass on plaintiff's land.

10. Appeal and error \S 1004(2)—Recovery for injury to trees held not excessive.

Where there was conflict in the evidence, a recovery of \$400 for cutting 18 trees and branding 135 so that some of them died could not be held excessive by the Supreme Court of Appeals.

Error to Circuit Court, Russell County.

Action by one Hayter against the Clinchfield Coal Corporation. Judgment for plaintiff, and defendant brings error. Affirmed.

Morison, Morison & Robertson, of Bristol, Burns & Kidd, of Lebanon, and John W. Flannagan, Jr., of Clintwood, for plaintiff.

M. M. Long, of St. Paul, and S. H. & Geo. C. Sutherland, of Clintwood, for defendant.

BURKS, J. [1] The plaintiff (Hayter) claims that the defendant cut and removed from the former's land 18 trees and branded 135 trees, seriously injuring them. The defendant admitted branding the 135 trees on plaintiff's land, but denied that any injury resulted from the branding, and also denied

that any trees were cut on the plaintiff's land. There was a sharp conflict between the evidence for the plaintiff and that for the defendant on the matters denied by the defendant. There was also a sharp conflict between the testimony for the two parties as to the value of the trees alleged to have been cut. The plaintiff and one or more of his witnesses testified that the trees cut were worth \$10 apiece. The testimony for the defendant was that these trees were not worth more than from \$1.20 to \$1.50 apiece. The testimony for the plaintiff was to the effect that the trees had been seriously injured by the branding, and that at least eight of them had died prior to the institution of this action. The testimony for the defendant was to the effect that the branding did the trees no harm, and that they were worth just as much after the branding as before. The jury found a verdict for the plaintiff and assessed his damages at \$400. There was a motion to set aside the verdict as contrary to the evidence, which the trial court overruled, and entered up judgment for the plaintiff for the amount of the verdict. While the decided preponderance of the evidence appears from the record to be with the defendant as to the damages sustained by the plaintiff, it is plain from the above statement of facts that this court cannot interfere with the verdict and judgment of the trial court. It was the province of the jury to weigh the evidence on these subjects, and under the circumstances it cannot be said that the verdict was without evidence to sustain it, or is so plainly contrary to the evidence that this court ought to interfere. *W. S. Forbes & Co. v. Southern Cotton Oil Co.*, 130 Va. —, 108 S. E. 15.

[2] A motion was made to dismiss the writ of error on the ground that the petition did not show that the judgment complained of was a final judgment. The petition speaks of the judgment complained of as a certain judgment rendered by the circuit court of Russell county at its September term, 1919, for \$400 in favor of C. M. Hayter against the petitioner. The ground of the motion appears to be that the petitioner speaks of the judgment as a certain judgment instead of a final judgment. Turning to the record, we find that the only judgment entered by the court at that time in favor of the plaintiff against the defendant was in fact a final judgment. The motion to dismiss is wholly without merit.

[3] The first error assigned by the plaintiff in error is the action of the trial court in allowing the plaintiff to file a bill of particulars at the time at which it was filed. On motion of the defendant the plaintiff was required to file a bill of particulars by an order made December 19, 1916. It was a proper case to have required a bill of particulars, and the order of the court was not complied with. At the September term, 1919, both par-

ties announced themselves ready for trial, and the trial was begun. Nothing was said at that time about the failure to file the bill of particulars, but, after the plaintiff had gone on the stand and had testified at some length in his own behalf, he offered in evidence on his own behalf several letters written him by the local land agent of the defendant with reference to the controversy, in one of which it was admitted that the defendant had branded 135 white oak trees on the plaintiff's land, but denied that the branding had done the timber any harm, and also denied that any trees had been cut on the plaintiff's land by the defendant. At this stage the defendant objected to any testimony "with reference to damage alleged to have been suffered by reason of the branding of said 135 trees because no bill of particulars had been filed, and that the defendant could not at that date prepare its defense to the issues raised by the bill of particulars if it were permitted to be filed." No motion was made to postpone the hearing or to continue the case. Looking at the case retrospectively, it seems plain that the defendant was not taken by surprise, and that he was full-handed with proof on the items of controversy set forth in the bill of particulars. It had its witnesses present to testify as to the boundaries of the land, and a number of witnesses to testify as to the value of the trees cut and removed and the injury to the 135 trees that were branded, and there is no suggestion now that any injury resulted to the defendant from allowing the plaintiff to file the bill of particulars at the time at which it was filed. The sole ground of complaint is that the statute permitting the defendant to call for a bill of particulars was not complied with. We are satisfied from the record that the defendant was not, and could not have been, injured by permitting the bill of particulars to be filed at the time at which it was filed. It is said in the brief for the defendant in error that the bill of particulars had in fact been filed long before and was found among the papers in the case, but there is no evidence of this fact in the record. The bill should have been filed in accordance with the order of the court, but when it was found that the orders did not show the filing it was necessary for the trial court to determine what should be done. Some discretion must be left to the trial courts in matters of this kind, and where, as here, it can be seen from the record that no injury could have resulted to the defendant from the failure to file the bill of particulars earlier, this court will not set aside its ruling. We are not unmindful of former rulings of this court on the subject of bills of particulars, a number of which are referred to in *Burks' Pleading & Practice*, § 318, and *Colby v. Ream*, 109 Va. 308, 63 S. E. 1009, referred to by the plaintiff in error, but the facts of this case are easily distinguish-

able from prior cases. Furthermore, we are satisfied that the plaintiff in error is not entitled to a reversal on this point in view of the provisions of section 6331 of the Code.

The second assignment of error is to the action of the trial court in admitting in evidence a certain plat and blueprint and certain drawing over the objection of the defendant, and in overruling the defendant's motion to strike the same from the evidence. Plaintiff and defendant claimed under a common grantor but the plaintiff held the older deed and hence the superior title to the land within his boundaries, but there was a dispute between them as to the true location of the beginning corner of the plaintiff's title and the next succeeding corner, and the plaintiff also claimed that the defendant had ignored some of the calls of his deed at another point, and had thereby cut off a triangle of his land upon which were 15 of the trees which had been cut and removed by the defendant. In order to give the jury a clearer view of the situation and of the location of the calls in his deed, the plaintiff, while testifying in his own behalf, produced and offered in evidence a plat and blueprint and certain drawings of his tract and proceeded to point out thereon the location of the beginning point and other disputed calls of the deed under which he claimed title, which deeds had been previously introduced in evidence. The defendant strenuously objected to the reception in evidence of the plat and blueprint and the drawings on the ground that their correctness had not been established, but the court overruled the objection and admitted them, and this ruling is assigned as error.

[4] The plat and blueprint had been made by a surveyor, Thacker, in 1910, three years before the present controversy arose. Thacker was not examined as a witness in the case, but the plaintiff testifies that the map was correct "according to the records" and he thought was correct, though he admitted on cross-examination that he did not see Thacker make the map, was not present when he located the lines on the map, he was not a surveyor, and did not know how to use a compass. As to his own drawings the plaintiff further testified that he made the drawings aforesaid, and copied them from the Thacker map, and time and again testified that his drawings were correct (although he did not run the lines nor locate them with a compass) and truly represented the location of the points in dispute. With his own title deeds before him and also the deed under which the defendant claims, and reading the calls of his deeds, he pointed out the location on the drawings of each of the disputed calls and also of the triangle cut off by the omission of certain calls in his deed. The drawings made by himself enabled him to give a more graphic description of the

disputed points than he could have done by mere oral statements. There is no dispute about the fact that the plaintiff made the drawings himself and testified as to their correctness. If they were in fact correct representations of the locus in quo, it is immaterial from what source the plaintiff derived his information upon which they were based, and they were properly received in evidence; and if the drawings were mere tracings of the Thacker map and were properly received in evidence, the defendant could not have been injured by admitting in evidence the Thacker map and blueprint, even if not otherwise shown to be correct. If the drawings were correct representations of the locus in quo, the map was necessarily so.

[5] It is not necessary that the correctness of a map or drawing should be shown by the person who made it. That fact may be shown by any competent witness who knows it. The map or drawing does not prove itself by mere production, but any witness who knows the object represented may testify that the map or drawing correctly represents his idea of such object, and when he has so testified the map or drawing may be received in evidence. Witnesses often make drawings while testifying to illustrate the relative location of objects, and this is always permissible. It is simply the testimony of the witness in graphic form. 1 Greenl. Ev. (16th Ed.) §§ 439d, 439g, 439h; 17 Cyc. 412, and cases cited.

[6-8] The next error assigned is the action of the trial court in giving certain instructions of its own motion. The court gave several instructions at the instance of the plaintiff and of the defendant, respectively, and also four instructions of its own motion. The latter we have examined carefully, and think that they are free from the objections alleged. The plaintiff in error objects to those instructions on one or the other of two grounds. It is said that one of the instructions allowed the plaintiff to recover if his deeds covered the land on which the trees cut or injured stood, and did not require the plaintiff to show true title to the land. The plaintiff showed a common title in the immediate grantors of the plaintiff and defendant, respectively, and that the plaintiff's deed, which was duly recorded, was prior in point of time to that of the defendant. This was a sufficient showing of true title in the plaintiff to entitle him to recover. The objection made to three of the instructions given by the court of its own motion involves the subject of the duty of an injured party to minimize the consequential damages resulting from the tort of another. This question of the duty of the plaintiff to minimize his damages is raised in several of the assignments of error, and will be finally disposed of here. In brief, the contention of the defendant is that it was the duty of the plaintiff to sell

his trees which had been branded soon after they were branded and before the worms got into them and injured them, and if he did not promptly put them on the market, and the damage resulted from such failure and delay, he could not recover. It is unnecessary to enter upon a discussion of when it is necessary for a plaintiff to minimize his consequential damages resulting from the wrongful act of a defendant. The duty is not arbitrarily imposed on the injured party in all cases, but only where it is a reasonable duty, and can be performed at trifling expense, or with reasonable exertion. *Stonega Coal Co. v. Addington*, 112 Va. 807, 73 S. E. 257, 37 L. R. A. (N. S.) 969. But there can be no such duty where the injured party does not know and is not chargeable with notice that consequential damages are likely to ensue from the wrongful act. Hayter had no knowledge of the effect of branding trees, and was assured by the defendant shortly after the branding that the branding would not hurt them, and at the trial produced a number of witnesses who testified on its behalf that branding would not injuriously affect trees, and in this case had not done so. Under such circumstances it could not have been the duty of Hayter to hasten the sale of his trees, in order to avoid a damage which was not to be anticipated, even if such duty were imposed under other circumstances.

It is assigned as error that the court modified two of the instructions offered by the defendant and refused to give them except as modified. The error, if any, is not pointed out; but, even if adequately assigned, no error was committed in making the change. The modification was slight and simply applied the instructions to the evidence in the case. The refusal of the trial court to give certain instructions tendered by the defendant relating to the duty of the plaintiff to minimize his damages constitutes the sixth assignment of error. This has already been sufficiently dealt with.

[9, 10] The seventh assignment of error is that the trial court erred in refusing to set aside the verdict because excessive and also contrary to the law and the evidence. The defendant admitted branding 135 trees on the plaintiff's land by mistake. This alone entitled the plaintiff to a judgment for some amount, as it was a trespass on the plaintiff's land. 28 R. C. L. p. 762, § 10. There was conflict as to the amount of the resulting damages. There was also conflict as to the value of the trees cut and removed. As the case appears in cold print, we could not, if on the jury, have found so large an amount, but this court cannot discredit the statements of the witnesses as to the value which the jury have believed. The credibility of

the witnesses was a question for the jury and with its finding we cannot interfere.

The judgment of the trial court will be affirmed.

Affirmed.

(131 Va. 55)

GILMER v. REDWINE.

(Supreme Court of Appeals of Virginia. Sept. 22, 1921.)

1. Convicts ~~§~~ 3—Statute for appointment of committee of convict's estate construed.

Under Code 1919, § 4998, in order to appoint a committee for the estate of a convict, the person must have been convicted of a felony and sentenced to the penitentiary, or to the state convict road force for one year or more, and must possess some estate, real or personal, some portion of which must be within the territory of the court making the commitment, and the motion must be made by an interested party, and on the existence of any of these grounds being challenged, evidence of the existence of the grounds must be furnished.

2. Convicts ~~§~~ 3—Where no evidence was presented on issues concerning the right to appoint a committee for a convict's estate, the appointment was illegal.

Where the appointment of a committee for the estate of a convict was resisted on the grounds that he had no estate, and that the person moving for the appointment had no interest in committing his estate, the bill of exceptions, reciting that no evidence was offered either by the movant or the defendant, shows the appointment of a committee was erroneous.

Error to Circuit Court, Scott County.

Proceedings by Bettie Redwine, administrator of S. L. Redwine, deceased, against T. O. Gilmer. From judgment appointing a committee for the estate of said Gilmer, as a convict, he brings error. Reversed.

O. M. Vicars, of Wise, and S. H. Bond and W. H. Nickels, both of Gate City, for plaintiff in error.

W. S. Cox and J. P. Corns, both of Gate City, and Coleman & Carter, of Big Stone Gap, for defendant in error.

SAUNDERS, J. This is a writ of error to a judgment of the circuit court of Scott county, pronounced at its May term, 1920. This judgment, in part, is as follows:

" * * * For motion of Mrs. Bettie Redwine, administratrix of S. L. Redwine, deceased, for the appointment of a committee for T. O. Gilmer, who has been convicted of a felony, and sentenced to the penitentiary, the court doth appoint C. W. Dougherty as said committee, it appearing that the notice has been given according to law, and the said T. O. Gilmer appearing in court, the court selected the said Dougherty as his committee."

T. O. Gilmer objected to the appointment of a committee on several grounds which were overruled by the court. To this action of the court the said Gilmer excepted. His bill of exception is reproduced, in part, as follows:

"Whereupon the said Gilmer was brought into court, and by counsel objected to the appointment of a committee for him, on the following grounds:

"First. Bettie Redwine had no interest in the matter of an appointment for him.

"Second. He had no estate for which to appoint a committee.

"Third. He had not had sufficient notice of said motion. But the court overruled his said objections, and appointed C. W. Dougherty committee for the said T. O. Gilmer, over the protest of the said T. O. Gilmer, no evidence having been offered by either party. To which action of the court in appointing said committee, the said T. O. Gilmer excepted, and prays that his bill of exceptions be signed," etc.

[1] The party making the motion relies upon section 4993, Code of Virginia, which provides that—

"When a person is convicted of a felony and sentenced to confinement in the penitentiary or to the state convict road force for one year or more his estate, both real and personal, if any he has, shall, on motion of any party interested, be committed by the circuit or corporation court of the county or city in which his estate, or some part thereof is, to a person selected by the court, who after giving bond," etc.

Four things are necessary to furnish authority to a court to commit an estate under this section:

I. The person whose estate is proposed to be committed must have been convicted of felony and sentenced to the penitentiary, or to the state convict road force, for one year, or more.

II. There must be some estate, real or personal, belonging to the convict.

III. The motion must be made by an interested party.

IV. The estate, or some portion of it, must be within the territory of the court making the commitment.

It is manifest that if a motion under the section, supra, is resisted in the trial court, and the existence of any one, or more, of these grounds of jurisdiction is challenged, evidence that the grounds so challenged do exist must be furnished.

[2] In the instant case, Gilmer objected: First, that Bettie E. Redwine had no interest in committing his estate to a person of the court's selection; second, that he had no estate to be committed. This court is unable to presume that in response to these objections evidence was taken, and the grounds of jurisdiction established, for the obvious reason that the bill of exceptions recites that no "evidence was offered," either by the mov-

ant. Bettie E. Redwine, or by the plaintiff in error. So far as appears from the record, Bettie E. Redwine had no interest whatever in the appointment of a committee for Gilmer, and the latter had no estate to be committed. As these facts were in issue, they should have been affirmatively established, in order to support the jurisdiction of the trial court, and sustain the action of which complaint is made.

The objections of the plaintiff in error were taken in time, and saved by proper bill of exceptions.

For the reasons given, it is considered that in the situation presented, the trial court erred in committing the estate of T. O. Gilmer to C. W. Dougherty, and its order in this respect must be reversed.

Reversed.

BURKS, J., absent.

(131 Va. 682)

CHARLES v. McCLANAHAN et al.

(Supreme Court of Appeals of Virginia.
Sept. 22, 1921.)

1. Deeds ~~294~~—Prior stipulations are merged in the deed.

In the absence of fraud or mistake in the instrument itself, prior stipulations and understandings are merged in the final and formal deed executed by the parties.

2. Reformation of Instruments ~~17(1)~~ — Grantee held not entitled to have mineral reservation stricken from deed.

Where a deed expressly reserved one-half of the minerals, the grantee, accepting the deed with knowledge of the reservation, was not entitled to have the deed reformed by striking the reservation on the theory that the grantor intended to sell and he intended to buy the entire interest of the grantor in the land.

3. Reformation of Instruments ~~17(1)~~ — Grantor not entitled to reformation of deed reserving one-half of the minerals so as to reserve all.

Where grantor reserved one-half the minerals under the mistaken belief that he owned one-half only, he was not entitled to reform the deed; the reservation as made representing the agreement of the parties when made.

4. Quietting title ~~7(2)~~—Grantee's deed omitting mineral reservation held cloud on grantor's title.

Where land was conveyed by deed reserving one-half the minerals, and the grantee in turn conveyed by deed without reservation, such deed constituted a cloud on the title of the original grantor which he was entitled to have removed.

5. Reformation of Instruments — 32—Failure to assert incorrectness of deed for 17 years a waiver.

Where a grantee accepted a deed reserving mineral rights as a full performance of the contract to convey and made no claim for 17 years, that the reservation should not have been included, he must be held to have waived his rights.

Sims, J., dissenting.

Appeal from Circuit Court, Buchanan County.

Suit by Green Charles against George W. McClanahan and others, with cross-bill by defendant named. From the decree plaintiff appeals. Reversed and rendered.

W. A. Daugherty, of Grundy, for appellant.

Williams & Combs, of Grundy, for appellees.

PRENTIS, J. On September 5, 1901, Green Charles and wife and D. M. Charles and wife conveyed a certain tract of land to George W. McClanahan. So much of the granting clause as is necessary to recite reads thus:

"The said parties of the first part do grant, bargain, and sell unto the said George W. McClanahan all that certain piece or parcel of land situate in Buchanan county, Va. [here follows a proper description of the land], containing 20 acres, the same more or less. (One-half of the mineral is excepted from this conveyance.)"

Then follows a covenant of special warranty, with the usual Virginia statutory covenants of title.

On June 21, 1910, D. M. Charles and wife conveyed to Green Charles all of their undivided interest in a large tract of land, excepting therefrom the 20 acres which had been conveyed to George W. McClanahan, and including therein all coal and other mineral which had been excepted from the McClanahan deed and in four other conveyances, fully identified. Then on July 16, 1918, McClanahan and wife conveyed to their son, Wilson McClanahan, the 20 acres of land which had been thus conveyed to him in 1901, without making any reservation of the mineral rights. Thereafter, in May, 1920, Green Charles instituted this suit. Its objects were: (a) The correction and reformation of the deed from Green Charles and D. M. Charles to George W. McClanahan of September 5, 1901; and (b) the vacation and annulment of the deed from George W. McClanahan and wife to Wilson McClanahan of July 16, 1918, in so far as it purports to convey one-half of the coal and minerals underlying the 20 acres of land thereby conveyed upon the ground that this deed constitutes a cloud upon the complainant's title to such one-half of such coal minerals.

The pertinent facts as to the original conveyance from Charles to McClanahan are that at the time the grantors did not think that they owned but half of the coal and mineral underlying the tract (though Green Charles denies this). The claim on the part of McClanahan is that it was his purpose to buy and the intention of the grantors to convey their entire interest in the land; and he filed an answer which he asked to be read as a cross-bill, praying that his deed be reformed so as to carry out this intention.

It is manifest, however, that even if the grantors were mistaken in thinking that they did not own all of the minerals, it is nevertheless true, and is clear from the testimony, that when they came to execute the deed, it was explicitly and distinctly understood that the title to one-half of the minerals thereunder was not to be conveyed. There was no mistake of the draftsman in drawing the deed, nor was there any mistake or misunderstanding between the parties as to the property which the deed conveyed and as to the estate in the minerals therein which were reserved. The precise form of the deed grew out of the ignorance of both the grantors and the grantee as to the true estate which the grantors owned prior to the conveyance.

[1] We must first determine, then, in this case, the true effect and proper construction to be put upon the original conveyance of 20 acres here involved. McClanahan claims that it was the previous understanding that he was to have the entire estate therein which the grantors owned. In the absence of fraud or mistake in the instrument itself, the rule is universal, applicable to deeds as well as to all other contracts, that prior stipulations and understandings are merged in the final and formal contract executed by the parties, and when a deed has been delivered and accepted as performance of an antecedent contract to convey, the contract is merged in the deed.

In *Slocum v. Bracy*, 55 Minn. 249, 56 N. W. 826, 43 Am. St. Rep. 499, it is said that—

"No rule of law is better settled than that, where a deed has been executed and accepted as performance of an executory contract to convey real estate, the contract is *functus officio*, and the rights of the parties rest thereafter solely on the deed."

The question has been considered very recently by this court in two cases. In *Charles v. Charles*, 127 Va. 610, 104 S. E. 825, in which it was held that there was no reservation of title to certain minerals claimed by the grantor because the language relied upon there, which was in the clause relating to covenants, was insufficient to create such a reservation. It followed, therefore, that the grantee took the entire estate of the grantors under the express language

of the deed in the granting clause. This is said:

"When parties reduce their contracts or agreements to writing, acknowledge them before an officer, and cause or permit them to be spread upon the public records, in the absence of any evidence of fraud, there is a very strong presumption that they correctly set forth the understanding and agreement of the parties thereto. Courts of equity will not lightly set them aside."

And the doctrine is there stated to be that, in order to justify a court of equity in undertaking to correct a deed which the parties have accepted, the evidence must be clear, convincing, and satisfactory, and the pertinent cases are there cited.

In *Woodson v. Smith and Johnson*, 128 Va. 652, 104 S. E. 794, this is said:

"Doubtless many cases may arise in which distinct and unperformed stipulations contained in a contract for sale will not be merged in or discharged by deed where that instrument is silent upon the subject of such stipulations. In such cases there is no conflict between the contract and the deed. But the deed must be regarded as the sole and final expression of the agreement between the parties as to every subject which it undertakes to deal with. All inconsistencies between the prior contract and the deed must be determined by the latter alone, and previous negotiations or agreements, verbal or written, cannot be set up for the purpose of contradicting it. The application of these principles may result in occasional hardship and occasional failure to carry out the real intention of the parties; but the principles themselves are safe and sound, they have been shown by experience to promote justice and fair dealing in the average case, and they are, for these reasons, abundantly supported by authority"—citing *Portsmouth Refining Co. v. Oliver Refining Co.*, 109 Va. 513, 64 S. E. 56, 132 Am. St. Rep. 924; *Stephen Putney S. Co. v. R. F. & P. R. Co.*, 116 Va. 211, 81 S. E. 98; 2 *Devlin on Deeds* (3d Ed.) § 850a; 13 Cyc. 616; 8 *Ruling Case Law*, p. 1048, § 102; note to *Clifton v. Jackson Co.*, 16 Am. St. Rep. 622.

[2] Applying this undoubted rule to the facts of this case, it seems to us perfectly clear that the prayer of the cross-bill is without merit, and that McClanahan, the grantee under the original deed, acquired no interest in the one-half of the minerals underlying the tract which is the subject of this controversy, because the title thereto is expressly reserved, and hence he is not entitled to have his deed reformed by striking out the exception from the grant, of which he had full knowledge before the delivery of the deed, and which he accepted as full and final performance of the contract.

The trial court dismissed the complainant's bill upon the ground, to use the language of the decree, "that the equities are with the defendants"; that is, the decree refused to

grant the prayer of the bill for the correction and reformation which was prayed for by the complainant, Charles, and also denied his prayer as to so much of the deed from George W. McClanahan to his son, Wilson McClanahan, of July 16, 1918, as purports to convey the one-half of the coal and minerals underlying the tract which had been excepted from his conveyance, because it constituted a cloud upon his (Charles) title.

[3] We think that the court correctly denied the prayer of the bill for the reformation and correction of the original deed, because the deed expressed sufficiently the true and final agreement of the parties, and needs no correction or reformation. It expressly excepts from the operation of the conveyance one-half of the minerals. As this expressed the understanding of the parties when the instrument was delivered, the complainant is not entitled to any such relief. The language may possibly need construction, though its meaning to us seems clear. The evidence shows that the only mineral which can be profitably mined in that locality is coal, and that in reserving the minerals the parties had coal in mind. The language, however, is comprehensive and includes one-half of all mineral substances which may underlie the property which may profitably be mined without impairing the rights of the owner of the surface.

The complainant also alleged that the deed of July 16, 1918, from George W. McClanahan and wife to their son, Wilson McClanahan, constituted a cloud upon his title, because it undertook to convey the entire tract without the reservation of the half of the minerals which the complainant owned, and the court refused to grant this relief.

[4] We are of opinion that this constitutes harmful error, and that this relief should have been granted. Under our construction of the original deed to McClanahan, he has no title to the half of the minerals which was reserved, and it appears from this record that the complainant, Green Charles, is now the sole owner of the estate which was thus reserved. The deed from George W. McClanahan and wife to Wilson McClanahan does, therefore, constitute a cloud upon his title, which he is entitled to have removed.

The equitable doctrines referred to in the dissenting opinion are not controverted. We cannot, however, apply them to the facts appearing in this record; for we find no evidence of fraud on the part of the appellant Charles. He testifies that at the time of the original contract the reservation of the minerals was made, saying with reference thereto that he told McClanahan "in the beginning that we would except one-half of it." and that he "also told him when we made the deed that we would except one-half of it." This version of the original contract is strikingly confirmed by the testimony of Mc-

Clanahan himself, for in his cross-examination this question and answer appear:

"Q. Then at the time you bought and at the time you accepted this deed, you bought the surface and one-half of the coal and mineral underlying this tract, didn't you?

"A. That is what I bought."

[5] If McClanahan had the rights under the original agreement which he now claims, he could have refused the deed which was tendered and either recovered the purchase money, \$25, or enforced his rights in a suit for specific performance. As he did neither, but accepted the deed as a satisfactory performance of the contract of sale, and made no such claim for 17 years thereafter, he must be held to have waived every claim which is inconsistent with its provisions.

Our conclusion, therefore, is to reverse the decree of the trial court and enter a decree here canceling, vacating, and annulling the deed from George W. McClanahan and Jemima McClanahan, his wife, to Willson McClanahan, dated July 16, 1918, in so far as that deed purports to convey one-half of the coal and minerals underlying the 20 acres of land embraced in and conveyed by that deed, and removing the cloud thereby created upon the appellant's title to one-half of the coal and minerals underlying the tract.

BURKS, J., absent.

SIMS, J. (dissenting). I cannot concur in two of the holdings of the majority opinion, namely: (a) That the defendant George W. McClanahan is not entitled to have the deed to him from Green Charles and D. M. Charles, of date September 5, 1901, reformed, as prayed for in the answer of such defendant, by striking therefrom the clause therein which is as follows, to wit: "(One-half of the mineral is excepted from this conveyance)"—so as to make the deed conform in its subject-matter with the contract of purchase which was entered into between said defendant and such grantors prior to the execution and delivery of the deed; and (b) that the deed from such defendant and wife to their son, Willson McClanahan, of date July 16, 1918, should be canceled, vacated, and annulled in so far as it purports to convey one-half of the coal and minerals underlying the land conveyed by such deed.

The correctness of both of these holdings depends upon the correctness of the holding first mentioned.

As I understand the opinion, it does not affirmatively decide whether the evidence does or does not establish that the contract of purchase differed from the deed in that the contract of purchase contained no reservation of any mineral interest, whereas the deed did contain the reservation aforesaid, nor does the opinion affirmatively decide whether such reservation in the deed was or

was not occasioned by the mutual mistake of both the grantors and the said defendant grantee in thinking at the time the deed was executed and delivered that the grantors owned only a half interest in the minerals (meaning coal and other minerals) underlying the land, or by such mistake on the part of the grantee, induced by the fraudulent representation of the grantors. But the opinion takes the following position, namely (I quote from the opinion):

"* * * That even if the grantors were mistaken in thinking that they did not own all of the minerals, it is nevertheless true, and is clear from the testimony, that when they came to execute the deed, it was explicitly and distinctly understood that the title to one-half of the minerals thereunder was not to be conveyed. There was no mistake of the draftsman in drawing the deed, nor was there any mistake or misunderstanding as to the property which the deed conveyed and as to the estate in the minerals therein which were reserved. The precise form of the deed grew out of the ignorance of both the grantors and the grantee as to the true estate which the grantors owned prior to the conveyance.

"We must first determine, then, in this case, the true effect and proper construction to put upon the original conveyance of the 20 acres here involved. McClanahan claims that it was the previous understanding that he was to have the entire estate therein which the grantors owned. In the absence of fraud or mistake in the instrument itself the rule is universal, applicable to deeds as well as to all other contracts, that prior stipulations and understandings are merged in the final and formal contract executed by the parties, and when a deed has been delivered and accepted as performance of an antecedent contract to convey, the contract is merged in the deed."

Then follows the citation of a number of cases to sustain such position.

This position, as I understand it, is this: If it be assumed that the contract of purchase was of the land and all mineral interests, and that, when the deed came to be made subsequently, the clause reserving one-half of the mineral interest, which is at variance with the contract of purchase, was inserted in it solely because of the mutual mistake of the grantors and grantee in thinking at the time that the grantors did not own such one-half interest, nevertheless the grantee is bound by the deed as it stands, since the language employed in it is the precise language intended at the time by both grantors and grantee to be so employed; there being no mistake of the draftsman in drawing the deed. Such position, as it seems to be, is in direct conflict with the well-settled doctrine on the subject.

As said in 2 Pomeroy's Eq. Jur. (3d Ed.) § 853:

"All mistakes of fact in agreements executed or executory, express or implied, must be either concerning the subject-matter or the terms. In

the first case the terms are stated according to the intent of both the parties, but there is an error of one or both in respect of the thing to which those terms apply, its * * * title, * * * and the like. * * *

The case before us belongs to the first class of cases mentioned in the quotation just made. The error under consideration concerns the subject-matter of the contract, not the terms (i. e., the language) intended to be used in the deed. There was no mistake in the language which was intended to be used in the deed; but the mistake of both grantors and grantee (or, as we shall presently more specifically mention, the mistake of the grantee induced by the fraudulent representations of the grantors and so coupled with the fraud of the grantors) "prevented from being put into writing" in the deed the whole subject-matter which was embraced in the contract of purchase, and which but therefor would have been put into the deed. 3 Pomeroy's Eq. Jur. § 867. In such case it is immaterial that there is no mistake of the draftsman in drawing the deed. As is well settled, a court of equity will reform a deed where, by reason of fraud or mutual mistake, the language, fully understood and intended to be used in the deed, either embraces "subject-matters which were not intended by the parties to come within its operation, in which case the parol evidence will show that such subject-matters should be omitted and the relief demanded will be a correction which shall exclude them, * * *" or where the deed omits "certain subject-matters * * * which were intended by the parties to come within its operation; and in this case the parol evidence will show that such subject-matters should be included, and the relief demanded will be a modification of the writing, so that it shall embrace them and shall then extend its operation to particular subject-matters not mentioned in it, but to which it was originally intended to apply." See Pomeroy's Eq. Jur. § 865. The case before us is one in which the error prevented the terms of the deed from conveying the whole mineral interest embraced in the contract of purchase. Hence the case falls within the class of deeds last above mentioned.

As said by the same authority (section 866):

"The doctrine in all its breadth and force is maintained by courts and jurists of the highest ability and authority, which hold that, whether the contract is executory or executed, the plaintiff may introduce parol evidence to show mistake or fraud whereby the written contract fails to express the actual agreement, and to prove the modifications necessary to be made, whether such variation consists in limiting the scope of the contract, or in enlarging and extending it so as to embrace land or other subject-matter which had been omitted through the fraud or mistake, and that he may then obtain a specific performance of the contract thus varied, and such relief may be granted although

the agreement is one which by the statute of frauds is required to be in writing. This view, in my opinion, is not only supported by the overwhelming preponderance of judicial authority, but is in complete accordance with the fundamental principles of equity jurisprudence. * * * The same broad view of the doctrine is clearly illustrated in the treatment of executed contracts or conveyances. It is settled by the great preponderance of authority that a deed of land may be thus corrected by enlarging its scope, extending its operation to other subject-matter, supplying portions of land which had been omitted, making the estate conveyed more comprehensive, as changing a life estate into a fee, and the like, and by enforcing the instrument thus varied against the grantor."

And as also said by the same authority (section 859):

"It is * * * settled that in suits, whenever permitted, to reform a written instrument on the ground of a mutual mistake, parol evidence is always admissible to establish the fact of the mistake and in what it consisted, and to show how the writing should be corrected in order to conform to the agreement which the parties actually made."

The same is true in cases of fraud. *Id.* § 872 et seq.

And the same doctrine is applicable where the reformation in the deed is sought to be made by the allegations of the answer of a defendant. *Id.* § 860, at page 1519.

Hence, in the view I take of the case, it is essential for the decision of the questions covered by the two holdings of the majority opinion above referred to that we should decide what the evidence in the cause establishes was the contract of purchase with respect to its difference from the deed, and what caused the reservation aforesaid to be inserted in the deed.

Upon such a question of fact it is true, as is well settled, that "the evidence must be clear, convincing, and satisfactory." *Charles v. Charles*, 127 Va. 604, 104 S. E. 823; *Pomeroy's Eq. Jur.* § 862. But the testimony of the defendant George W. McClanahan, who, it is to be remembered, was examined by the appellant, Green Charles, as a witness in his behalf, clearly, convincingly, and satisfactorily shows that the contract of purchase contained no reservation of any mineral interest in the land, and that it was not until subsequently to the payment and satisfaction in full by this defendant of the purchase money and other consideration for the land that, when the deed to be made by the vendors was mentioned, the vendors (through appellant) stated to the defendant vendee that they owned only a half interest in the mineral interests in the land, and for that reason alone would have to reserve such an interest by the provisions of the deed. Both of the vendors testify in the cause as witnesses for appellant, and it is, to my mind, a significant fact that neither of them denies, and the appellant

practically admits, that they did represent to the said defendant at the time they made the deed to the latter, as the reason for the reservation aforesaid, that they owned only the half interest in the minerals which the deed by its provisions conveyed, and said defendant positively testified repeatedly in his deposition was their distinct representation on the subject; yet both of such vendors testify in effect that such representation was untrue; that they never thought that there was any defect in their title to the mineral interests except as to one-third of such interests. They testify in substance that they had a bona fide doubt at the time they made the deed to the said defendant as to whether they had any title to one-third of such mineral interest; but they did not so state the situation to such defendant. The appellant, Green Charles, testified on this subject as follows:

"Q. Wasn't the exception made because you did not think you owned the entire interest in the coal?"

"A. It might have been something bearing on my mind that way, that we did not own the entire interest; I could not say. * * *

"Q. Did you not state to George W. McClanahan that you did not own the one-half interest in the coal?"

"A. I don't remember of ever saying much to him about it. I might have said something to him that we didn't own it, on account of some settlement that was made in the Pearson survey."

D. M. Charles testified on the same subject as follows:

"We thought there was a third of the coal gone from us, but we were going to except half of it."

Such being the facts, it seems to me to clearly appear that the untrue representation of the grantors to the grantee as to the title was in effect a fraudulent representation, since the grantors knew at the time they made it that it was not a correct representation, and it was intended to induce the vendee to act upon it as being strictly correct.

There is nothing in the testimony in chief of appellant, or in the other evidence for appellant, in conflict with the testimony of said defendant with respect to what the contract of purchase was, except that there are certain statements in the testimony of appellant on cross-examination which are to the effect that in the contract of purchase it was understood that a half interest in the minerals was not embraced in the sale. But this merely creates a conflict in the evidence for appellant, and, to my mind, these statements in the testimony of appellant bear internal evidence of their untrustworthiness; and, besides, they come from one guilty of the fraudulent representation aforesaid; so that they do not, as I think, in any degree lessen the

convincing force and effect of the testimony of the said defendant.

On the whole, therefore, I think that the case established by the evidence is as follows: The contract of purchase was of the land, including all mineral interests (meaning coal and other mineral interests). When the deed came to be made, the aforesaid reservation provision was inserted in it, solely because of the mistake of the grantee aforesaid in thinking that the grantors did not own and hence could not convey more than a half of the mineral interest embraced in the contract of purchase, such mistake on the part of the grantee being induced by the fraudulent representation aforesaid on the part of the grantors.

This presents, to my mind, a typical case for reformation of the deed under the well-settled doctrine on the subject. And the same would be true if the mistake aforesaid had been merely a mutual mistake of grantors and grantee.

McClanahan held the deed as he did for the 17 years before this suit was brought because he thought it was all the conveyance his grantors had it in their power to make him. He was led into this mistake by the false representation of his grantors aforesaid. From the bill in this suit McClanahan first discovered the existence of the mistake. He thereupon promptly answered the bill and asked for the reformation aforesaid of the deed.

I think, therefore, that the deed should be reformed in accordance with the prayer of the answer of the said defendant. It follows that the deed aforesaid of such defendant and wife to his son does not constitute any cloud upon any title of appellant, and hence should be allowed to stand as it is.

(131 Va. 31)

DUTY et al. v. HONAKER LUMBER CO. et al.

(Supreme Court of Appeals of Virginia.
Sept. 22, 1921.)

1. Boundaries \S 26—Except when relief authorized by statute or some peculiar equity is sought, equity courts cannot settle title and boundaries.

Except when the relief authorized by the Code 1919, \S 6248, is sought, or there is some peculiar equity, courts of equity are without jurisdiction to settle disputes regarding titles and boundaries.

2. Equity \S 365—Petitions and cross-bills on matter where law remedy was adequate should have been dismissed without prejudice.

The petitions and cross-bills of those who were not parties defendant to an original bill in equity, claiming title and asserting boundaries, and who had adequate remedy by ejectment, should have been dismissed without prejudice,

since they could not be jeopardized by a decree to which they were not parties.

3. Equity §348—Relief denied where essential allegations can not be proved with reasonable certainty because of deaths.

Where if the allegations of the original bill had been proved, the relief prayed would have been afforded but all of the parties to the original transactions are dead and there is no written evidence of value and any conclusion would be conjectural and founded upon a random guess, relief must be denied, since essential allegations must be proved with reasonable certainty.

Appeal from Circuit Court, Dickenson County.

Bill by J. Harmon Duty and others against the Honaker Lumber Company and others. Bill, cross-bill, demurrer, exceptions, motions to strike out, and objections to pleadings dismissed, and decree entered dismissing the cause, and complainants appeal. Affirmed.

Chase & McCoy, of Clintwood, for appellants.

Greever, Gillespie & Divine, of Tazewell, Sutherland & Sutherland, of Clintwood, Bird & Lively, of Lebanon, and A. A. Skeen, of Clintwood, for appellees.

PRENTIS, J. We do not think it necessary to recite the involved and complicated pleadings and procedure in this case. Counsel for the appellants, in their very accurate summary of all of these details allege that there are 17 separate issues. By eliminating all of the claimants of the land in controversy who disturb his theory of the case, he simplifies and reduces these issues to 5. Inasmuch as we think the case can and should be disposed of in accordance with certain general principles, we do not think it necessary to discuss these various issues and counterclaims, or the voluminous evidence introduced to support them, with any great particularity.

The complainants are the executors of the last will and testament of John H. Duty, deceased, his widow and children, and the grandchildren of John H. Duty, representing their deceased parents. They allege title to a tract of about 200 acres of land, one-half of which lies in Dickenson county and half in Buchanan county; the county line being the line of division. They allege that by a deed dated August 15, 1872, William B. Aston, as the agent of William Warder, conveyed this land to John H. Duty and his brother, Joel F. Duty; that at that time the entire tract lay in Buchanan county, but since then, in 1880, Dickenson county was formed; that Joel F. Duty, now deceased, in March, 1879, sold an undivided one-half interest in this land to Humberson Gilbert,

who paid him therefor, but that he failed to convey to Gilbert; that Gilbert afterwards sold his interest to John H. Duty, thus making him the owner of the entire tract; that Joel F. Duty and Gilbert both died intestate, and both left widows and children surviving them; that three of the seven children of Joel F. Duty, by deed of November 1, 1910, conveyed to the living children of John H. Duty, among the complainants, all of their interest in the tract, but that the widow and other four children of Joel F. Duty, deceased, had failed to do so; that John H. Duty, in his lifetime, conveyed to the Honaker Lumber Company the timber growing on the tract, with certain rights of way.

The object of the suit, as stated in the petition, was:

"For the purpose of extracting the title to any interest or claim to any part of this 200-acre tract of land lying partly in Dickenson county and partly in Buchanan county, that may now be in the four children and widow of Joel F. Duty, deceased, who did not sign the deed of November 1, 1910, and in the heirs at law of Humberson Gilbert, deceased, by reason of this land being owned at one time by Joel F. Duty, deceased."

They therefore make such of the other heirs at law of John H. Duty as are not parties complainant to the suit parties defendant, as well as the heirs at law of Joel F. Duty, deceased, the heirs at law of Humberson Gilbert, deceased, and the Honaker Lumber Company, as the owner of the timber, with certain rights and privileges. The object of the suit, therefore, was to divest the heirs at law of Joel F. Duty and the heirs at law of Humberson Gilbert of any title there may be in them to any part or interest in the land, and to perfect the same in the heirs at law of John H. Duty, deceased, subject to the rights of the Honaker Lumber Company.

The court dismissed the bill, cross-bill, demurrer, exceptions, motions to strike out, and objections to the various pleadings, and adjudged, ordered, and decreed that the cause be dismissed, each party to pay his own costs.

Referring, first, then, to the claim of the complainants in the original bill, it appears that the paper filed as the original deed from Aston, as the agent of Warder, is not the original of such a deed, no such conveyance is proved, and for the first time apparently in the briefs filed in this court, the claim here is that it was a clumsy copy of the original which has been lost or destroyed. There is no sufficient evidence to support the title of the complainants asserted in the bill under this alleged deed, which is thoroughly discredited. The effort to set up a title by adverse possession under this alleged conveyance by the complainants is also without

substantial support in the testimony, so that in our view there is no error in the decree as to the complainants in dismissing the original bill.

[1] The heirs of Joel F. Duty and Humberson Gilbert, who were made parties to the original bill, filed separate answers and cross-bills and each claimed for themselves the title to that part of the land known as the "tall timber" tract in Dickenson county. Those of Joel F. Duty's heirs who claim title allege that he sold this Dickenson county tract to Humberson Gilbert, and that Gilbert afterwards abandoned the sale and sold his interest back to Joel F. Duty. The heirs at law of Humberson Gilbert, however, claim that they are the true owners of this Dickenson county tract, because of an alleged deed from Thomas W. Davis, agent of the Warders, to Humberson Gilbert, and in addition that their ancestor acquired title by adverse possession. In addition to this W. R. and A. W. Davis, who were not defendants in the original bill, filed their petition, claiming the "Gum Hollow" or Buchanan county portion of the tract under a conveyance from the agent of the Warders in 1802, and alleging that this is the true title, because the pretended deed of 1872 to John H. and Joel F. Duty is a forgery. Then again comes one Minnie Humphreys Jones and files her petition, claiming title to the Dickenson county portion of the tract under a paper executed to her by Davis, agent of the owners, and also under a deed from Pobst, commissioner, conveying to her the unsold Warder land in Dickenson county. She also alleges that the pretended deed of 1872 to John H. and Joel F. Duty is a forgery, denies that T. W. Davis, as agent for the Warders ever conveyed the land to Humberson Gilbert, or that he ever had any title or right to it. Thus we have the heirs at law of John H. Duty, deceased, claiming all the land involved, that in Buchanan as well as that in Dickenson county; W. R. Davis and A. W. Davis claiming the "Gum Hollow" tract in Buchanan county, Minnie Humphreys Jones, the heirs of Joel F. Duty and the heirs of Humberson Gilbert all claiming the "tall timber" tract in Dickenson county.

Because the testimony upon which these various claimants, undertaking to sustain their title to the land in controversy may doubtless at some time be submitted to a jury for consideration, we refrain from expressing any opinion as to its probative value.

[2] The rule in cases of this sort has been so recently stated by this court in *Litz v. Rowe*, 117 Va. 752, 86 S. E. 155, L. R. A. 1916B, 799, that it is hardly necessary to do more than cite that case. Except when the relief which is authorized by Code 1919, § 6248, is sought, and in the absence of some peculiar equity courts of equity are without jurisdiction to settle disputes regarding the title and

boundaries of land. It is perfectly apparent from the recitals which we have made that there is a vigorous dispute as to the true ownership of the lands here in controversy. The petitions and cross-bills of those who were not parties defendant to the original bill should have been dismissed without prejudice. If they or either of them had the true title they would not be bound by any decree in the case. Not being parties to the suit their interests were in no way jeopardized, and they could not have been prejudiced by any decree entered in that case. An action of ejectment, under such circumstances generally affords a complete and adequate remedy for the assertion of a title or interest in land in this state.

Other cases supporting this view could be cited, but it is only necessary to paraphrase what is said in *Bailey v. Johnson*, 118 Va. 505, 88 S. E. 62. The circuit court, in the original suit in equity for the removal of a certain cloud alleged to rest upon complainants' title, was without jurisdiction in that cause to determine the question of title as between these several independent, distinct, and hostile claims. Such an independent and hostile claim, involving the whole property, and denying in toto and ab initio the title of the complainants, cannot be set up and adjudicated in a suit in equity. To permit this would authorize an adverse claimant to implead other claimants of the title in such a way as to substitute an equity suit for an action of ejectment.

As to the parties who were impleaded as defendants to the original suit, as it appears that they claim title under the same invalid deed under which the complainants claim, they were also properly denied any affirmative relief in this suit.

[3] Without intending to express any opinion as to the preponderance of the testimony, it appears to us that each of the adverse claimants was quite successful in showing the invalidity of the claims of each of the others. Like the lean cattle which Pharaoh in his dream saw emerge from the river, they have eaten the others up, but nevertheless they are themselves just as lean as they were at the beginning. If the allegations of the original bill had been proved, doubtless the equitable relief prayed for could have been afforded. As all of the parties to the original transactions are dead and there is no written evidence of value, any conclusion which the court might reach would necessarily be conjectural and founded upon random guess, rather than based upon any sufficient proof. When this is the case a court of equity invariably denies relief, because a just determination and settlement of the controversy is impossible. Essential allegations, which the parties to such a controversy cannot prove with reasonable certainty, cannot with-

out evidence be assumed by the court to be true. *Nelson v. Triplett*, 99 Va. 421, 39 S. E. 150; *Redford v. Clarke*, 100 Va. 115, 40 S. E. 630; *Hill v. Saunders*, 115 Va. 60, 78 S. E. 559.

Like the learned circuit judge, therefore, we find ourselves unable to determine these controversies under these pleadings and the evidence which was submitted. The true title can only be determined in an action or actions of ejectment, or possibly by suit in equity under Code 1919, § 6248. These remedies remain open to each of the claimants.

Affirmed.

BURKS, J., absent.

(131 Va. 401)

YOUNG et al. v. BOWEN et al.

(Supreme Court of Appeals of Virginia.
Sept. 22, 1921.)

1. Appeal and error ⇨1022(1)—Findings of master sustained by trial court not disturbed.

Findings of master on evidence taken before him concerning items in a suit to surcharge and falsify an ex parte account of an administrator, which are sustained by the trial court, will not as a rule be disturbed on appeal.

2. Executors and administrators ⇨516(6)—Evidence held insufficient to sustain charge against administrator.

In an action to surcharge and falsify an ex parte account of an administrator, evidence held insufficient to sustain a charge against the administrator made by the master.

3. Executors and administrators ⇨513(2)—Ex parte settlements of commissioner of accounts presumed correct.

In a suit to surcharge and falsify an ex parte account of an administrator, ex parte settlements of the commissioner of accounts are presumed to be correct until surcharged and falsified (Code 1919, § 5429), and not only the duty of specifying errors, but also the onus probandi, devolves on the party complaining.

4. Executors and administrators ⇨132—Administrator had no authority to construct storehouse.

An administrator has no authority to use funds of the estate to erect a storehouse upon land of the estate, and where he constructs such a building and it is burned, he is liable to the estate for the funds used in its construction, with interest.

5. Executors and administrators ⇨132—Administrator to be credited with income obtained from improper investment.

Where administrator without authority used funds of estate to erect a storehouse which was subsequently burned, in charging him with the amount of the funds thus diverted, with in-

terest, he should be credited with rents collected by distributees before the fire.

6. Executors and administrators ⇨516(7)—Administrator entitled to credit for item improperly charged against himself.

In a suit to surcharge and falsify the ex parte account of an administrator, the administrator should be credited with an item with which he had improperly charged himself in his ex parte settlement, where the mistake was called to the attention of the court by the administrator's answer, which he prayed to be read as a cross-bill.

7. Executors and administrators ⇨516(7)—Principal and surety ⇨194(1)—In action to surcharge account, widow, as administrator's surety, cannot obtain judgment against co-sureties until she has paid more than her share of the debt.

A widow who signs as surety on the bond of an administrator may obtain a judgment against the administrator in a suit by herself and distributees to surcharge and falsify an ex parte account of the administrator, but is not entitled to a judgment against her co-sureties until she has paid more than her part of the debt of the principal.

Appeal from Circuit Court, Scott County.

Action by Reese Bowen, guardian, and others against P. C. Young, administrator of the estate of J. F. Chesser, deceased, and others. Decree for plaintiffs, and defendants appeal. Reversed and remanded, with directions.

W. S. Cox and S. H. Bond, both of Gate City, for appellants.

Coleman & Carter, of Big Stone Gap, for appellees.

BURKS, J. This is a suit by the widow and distributees of J. F. Chesser to surcharge and falsify the ex parte accounts of P. C. Young, as administrator of the estate of the said J. F. Chesser. The cause was referred to a master to take evidence and restate the accounts, by a decree rendered in June, 1911, but the master did not make his report till September, 1917. To this report there were 16 exceptions by the administrator. At the September term, 1918, the circuit court overruled all of said exceptions, and entered the decree appealed from.

[1] The petition for the appeal assigns 14 errors to the rulings of the trial court, and some of the assignments embrace numerous items. Except as hereinafter stated, the findings of the master are approved. The findings of the master were based on the testimony of sundry witnesses, and it would not be profitable to discuss in detail the reasons for sustaining the findings of the master which were approved by the trial court. The evidence was taken by the master, and as to

many of the items was conflicting. In such case his findings sustained by the trial court will not, as a rule, be disturbed by this court. *Smiley v. Smiley*, 112 Va. 490, 71 S. E. 532, Ann. Cas. 1913B, 1159. But some of the findings of the master appear to be so plainly wrong that we cannot give them our approval.

The master charged the administrator with the price of a saw, \$125, and interest thereon \$126.25. It satisfactorily appears that this saw went with the sawmill as a part thereof, and the estate got the benefit of it in the price paid for the sawmill. While there is some slight evidence tending to show that the saw did not go with the mill, the great weight of the evidence is to the contrary, and there is no evidence that the administrator derived any benefit therefrom.

The administrator is also charged by the master with \$82.75 principal, and \$30.82 interest on the same, for excess payment to Elizabeth Chesser. The evidence to sustain this charge is the testimony of Elizabeth Chesser, is very brief, and is as follows:

"Q. 9. You speak of P. C. Young, administrator, having collected \$82 and some cents amount overpaid by him? You and P. C. Young, J. D. Carter, and Reese Bowen, guardian, went over the account of P. C. Young, administrator, with a view to making a settlement, and did not P. C. Young, Reese Bowen, guardian, come to Gate City and get the commissioner of accounts to make the settlement, and then reported to you that the amount overpaid was \$82.75?"

"A. Yes, sir; that is what they reported.

"Q. 10. Do you remember whether Reese Bowen, guardian, was present when you refunded to P. C. Young the amount you speak of?"

"A. P. C. Young owed me some; he retained the \$82.75 out of the amount he owed me. Reese Bowen was present when the settlement was made."

[2, 3] This was not sufficient to sustain the charge made by the master. It does not appear therefrom that the estate of the intestate was in any way affected by the refund. Furthermore, the settlement was made by the commissioner of accounts, and it is to be presumed that if it was proper to make a charge therefor against the administrator he would have done so. The ex parte settlements of the commissioner of accounts are presumed to be correct until surcharged and falsified (Code, § 5429), and "not only the duty of specifying errors, but also the onus probandi, devolves on the party complaining. *Peale v. Hickie*, 9 Grat. [50 Va.] 445; *Corbin v. Mills*, 19 Grat. [60 Va.] 438." See notes to section 5429 of Code.

[4, 5] The master failed to allow the administrator any credit for rent received by the widow and the guardian of the infant

distributees from a storehouse erected by him out of funds of the estate on land of the decedent. The administrator, without authority, used funds of the estate to erect the storehouse, which was subsequently destroyed by fire. He had no authority to thus use the funds of the estate, and the master properly charged him therewith, but before the storehouse was burned the widow and guardian collected rents therefrom amounting to \$401.25. To this extent they profited thereby, and the administrator should have had credit therefor. Counsel for the appellee surmise that the master did not compute interest on the amount invested during the time that the widow and guardian were collecting the rents, but there is no evidence of this fact. It is a mere surmise. The administrator should be charged with the principal and with interest on the fund diverted from the date of the diversion, and credited by the \$401.25 collected from the rents.

[6] The master failed to credit the administrator with \$518.83 principal and \$50.06 interest, with which he had been improperly charged in his ex parte settlement. This mistake had been called to the attention of the court by the administrator's answer, which he had prayed to be read as a cross-bill, and which was not answered by the complainants in the original bill. The item appears in the ex parte settlement as follows:

"1902 Sept. 15th to amt. of acct. of J. F. Chesser due Chesser and Young for estate \$518.83, interest on same April 24, 1904, \$50.06."

It seems very plain that a debt due by Chesser could not be charged to his administrator as an asset received by the latter. The cause should be referred back to a master to make these corrections.

Assignments of error 12, 13, and 14 are as follows:

"(12) The court erred in giving judgment against your petitioners, W. P. Peterson and I. P. Robinett, they only being cosureties on the bond of P. C. Young along with Elizabeth Chesser, one of the plaintiffs in the case. Under the pleadings in the case and the proof it was error to give judgment against your two petitioners.

"(13) Your petitioners I. P. Robinett and W. P. Peterson allege and represent that there is error against them, even if there is no other error in the case, in rendering judgment against them in favor of Reese Bowen, guardian, and not also including Elizabeth Chesser along with them in said judgment. Elizabeth Chesser was cosurety with your petitioners, she was liable jointly with them on the bond, and it is certainly error to give judgment against two of the sureties on the bond and not include all three when they are all before the court.

"(14) The court erred in rendering judgment against your petitioners I. P. Robinett and

W. P. Peterson in favor of Elizabeth Chesser for the full amount found due her. If Elizabeth Chesser is due the amount found by the commissioner to be due to her, your petitioners as co-sureties with her would only be liable to Elizabeth Chesser for two-thirds of the amount due her. Here we have a judgment against two co-sureties in favor of the third co-surety for the full amount of the debt found to be due the co-surety by the principal in the case."

In reply, counsel for the appellees say:

"We admit that the lower court erred in the particulars stated in these assignments of error by appellants. But we assume that this honorable court will in this respect modify the decree of the lower court and in all other respects affirm the same."

[7] We are unable to make the desired correction in the present condition of the record. J. F. Chesser died intestate leaving a widow and six children, and his widow is one of the three sureties on the administrator's bond. His widow, three adult children, and the guardian of the other three are the complainants in this suit. All of the children are now of age, and each is entitled to a decree for his or her share of the estate. The record does not show what each child has received. It will be necessary to restate the account of the administrator to ascertain with what sum he is chargeable in conformity with this opinion, and also to state a distributees' account to ascertain definitely how the balance found against the administrator is to be distributed among the several distributees. When these facts are ascertained, each child will be entitled to a decree in his or her favor against the administrator and the sureties on his bond for the amount ascertained to be due to him or her; but the widow, Mrs. Elizabeth Chesser, is not entitled to any decree against her co-sureties in the present state of the record. It may be that her co-sureties will have to pay the full amount of the decrees in favor of the children, and this may result in their having a claim against her, instead of being indebted to her. She can have a decree against the administrator but not against her co-sureties at the present time. A surety is not entitled to a judgment against his co-surety until he has paid more than his part of the debt of the principal. *Davies v. Humphreys*, 20 Eng. Rul. Cas. 632; 21 R. O. L. 1134; 1 Barton Law Fr. (2d Ed.) 106, and cases cited.

The decree of the circuit court will be reversed, and the cause remanded, with direction to make the inquiries hereinbefore mentioned, and to settle the rights of the parties in accordance with the views hereinbefore expressed.

Reversed.

GOINS v. GARBER.

(131 Va. 59)

(Supreme Court of Appeals of Virginia. Sept. 22, 1921.)

1. Costs \S 134—Refusal of late motion to require nonresident complainants to increase security for costs not unreasonable discretion.

The court having in the first instance complied with the mandatory provisions of Code 1904, \S 3589, by requiring complainant, on suggestion of his nonresidence, to give security for costs, and defendant not having then objected to the amount of the bond, the court was required only to exercise reasonable discretion as to any subsequent motion for increase of security; so that such motion being made when the case was about to be disposed of on the merits, and not passed on till after decisions on the merits against defendant, refusal of the motion was reasonable.

2. Equity \S 276—No abuse of discretion in rejecting answer to amended bill.

Where amended bill was filed merely to bring in unknown heirs, it was not an abuse of discretion to reject answer of the original defendant to the amended bill, it being merely an amplification of his answer to the original, bringing in no matter of defense not in general terms embraced in the first answer, and being unnecessary.

3. Appeal and error \S 1032(1) — Appellant must show error was prejudicial.

Appellant, the original defendant, complaining of directions to the commissioner to summon before him any one that he deems a necessary party, must show, not only error therein, but that the error was prejudicial to him.

4. Infants \S 77—Guardian ad litem properly appointed for infants appearing among unknown heirs named as defendants.

It appearing that infants were among the "unknown heirs" named as defendants in an amended bill for specific performance, it was proper for the court, under Code 1919, \S 6098, to appoint a guardian ad litem to defend their interests.

5. Vendor and purchaser \S 131—Title by adverse possession enough.

It is enough that a vendor has a good title by adverse possession.

6. Vendor and purchaser \S 172 — Purchaser chargeable with interest after maturity of noninterest-bearing notes.

Where there are no serious defects in a vendor's title, and the purchaser has been in possession from the giving of title bond, he is properly charged with interest from maturity of noninterest-bearing purchase-money notes.

7. Appeal and error \S 1171(1)—Assignment held frivolous and de minimis.

The assignment by appellant, defendant in suit by vendor against purchaser for specific performance of a contract of purchase of 107 acres of land for \$300, that the court erred in awarding writ of possession against W., a person whose claim to and possession of less than an acre of the land began after defendant pur-

chased and took possession, must be regarded as frivolous and de minimis, defendant not asking for rescission, and the only possible relief that he could claim, even if W. had title, being an insignificant abatement of purchase money.

8. Appeal and error 984(1)—Decree, otherwise affirmed, not interfered with in respect to costs except for palpable error.

A decree, affirmed in all other respects, will not be interfered with in respect to costs, a matter resting in the lower court's discretion, unless there is palpable error in that respect.

Appeal from Circuit Court, Lee County.

Suit for specific performance by Elkanah Garber against J. H. Goins. From an adverse decree, defendant appeals. Affirmed.

L. T. Hyatt, of Jonesville, for appellant.
Jas. W. Orr, of Jonesville, for appellee.

KELLY, P. A sufficient preliminary statement of the case is this: On the 18th of December, 1907, Elkanah Garber executed a title bond to J. H. Goins whereby he bound himself to convey to Goins on or before the 17th of December, 1908, a tract of land containing 107 acres. By the terms named in the bond the sale was made by the boundary and not by the acre, and the purchase price was \$300, paid and to be paid as follows: \$50 cash and \$50 each succeeding year for five years, the deferred payments being represented by five notes executed by Goins. The bond specified that Garber should make to Goins "a good and sufficient deed with covenants of general warranty and free from incumbrances."

Goins entered at once into possession of the land, and (with the exception of two small portions known as the Rhoda Lawson land and the Null Wallen land hereinafter mentioned) has remained in possession ever since, but he made no further payments on the purchase price.

In July, 1916, Garber filed his bill to specifically enforce the contract. He had not theretofore tendered Goins a deed, but alleged that he had not done so because no further payments had been made on the price, and he offered and filed a deed with his bill. Goins answered, setting up several minor defenses, but relying principally upon the allegation that Garber did not have a good title to the land. He did not ask for a rescission of the contract, but merely that Garber be required to perfect his title before any decree should be rendered to enforce the payment of the purchase money. There was an amended bill and an answer thereto, both of which will be more particularly mentioned later.

The cause was referred to George P. Cridlin, one of the commissioners of the court, to report on the state of the title, and he

returned first a preliminary and later a final and very full and complete report. Upon the coming in of the latter, the court entered a decree confirming the same, disposing of all the questions in the case, and directing a sale of the land, unless within 30 days thereafter Goins should pay the balance of the purchase money and the costs of the suit. From that decree this appeal was taken.

[1] 1. The first assignment of error is that the court improperly overruled a motion by the defendant to require the complainant, who was a nonresident, to give an additional bond to secure the costs. The assignment is without merit. The motion in question was made after the cause was fully matured for hearing on the merits and at the term at which the final decree was entered. At a very early stage of the case the defendant had, pursuant to the statute, Code 1904, § 3539, suggested the nonresidence of the complainant, and the court had accordingly ordered the latter to execute a cost bond in the penalty of \$50. This bond was duly given, and no objection was then made as to the amount of the penalty, nor does it appear that any question was raised in that respect until four years later when the case was about to be disposed of on its merits. The court, having complied with the mandatory provisions of the statute in the first instance, was only bound to exercise reasonable discretion in regard to any subsequent motion for increase of the security. The motion was not passed on until after the court had decided the merits of the case adversely to the defendant, and its refusal of the motion by the same decree which disposed of all the other questions was a perfectly reasonable and natural consequence.

[2] 2. The next assignment charges that the court erred in sustaining the complainant's exceptions to the defendant's answer to the amended bill.

The answer to the original bill, after a general denial of title in the complainant, undertook to point out certain particular defects therein. When the cause came on to be heard the first time on the original bill, the answer thereto, and certain depositions, the court deemed it necessary and accordingly directed that the complainant should amend his bill to bring in new parties, in whom it appeared that the legal title to the land, or some part thereof, might be outstanding. This action of the court was in direct furtherance of the course suggested by the defendant's answer, and was eminently proper. In plain compliance with this direction an amended bill was filed, bringing in new parties, all of whom, with the exception of one man whose name was given, were described in the decree order-

ing the amendment merely as the "unknown heirs" of certain deceased persons therein named, and by proper allegations the latter were made defendants to the amended bill under the general designation of "unknown heirs" of the deceased persons aforesaid.

The amended bill was filed on the 28th of September, 1916. At the September term, 1920, after all the evidence had been taken, the final report of Commissioner Cridlin filed, and the cause fully prepared for hearing, the defendant tendered and was allowed to file what he termed an answer to the amended bill. This paper was prepared and offered by counsel who had recently come into the case in place of the attorney originally employed, whose business had called him permanently to another jurisdiction. It was an amplification of the first answer, but it was not necessary. There was no matter of defense therein which was not in general terms embraced in the first answer and in the issue theretofore made up and referred to the commissioner. Under these circumstances there was no error in rejecting the answer, which in effect was done by sustaining the exceptions thereto. Applications to amend answers rest in every case in the sound discretion of the court. 1 Bart. Chy. Pr. p. 445. In our opinion there was no abuse of discretion in this instance.

[3] 3. The third assignment of error is as follows:

"The circuit court erred in directing Geo. P. Cridlin, commissioner, to report upon any other matter than the state of the title to the land in controversy, and particularly in directing the said commissioner to summon before him any person, or persons, whom he should deem necessary parties to the cause."

It is conceded that the reference to a commissioner for the purpose of having a report upon the title was entirely proper, but the defendant contends that the following provision in the decree was erroneous:

"Said commissioner will also ascertain and report whether or not all necessary parties are before the court that should be made parties in the cause, and should he find that any necessary party is not before the court he will summon such party before him as commissioner, either by personal service or by publication in some newspaper in the manner and for the length of time that orders of publication are made against nonresident defendants."

When the appeal was granted in this case we were disposed to think that this assignment raised a very interesting question of practice, namely, the question as to the binding effect of a decree in a case of this sort where an interested party not named in the pleadings, and who does not at any time voluntarily appear, is brought into the case, and his rights adjudicated upon no other

process than a notice given by a commissioner acting in pursuance of a general direction of the court to convene any necessary parties not theretofore named as such in the proceeding. Upon more mature consideration of the very voluminous record, however, we find that the question is not material here, and that it is entirely moot so far as the decree complained of is concerned.

The commissioner, in compliance with the provision of the decree above quoted, after much care and labor, compiled a long list of persons who were probably interested in the title to the land. This list in the main was comprised of persons referred to in the bill as "unknown heirs." By this general classification they had already been made parties to the proceeding, and an order of publication had been made and published against them as such. The statute (Code 1904, § 3230) expressly authorizes this course, and no objection was made to the sufficiency of the bill or publication in that respect.

The commissioner published a notice, as directed by the decree, addressed to all the persons named in the list compiled by him as aforesaid, and in addition to such publication caused the notice to be served personally on a number of the individuals named therein.

It seems altogether probable that every person who could be regarded as a necessary party to the suit (except possibly Rhoda Lawson, who appeared and whose interest was recognized and properly disposed of, and Null Wallen, whose claim is hereinafter dealt with) was embraced either by name or under the general designation of "unknown heirs." The notice, therefore, as to them was given in the manner authorized by the statute, Code 1904, § 3321. This section does not limit the class of cases in which a court of equity may direct that notice be given for hearings before its commissioners. *Hill v. Bowyer*, 18 Grat. (59 Va.) 364, 380. Whether there were some persons included in such publication or personally served who were not in any way made parties to the bill and did not appear, and, if so, how far they were bound by the commissioner's report and the decree confirming the same, are questions which we need not decide. No such person (unless it be Null Wallen) is pointed out to us in the assignment under consideration, and no harmful error on account of any such fact is specified. It is incumbent upon an appellant, not only to show error in the proceeding complained of, but to show also that the error was prejudicial.

[4] 4. The preliminary report of the commissioner showed that several persons named in the aforesaid list of interested parties were infants, and the court appointed a guardian ad litem to defend their interests. Accordingly the guardian filed his answer in

that capacity, and also an answer for the infants by himself as guardian. It is alleged that this was error because the infants in question had not been made parties in the suit. This position is not tenable. These infants were among the "unknown heirs" named as defendants in the amended bill, and the action of the court was therefore entirely regular and proper. See Code 1919, § 6098.

[5] 5. The fifth assignment of error is that the court erred in holding that Elkanah Garber had such title to the land in controversy as he contracted to convey, and therefore erred in decreeing specific performance.

The finding and adjudication of the court upon this point as expressed in its decree was as follows:

"That while the complainant, at the time he contracted said land to the defendant, J. H. Goins, had no legal title thereto, and has not, since that time, acquired such legal title, yet his claim thereto by reason of the turning over to him by A. B. Smith and Wm. Goins of the title bond executed to them therefor by John M. Tate, coupled with his possession thereof to the date of said contract and the possession of the defendant since the date of the said contract, constitutes such title as he contracted to convey, namely, 'a good and sufficient deed with covenants of general warranty, and free from incumbrances,' and this notwithstanding the fact that the said John M. Tate, who executed the said title bond to the said A. B. Smith and Wm. Goins, never had any legal title to the said land."

It is said in the brief of counsel that this language of the court, showing that the complainant had only a possessory title, demonstrates the error complained of. This is altogether a mistaken idea. The evidence warranted the court in finding that the complainant had acquired a good title by adverse possession, and his title therefore was as free from valid objection as if it had been acquired by a deed from a former true owner, or by a grant from the commonwealth. *McClanahan's Adm'r v. N. & W. R. Co.*, 122 Va. 705, 716, 96 S. E. 453.

[6] 6. Error is assigned on the ground that the court overruled the defendant's exceptions to the commissioner's report.

The first two exceptions involve legal questions of no special interest or novelty, and pecuniary amounts which are de minimis, and as to these we content ourselves by saying merely that the exceptions were properly overruled. The only other exception was that the commissioner improperly allowed interest on the first three of the purchase-money notes from their maturity. The title bond from Garber to Goins provided for five notes of \$50 each, "to become due in one, two, three, four and five years, the first three of said notes without interest, and the other two and last of said notes to bear interest from date." Of course the commissioner was right in charging interest on the notes after maturity,

unless there were some peculiar circumstances in the case to take these notes out of the general rule that interest follows the principal after maturity "as the shadow follows the substance." It is contended that there are such circumstances, and that no interest should be charged "until the complainant procured a good title and delivered a deed in accordance with the stipulations of said title bond." It turns out as a matter of fact that there were no serious defects in the title, and, moreover, the defendant has been in possession of the land ever since the title bond was given. Under these circumstances it was clearly right to charge him with the interest. See *Barnett v. Cloyd*, 125 Va. 546, 100 S. E. 674; *Cohen v. Jenkins*, 125 Va. 635, 100 S. E. 678.

[7] 7. The seventh assignment is:

"That the court erred in the decree of September 13, 1920, in awarding a writ of possession against Null Wallen for the 147 square poles of land of which he was then in possession."

There is nothing in the record to show that Null Wallen had any valid claim to this less than one acre of land in controversy. He does not appear to have been a party to the bill by name or by any general designation of classes, but he was served with notice by the commissioner, and the commissioner reported that "He did not appear and would not appear," that the commissioner was therefore unable to obtain any evidence of Wallen's claim, and accordingly reported that Wallen had no valid claim, and that a judgment should go against him for the land claimed by him.

Whether this action bound Wallen or not, it is evident that the assignment must be regarded as frivolous and de minimis. Wallen's claim and possession began after the land had been sold to and had been taken possession of by the defendant. The latter is not asking for rescission, and even if it were conceded (instead of being otherwise reported by a very accurate and careful commissioner) that Wallen had title to the small piece of land claimed by him, the only possible relief which the defendant could claim would be an insignificant abatement of the purchase money.

[8] 8. The eighth assignment is that the court erred in rendering judgment against the petitioner in favor of the complainant for costs.

This assignment does not involve the general costs of this suit, but only a very small portion thereof accruing at an early stage of the case. The question of costs was one resting in the discretion of the lower court, and we see no evidence here of an abuse of that discretion. When this court affirms a decree in all other respects, it will not interfere with the decision in respect to the costs of the cause unless there is palpable error in that

particular. *Wimblish v. Blanks*, 76 Va. 365, 369; *Williams v. Bond*, 120 Va. 678, 689, 91 S. E. 627.

The decree complained of is affirmed.
Affirmed.

(89 W. Va. 199)

FISHER v. FISHER et al. (No. 4274.)

(Supreme Court of Appeals of West Virginia.
Oct. 4, 1921.)

(Syllabus by the Court.)

1. **Damages** ¶94—Compensatory damages must be considered in fixing amount of punitive damages.

Punitive or exemplary damages should not be awarded in any case where the amount of compensatory damages is adequate to punish the defendant; and in a case where such compensatory damages are not adequate for the purpose of punishment, only such additional amount should be awarded as, taken together with the compensatory damages, will be sufficient therefor.

2. **Damages** ¶215(1)—Instruction that jury may allow punitive damages in addition to compensatory damages held error.

An instruction should not be given which directs the jury that, if they are of opinion to award punitive damages, they may allow the same in addition to the damages to which they find the plaintiff to be entitled as compensation.

3. **Libel and slander** ¶124(7)—Jury should be instructed to consider provocation in mitigation of damages.

In an action for insulting words, it is proper for the jury, in mitigation of damages, to consider the provocation under which the words were uttered produced by conduct on the part of the plaintiff, and an instruction offered to this effect should be given.

(Additional Syllabus by Editorial Staff.)

4. **Libel and slander** ¶124(1)—Jury were properly told that statute was applicable to women as well as men.

It was proper for the court to tell the jury that the statute under which an action was brought for insulting words was applicable to women, as well as men; the defendant being a woman.

5. **Appeal and error** ¶1064(1)—Trial ¶243—Instructions in slander case as to construction of words held not necessarily conflicting, but harmless error, if conflicting.

In action for insulting words, an instruction that the jury should give them their ordinary and popular meaning, and another that they must so construe them unless used in a different sense, held not necessarily in conflict, but, if conflicting, harmless, where applied to the facts in the case, both meant the same.

Error to Circuit Court, Wood County.

Action by Cora E. Fisher against May H. Fisher and another. Judgment for plaintiff, and defendants bring error. Reversed, verdict set aside, and cause remanded for new trial.

F. P. Moats, Reese Blizzard, and C. M. Hanna, all of Parkersburg, for plaintiffs in error.

Robert B. McDougale, C. N. Matheny, and H. D. Matthews, all of Parkersburg, for defendant in error.

RITZ, P. In this action to recover damages for insulting words, the jury rendered a verdict in favor of the plaintiff for the sum of \$1,000, upon which judgment was rendered, to review which this writ of error is prosecuted.

The plaintiff, Cora E. Fisher, and the defendant, May H. Fisher, married brothers. At the time of her marriage the plaintiff was a widow, having three children of her own, and her husband was a widower, having four children. Since their marriage five children have been born to them. One of the children of the plaintiff by her former marriage and one of the children of her husband by his former marriage were in the military service during the late world war, and both of these boys were killed in action, one in the latter part of October, 1918, and the other on the 8th day of November, 1918. One of the children of the plaintiff by her second husband died of asthma in May, 1917, and another of their children was burned to death in the month of May, 1920, at the home of a neighbor. This latter child was of very tender years, and his clothes seem to have become ignited while playing with matches with the children of a neighbor family at their home. These facts are stated as it is insisted they have a material bearing upon the case, and made the words used of a peculiarly aggravating nature.

The occurrence giving rise to this litigation happened on the 18th day of June, 1920. According to the contention of the plaintiff, on that day Mrs. Homer Wenmouth came to her house for the purpose of receiving some strawberries which she had theretofore purchased. The plaintiff says that she went with Mrs. Wenmouth to the back of the house to get the strawberries, and after delivering them Mrs. Wenmouth started to return to the street by the way she had come, when plaintiff remarked to her that she might walk across the lawn, a nearer way, to which her visitor replied that some people would not like others to walk on their grass, to which the plaintiff replied that she did not care. but it would be different if it was on the next lawn, the next lawn belonging to the residence of the defendants. The defendant,

May Fisher, seems to have taken offense at this time, and addressed to the plaintiff some excited remarks which the plaintiff did not understand, and upon inquiring of the said May Fisher to whom she was speaking, and being informed that she was talking to plaintiff, plaintiff asked her to come closer, so that what she said could be heard; that the parties thereupon approached each other, and when they came close together the defendant, May Fisher, said to the plaintiff in an angry and excited tone:

"You let your children die like dogs. Yes, indeed, madam, every one of them. If you would stay in the house, and not stand around out on the lawn and point me out in overalls, your children wouldn't die like dogs."

This language was resented by the plaintiff, and after some criminations and recriminations the parties separated. The plaintiff's contention in regard to the language used by Mrs. May Fisher is borne out by Mrs. Wenmouth, who was present, and by Lula Wagnor and James Shepherd. The defendant admits the altercation, but denies that she used the language attributed to her by the plaintiff. She says that all she said was that the plaintiff neglected her children, and asserted on the witness stand that she sticks to that statement, and she contends that this statement was occasioned by the plaintiff pointing to her while she was in her back yard clad in overalls. As before stated, the jury's verdict was in favor of the plaintiff.

The defendants contend that the court erred in giving to the jury certain instructions on motion of the plaintiff, in refusing to give instruction No. 2 offered by the defendants, and that the damages awarded are excessive.

[4] The defendants insist that the court erred in giving to the jury plaintiff's instructions Nos. 2, 3, 4, and 6. Instruction No. 2 says that there is nothing in the antidueling law, or any other law, that would prevent the plaintiff from recovering because the defendant who used the alleged insulting words is a woman. It is not claimed that this instruction is vicious as a proposition of law, but that it was without application to the case. It occurs to us that this criticism is without merit. The defendant who used the alleged insulting words in this case is a woman, and it was entirely proper for the court to tell the jury that the statute under which the suit was brought was applicable to women as well as to men.

[5] Defendants claim that instructions 3 and 4 are inconsistent and contradictory. Instruction No. 3 is to the effect that, if the jury believed the words used, from their usual construction and common acceptation, to be insulting, and to tend to violence and a breach of the peace, they were actionable

words, unless it appeared from the manner of speaking them, and the circumstances which occasioned their use, that they were used in a different sense; and instruction No. 4 tells the jury that, in determining whether or not the language complained of is insulting, the words must be construed in the plain and popular sense in which the rest of the world would naturally understand them. The conflict in these two instructions, according to the contention of the defendants, is that in the latter the jury is told that, in construing the words, they must give them their ordinary and popular meaning, while in the former they are told that they must give them this meaning, unless it appears that they were used in a different sense. This conflict is more apparent than real, however, when we apply these instructions to the facts in this case. Instruction No. 3 was taken from the case of *Michaelson v. Turk*, 79 W. Va. 31, 90 S. E. 395, in which the defendant attempted to show that, while the words in their ordinary sense were very insulting, they were used at the time in a figurative sense, which was understood by all of the parties present. In this case there is no attempt to show that the language used was intended to convey any different meaning from what the words would import, so that the qualification of instruction No. 3, in regard to construing them in another sense in case the jury found that they were used in a different sense from what they would ordinarily be understood, was unnecessary, and should not have been given in this case. However, this qualification of the instruction was entirely harmless, inasmuch as there was no evidence before the jury to which it could be applied. These instructions, as applied to the facts in this case, mean exactly the same thing, and there was, of course, no necessity for giving more than one of them.

[1] One of the principal contentions of the defendants is that the court erred in giving instruction No. 6, which is as follows:

"The court further instructs the jury that, in determining the amount of damages to which the plaintiff may be entitled, if they believe she is entitled to recover under all the instructions, they shall take into consideration all the facts and circumstances of the case as disclosed by the evidence, the nature and character of the charges, the language in which they are expressed, and its tendency, the occasion on which they were published, the extent of their circulation and probable effect upon those to whose attention they came, and their natural and probable effect upon the plaintiff's personal feelings, and her standing in the community in which she lives; and, if under the other instructions herein she is entitled to recover, they should award her such sum by way of damages as will fairly and adequately compensate her: (a) For the insult to her, including any pain and mortification and mental suffering inflicted upon her; and (b) for any injury to her reputation as

a woman and citizen. And if the jury believe, from all the evidence in this case, that the acts complained of were influenced by actual malice and a willful design to injure or oppress the plaintiff, she may recover in this action, in addition to such damages as those mentioned above, punitive or exemplary damages; that is to say, that the jury will not be limited in the amount of its verdict for the plaintiff to compensation to her for the actual damages sustained as above indicated. They may give her such further damages as they may think right, in view of all the circumstances of the case, as a punishment for the defendant, and as a salutary example to others to deter them from offending in a like manner, but said damages are not to exceed \$25,000."

It is insisted that this instruction violates the rule well established by this court for awarding punitive damages as announced in the cases of *Clalborne v. Ry. Co.*, 46 W. Va. 363, 33 S. E. 262, *Allen v. Lopinsky*, 81 W. Va. 13, 94 S. E. 369, *Hess v. Marinari*, 81 W. Va. 500, 94 S. E. 968, *Pendleton v. Ry. Co.*, 82 W. Va. 270, 95 S. E. 941, and *Goodman v. Klein*, 87 W. Va. 300, 104 S. E. 726, in this: That it directs the jury that they may allow such punitive damages in addition to the compensatory damages. The doctrine announced in the above cases, that punitive damages can only be awarded to a plaintiff when the compensatory damages are not sufficient for the purpose of punishment, and this only to the extent that, taken together with the compensatory damages, the purpose of punishment will be met, is not questioned, but it is insisted by the plaintiff that this instruction is not susceptible of the interpretation placed upon it by the defendants, and the case of *Turk v. Ry. Co.*, 75 W. Va. 623, 84 S. E. 569, *L. R. A. 1915E, 145*, is relied upon to justify it. It will be observed from an examination of the instruction given in this case that it does tell the jury that the punitive damages allowed, if they are of opinion to allow any, are to be in addition to the compensatory damages; and, again, in the instruction they are told that they may give such punitive damages as further damages, clearly to our mind conveying the impression to the jury that, in case they were of opinion to give punitive damages, the same would be in addition to the compensatory damages to which they might find the plaintiff entitled. The instruction given and approved in the case of *Turk v. Ry. Co.*, supra, did not use this language. The giving of punitive damages, as we have repeatedly held, is a matter purely discretionary with the jury. Even though the case may be one loudly calling for punishment, the jury may deny punitive or exemplary damages. As we have said in other cases, all damages are punitive so far as the defendant is concerned. He gets nothing of substance in exchange for the recovery against him,

and when the jury are awarding damages for the purpose of punishment it must be borne in mind that the plaintiff is receiving something to which he is not entitled. This is the basis of the rule established in this jurisdiction that no more damages in the aggregate can be awarded in a case like this than will be sufficient to accomplish the purpose of punishment, when the compensatory damages are found to be insufficient for that purpose.

[2] An instruction should not be given which, in effect, tells the jury that if they find damages by way of punishment they may add the same to the amount found by them as compensatory damages, and return a verdict for the aggregate amount. This would be punishing the defendant twice for the same thing. We are of opinion that this instruction is amenable to the criticism made against it by the defendants, and that the court erred in giving the same.

[3] Instruction No. 2 offered by the defendants, and refused, is:

"If the jury believe from the evidence that the words complained of were the result of passion, and were used while the parties were engaged in a heated altercation, or quarrel, and if they further believe that in this quarrel May H. Fisher was provoked to use the words complained of by insulting language addressed to her by the plaintiff Cora E. Fisher, then these facts shall be taken into consideration by you in arriving at your verdict."

It will be observed that this instruction directed the jury to take into consideration any provocation the defendant May Fisher may have had when she used the words complained of because of offensive language used to her by the plaintiff. It is not contended that this is not a correct proposition of law. There is no doubt but that in determining the amount of damages to which a plaintiff is entitled in a suit like this the jury may consider the provocation under which the defendant used the words resulting from offensive language used by the plaintiff. *Alderson v. Kahle*, 73 W. Va. 690, 80 S. E. 1109, 51 L. R. A. (N. S.) 1198, *Ann. Cas. 1916E, 561*. It is said, however, that this instruction is covered by instruction No. 1 given on behalf of the defendants, and in a measure this is true; but instruction No. 1 was given upon the theory of justification of the defendants, and not upon the theory of mitigation, while instruction No. 2 is based upon the idea that these things may be considered to mitigate the damages. In this view both instructions should have been given. The jury did not consider the facts proven by the defendant as sufficient for justification, but if this instruction No. 2 had been given they might have considerably mitigated the damages because of the plaintiff's conduct.

It results from what we have said that the judgment will be reversed, the verdict of the jury set aside, and the cause remanded for a new trial.

(89 W. Va. 155)

DOWNS v. DOWNS et al. (No. 4278.)

(Supreme Court of Appeals of West Virginia.
Oct. 4, 1921.)

(Syllabus by the Court.)

1. Deeds ⇐54—Not effectual to vest title until delivered.

An instrument purporting to be a deed for land, though duly signed and acknowledged by the grantor and by him caused to be recorded, is not effectual to vest title in the grantee unless and until it is delivered to him by the grantor.

2. Deeds ⇐56(1)—Actual or constructive delivery will vest title.

The delivery may be actual or constructive, and, if either, the title in the land conveyed will vest in the grantee.

3. Deeds ⇐194(1)—Facts concerning execution and record, particularly grantor's admissions, may warrant presumption of intended delivery.

The facts directly or collaterally connected with the signing, acknowledgment, and recordation of an instrument purporting to be a deed for land may in some circumstances warrant the presumption of an intent on the part of the grantor to deliver the deed, especially so when they are reinforced by the admission of the grantor of the grantee's rights under the conveyance.

4. Deeds ⇐194(1)—Facts sufficient to warrant presumption of delivery stated.

Among such circumstances are the execution of a deed by the grantor to his son, including its acknowledgment and delivery for record, its retention by the recording officer for a long period of years, the grantee having died in the meantime, the grantor's avowed purpose being to induce the son to abandon employment elsewhere and return to the land, improve and cultivate it for the common benefit of both parties thereto, and the response of the son to the inducement, his return to and improvement and cultivation of the land, the erection by both of a residence on the land and its occupancy by the grantee for many years, in this instance 15, though not consecutive, with the apparent knowledge and acquiescence of the father, recordation of the deed, and his expressed recognition of the grantee's rights under the conveyance.

5. Deeds ⇐208(6)—Facts held to indicate grantor's intention to deliver and grantee's intention to accept conveyance.

The acts of a grantor, a father, in the execution and recordation of a deed, purporting to vest in the grantee, his son, without his knowledge, title to an undivided moiety of land for the avowed purpose of inducing the gran-

tee, then employed elsewhere, to return to the land, improve and cultivate it, and the acts of the grantee in reliance upon such inducement, considered together, disclose an intention on the part of the grantor to deliver, and upon the part of the grantee to accept the conveyance.

6. Deeds ⇐194(1)—Presumption of constructive delivery is not conclusive.

The presumption of constructive delivery of such an instrument is not conclusive, but may be rebutted by evidence showing either nondelivery by the grantor or nonacceptance by the grantee.

7. Deeds ⇐194(1)—Grantor must rebut presumption of delivery.

To rebut such presumption, and it may be rebutted, the burden rests upon the grantor; but to have that effect the proof must be certain, competent, and demonstrative.

8. Witnesses ⇐159(8)—Grantor may not testify to deceased grantee's repudiation of conveyance.

The grantor is not competent, according to section 23, c. 130, Code (sec. 4879), to prove repudiation of the conveyance by the grantee; he being dead when the testimony is given.

Appeal from Circuit Court, Doddridge County.

Action by Austin Downs against Effa L. Downs and others. From a decree canceling deed as a cloud on plaintiff's title, the defendants appeal. Reversed, and bill dismissed.

J. O. Wilcox and John J. Ingle, both of West Union, for appellants.

J. V. Blair, of West Union, for appellee.

LYNCH, J. The decree reviewed upon this appeal canceled a deed as a cloud upon plaintiff's title to an undivided moiety of a tract of 100 acres of land owned by plaintiff in Doddridge county, on which he has resided since he acquired it by purchase in 1877. The grantee, John S. Downs, is his son, and the defendants are the son's widow and heirs at law, he having died intestate before the institution of this suit.

The deed bears the date of September 27, 1893, as do also the certificate of acknowledgment and the memorandum of the clerk admitting it to record in the proper office of Doddridge county. If it lacked anything essential to complete the conveyance, it was the failure to deliver it then or afterward, directly or constructively, to the grantee. Whether it was or was not delivered in either manner is, as we apprehend, the chief question to be solved upon this investigation; and its proper solution depends upon the following facts and circumstances:

As appears from the face of the deed, the consideration for the conveyance was \$400, one-half of it cash, the receipt of which is

therein acknowledged, and two notes in equal amounts, payable in 6 and 12 months, with interest, were given for the residue and payment secured by a lien retained in the deed. The grantee was not present at any time during the execution of the deed and its delivery to the clerk for recordation on the same day. As at that time he was, and theretofore had been, in Marion county, he could not then have paid the \$200 receipted for or executed the notes described in the deed. It seems clear, at least the plausible inference is, that he had no knowledge or information of his father's intention to convey him an interest in the land until some time after the execution and recordation of the deed; the interval being of brief duration. So that, if the son did pay any part of the consideration in cash and execute notes for the residue, he did neither on the date of the deed, but may have done so either before or afterwards. The plaintiff and J. V. Blair, who as an attorney at law prepared it and the notes, and as a notary public certified the acknowledgment, were the only persons present at the time of the execution of the instrument, and they and the clerk when it was delivered to the latter for recordation.

The deed remained in the office of the clerk of the county court of Doddridge county from the time it was delivered to him until its redelivery, May 8, 1919, to the plaintiff accompanied by Blair as his counsel, and the notes in the possession of the plaintiff from the date of their preparation until they were exhibited with the bill without alteration or change in form or appearance and with no signature thereto affixed. Plaintiff and Blair identified them as the notes he had prepared for the grantee's signature.

The bill charges and plaintiff testifies that his son, the grantee, when informed of the action taken, repudiated it, refused to pay the consideration for the conveyance, or any part of it, and to obligate himself to comply with any of the terms thereby imposed, and ever thereafter continued so to refuse. These allegations as to the repudiation of the transaction, and refusal to comply with the terms proffered, the adult defendants in their answers deny, and during the taking of the depositions questioned by objections the competency of the plaintiff to relate the details of any conversation had between him and the grantee, who had died prior to the date of the father's examination as a witness in his own behalf. According to the recitals of the decree the cause came on to be heard upon these objections as also upon the matters therein specified; yet the decree is silent as to any ruling thereon. In such a case the legal inference is that the court deemed the objections unfounded and so treated them. But the evidence objected to clearly comes within the express inhibition of section 23 of chapter 130 Code (sec. 4879), and not within

its exception; and, as defendants still rely on the challenge for incompetency in this and other like instances, such testimony is disregarded upon this inquiry.

The purpose of the conveyance, as plaintiff himself has informed us, was to induce his son to abandon employment elsewhere and to reside upon the farm and assist in its management, control, and cultivation for the joint benefit of himself and the father's family. This design he conceived apparently without previous consultation with the son, and, as the context shows, in the absence of the latter. So far as disclosed, the son was not aware of the father's intention or purpose until after the execution of the deed.

There is some diversity of opinion as to the age of John S. Downs when the deed was made. He married the defendant Effa L. Downs August 17, 1894, less than a year after the date of the deed, and in the license his age is given as 23. But so far as it affects the merits of the controversy it matters not how old he was when the deed was executed. Soon after the marriage, however, he and his wife moved into the residence of his father, and he and they continued to occupy it jointly, just how long does not appear, but probably until the grantee with the aid and assistance of the father erected on the land a residence for the son, into which he moved and which he occupied for a period of about 5 consecutive years when he moved to Wetzel county, and later again to the residence so erected by him and his father, where he remained for several years, the combined periods of his occupancy being about 15 years. The record does not furnish accurate data as to the changes of residence to and from the land and none as to the cause therefor, or whether the father acquiesced in the son's absence during each interim. There is some testimony tending to show friction between them at the time the son finally left the premises, a few years before his death.

If the reason for the conveyance was to induce the son to occupy the land, and he did occupy, cultivate, improve, and keep it in a state of repair, as the testimony of competent disinterested witnesses shows the fact to be, he did what plaintiff contemplated when he executed the deed. The occupancy was not that of a tenant paying rent, it was not merely permissive or by sufferance, as we may presume in the absence of evidence to the contrary.

[1, 2] The execution of the deed by the father and the entry of the son into possession of the land virtually were contemporaneous acts. Both participated in the fruits of the common enterprise, the cultivation of the land. They jointly erected the residence occupied by the son. To the possession and utilization of the land by the son the father did not object, but concurred for 15 years or

more. His acquiescence is significant and tends to show his intention to convey, and the son's intention to accept the conveyance. Acceptance is as essential to the validity of a deed as delivery, *Campbell v. Fox*, 68 W. Va. 484, 69 S. E. 1007. Delivery of a deed implies its acceptance by the grantee except in the case of fraud, artifice, or imposition. 18 C. J. 212, 213, cases cited in note 64. If the deed is in due form, and the grantor has signed and acknowledged it for record, its manual delivery is not essential to an acceptance by the grantee, as a constructive delivery is sufficient.

[3, 4] Whatever suffices to raise a fair and reasonable presumption of an acceptance implies delivery. 18 C. J. 416. In other words, they are so related that each necessarily implies the other, when the circumstances are such as to warrant the implication and there is absent any act or conduct of the parties involving in doubt and uncertainty their intention as to either of these essential requirements. What they have said and done is to be weighed and considered in order to ascertain their intention and purpose regarding the title which the deed purports to vest in the grantee. The grantor deliberately and voluntarily caused the deed to be prepared, his acknowledgment certified, and the instrument recorded nearly 26 years before plaintiff sued for its cancellation. Professedly his purpose was to induce exactly what ensued, his son's return to the place of his birth and adolescence, the cultivation, repair, and improvement of the homestead. This purpose he accomplished, and the son by entering upon and remaining on the land during many years, though not continuously, with the knowledge and acquiescence of the father, indicated an intention on his part to accept the benefit of the conveyance. Such an entry by the grantee "into possession of the land is a circumstance tending to show a delivery of the deed, and in connection with other circumstances may be strong evidence of delivery." 2 Jones, *Law of Real Property*, §§ 1220, 1227. Recordation of the deed by the procurement of the father and its prolonged lodgment in the office of the recording officer without being recalled by the grantor until after the death of the grantee, including possession, improvement, and the joint enjoyment of the beneficial results are such additional circumstances as bring the case within the rule stated by the author. *Hammell v. Hammell*, 19 Ohio, 17; *Kearny v. Jeffries*, 48 Miss. 343, 359.

Although necessary to the effectiveness of a deed, acceptance need not be express, it may be implied, if the facts connected with the transaction and the acts done apparently in accord with the intention of the parties to the conveyance are sufficient to warrant the implication. *Guggenheimer v. Lockridge*, 39 W. Va. 457, 461, 19 S. E. 874. In *Williams*

v. Williams, 148 Ill. 426, 36 N. E. 104, decided a few months earlier than the case last cited, and on the facts somewhat like these now before us, the Illinois court said:

"If a grantor, with or without any previous arrangement with the grantee, executes a deed, and has it recorded, and notifies the grantee, who, by words or acts, accepts the conveyance, the delivery is sufficient, as the actual possession of the instrument is not indispensable."

The court also considered as significant the entry of the grantee upon the land, clearing it, repairing fences, setting out fruit trees, and the exercise by him of other like acts indicative of ownership. The facts in the *Williams Case* and in *Kingsbury v. Burnside*, 58 Ill. 810, 11 Am. Rep. 67, decided by the same court, were similar, the opinion in the former citing and being predicated upon the latter.

[8] Besides, the acknowledgment of a deed is in itself some manifestation of an intention to deliver it (*Ferguson v. Bond*, 39 W. Va. 561, 566, 20 S. E. 591); and its recordation tends strongly to indicate a purpose on the part of the grantor to deliver it, and when the grantee enters on the land conveyed the presumption is still stronger (*Com. v. Selden*, 5 Munf. [Va.] 160). Moreover, John S. Downs could as a matter of right have obtained possession of the deed while it remained in the clerk's office had he deemed its possession necessary to perfect his title or protect his ownership; for, "after being so recorded, such writing may be delivered to the party entitled to claim under the same." Section 7, c. 73, Code (sec. 3810).

Recordation is the equivalent of a notice of an intention on the part of the grantor to part with his title and vest it in another and thereby publicly warn prospective purchasers and his creditors, if any he has, that he has divested himself of the title and thereby of his land.

[6, 7] The presumption of a constructive delivery of a deed is not conclusive, but may be rebutted by evidence showing either non-delivery by the grantor or nonacceptance by the grantee. To escape the operative effect of the conveyance manually or constructively delivered or actually or constructively accepted, the burden rests upon the grantor or those who claim under him or whose rights are jeopardized by the conveyance to prove the fact to be as he or they allege. In order to entitle such person to the relief he seeks, the proof must be certain or reasonably conclusive. *Chambers v. Chambers*, 227 Mo. 262, 127 S. W. 86, 137 Am. St. Rep. 567. But the most potent and corroborative fact upon the question of delivery and acceptance is the admission of the plaintiff himself, as established by the uncontradicted testimony of Thaddeus L. Curry, to the effect that plain-

tiff had conveyed an interest in the land to his son John.

[8] In his bill and in the proof introduced by him plaintiff undertook to show noncompliance by the son with the terms of the deed when the depositions were taken, and as the testimony related to conversations between them the inhibition of section 23, c. 130, Code (sec. 4879), applies. What Mrs. Austin Downs said, though frank, proves nothing helpful to the plaintiff, and consisted only in an assurance on the part of the son that the land would not be sold while she lived. To that extent she recognized the son's right to sell the land, a right as to the exercise of which she seems to have been solicitous. So that, if she was competent to testify because she did not join plaintiff in the execution of the deed, her testimony does not affect the rights of the defendants. The latter invoked the aid of the statute cited by objections, and by submitting the question of competency to the determination of the court as appears from the decree. But the court either advisedly or inadvertently disregarded the challenge. However, defendants still persist in having that question determined upon this appeal. It is too plain to need the citation of authority, as the statute furnishes its own interpretation.

The only other proof that tends to disclose an intention on the part of the grantee to repudiate the deed and a purpose to reinvest the title in plaintiff was to the effect that he refused to accept half of the rental accruing on an oil and gas lease executed by the father alone on the land; the amount so due having been deposited in a Salem bank. The substance of this testimony was that the father urged upon the son the necessity of going to the bank to obtain the money, as it was deposited to their joint credit and neither could withdraw it without the consent of the other. The son went as requested, but refused to accept any part of the money as a matter of right, but finally consented to do so as a gift upon the insistence of the father. This testimony corroborated by competent witnesses is like a two-edged sword in that it cuts both ways, as will readily appear. The fact most relied on, however, is that the son told the father "to bring the papers up and he would sign them; and what was down there was his and he wouldn't bother him any more." None of the witnesses so testifying, it seems, knew to what papers they referred or what they had in mind by the allusion "down there" unless they meant the land. These statements do not deserve much if any consideration viewed in the light of the condition obtaining when the conversation occurred, as it did on the way home.

It is only necessary to refer to two other grounds urged upon our attention. One is the assessment of the land for taxation and the payment of taxes so assessed; the other the refusal of John S. Downs to sign a paper

having for its purpose a ratification of the oil and gas lease just mentioned. Plaintiff always paid the taxes charged against the land, although part of the time after the deed was made the assessment was in the joint names of both parties to the deed. How this fact affects the right of either is not apparent. It is a mere circumstance, which, without explanation or connection with the issue raised by the pleadings and proof, amounts to nothing, the only charge being that plaintiff paid the taxes and fraudulently caused the assessment to be changed from their joint names to his own, and this allegation no proof supports. John S. Downs did perhaps refuse to ratify the lease, and it soon afterwards lapsed, for what reason does not appear. He may have thought its execution unwise or an unnecessary and unprofitable incumbrance upon the land.

Whether he paid or did not pay for the moiety conveyed to him no competent testimony tends in any degree to show, except that, if he complied with the deed, he did so either before or after its recordation. That he did so before is not probable, though he may have done so afterwards, or he and his father may have made some other or different arrangement as to payment. Defendants allege, but offer no evidence to show, an indebtedness due from the father to him in excess of the consideration stipulated in the deed. Plaintiff was not competent as a witness to prove nonpayment, as that would be in derogation of the statute cited, so that the only proof of the nonpayment of the consideration is the failure to make the cash payment and execute the notes at the time the deed was made and recorded. What may have occurred afterwards the record does not disclose. That plaintiff remained silent so many years and took no steps toward the cancellation of the deed until after the grantee had died and no longer able to protect himself and family certainly is a circumstance replete with significance. It is without explanation except by the mere assertion that defendants had set up a claim to a half interest in the land after the grantee's death. The grantee had persisted in his right to such an interest while he lived, and that right the father never controverted, so far as we are advised.

Besides, if plaintiff has not received the consideration specified in the deed, and not lost his right to enforce payment thereof, he may still be entitled to it. But that relief he has not asked, and his right thereto we do not adjudge. Nor is weight to be given to the failure to proceed against the interest of the decedent in the 100 acres to satisfy his debts and liabilities in the suit brought for that purpose, because that fact in itself is not sufficiently important to warrant cancellation of the deed.

Our conclusion, therefore, is to reverse the decree and dismiss the bill.

(89 W. Va. 206)

BOBBS v. MORGANTOWN PRESS CO.(Supreme Court of Appeals of West Virginia.
Oct. 11, 1921.)*(Syllabus by the Court.)***Master and servant — 258(8)—Allegation of unlawful employment held sufficient.**

A count in a declaration for personal injuries, based on negligence in employing a girl between the ages of 14 and 16 years to work in a gainful occupation without first having obtained a work permit, as required by sections 3 and 4 of chapter 17, Acts 1919, is not bad on demurrer, for failure to allege in terms that such unlawful employment was the natural and proximate cause of plaintiff's injuries.

Case certified from Circuit Court, Monongalia County.

Suit by Mildred Bobbs, by, etc., against the Morgantown Press Company, for personal injuries. Demurrer to third count of declaration sustained and at plaintiff's request and on its own motion the circuit court certified the case for review. Demurrer overruled, and case remanded.

Moreland & Guy, of Morgantown, for plaintiff.

Glasscock & Glasscock, of Morgantown, for defendant.

LIVELY, J. Having sustained a demurrer to the third count in the declaration, the circuit court, at the request of plaintiff and on its own motion, has certified its ruling to this court for review.

The count alleges that the defendant owned and operated a printing shop containing such machinery and equipment as is usually found in such establishments, including a platen printing press operated by electricity, and the operation of which required great skill and experience in the operator in order to avoid being injured; that the plaintiff was a child between the ages of 14 and 16 years; and that defendant unlawfully, carelessly, and negligently employed her to work in such establishment, the same being a gainful business or occupation, without having first procured a work permit from the superintendent of schools of the city or county, or from some person authorized by him in writing, and with having failed to keep such permit on file and accessible to officers charged with the enforcement of sections 3 and 4 of chapter 17, Acts 1919 (the Child Labor Law), by reason of which unlawful acts, negligence, and carelessness of defendant the right hand of plaintiff was caught in the machinery, a printing press at which she was working by order of defendant, and mutilated and mangled, causing the loss of three fingers thereof, to her damage of \$10,000. The count also avers,

for reasons therein stated, that defendant is not entitled to protection under the Workmen's Compensation Act.

The grounds of the demurrer are: (1) That it fails to aver a cause of action; (2) it fails to allege any specific act of negligence; (3) it fails to show that the unlawful employment was the proximate cause of the injury. The controlling question here presented is whether the employment of a child between the ages of 14 and 16 years in a gainful occupation, without first having obtained the work permit from the authorities designated by statute, is prima facie negligence of the employer sufficient to sustain an action for damages resulting from an injury to the child arising out of and in the course of the employment.

In the cases which have been considered by this court, where the employment in a coal mine was of a minor under the age fixed by the statute, making it unlawful to employ such minor (12 years of age, afterwards raised to 14 years of age), we have decided that the unlawfulness of the employment and subsequent injury of the employee resulting from and in the course of the employment make out a prima facie case of negligence on the part of the employer. *Norman v. Coal Co.*, 68 W. Va. 405, 69 S. E. 857, 31 L. R. A. (N. S.) 504; *Daniel v. Big Sandy Coal & Coke Co.*, 68 W. Va. 491, 69 S. E. 993; *Blankenship v. Coal Co.*, 69 W. Va. 74, 70 S. E. 863; *Dickinson v. Stuart Colliery Co.*, 71 W. Va. 325, 76 S. E. 654, 48 L. R. A. (N. S.) 335; *Griffith v. American Coal Co.*, 75 W. Va. 686, 84 S. E. 621, L. R. A. 1915F, 803; and *Mangus v. Coal Co.*, 87 W. Va. 718, 105 S. E. 909. These cases hold, following the *Norman Case*, that the violation of the statute is rightly considered the proximate cause of an injury which is the natural, probable, and anticipated consequence of the employment; that the infant does not assume the risks incident thereto, including the risk of injury by a fellow servant, and that the defense of contributory negligence could only be asserted where the injury is such as could not reasonably be anticipated as a probable consequence of the nonobservance of the statute; and to avail the employer as a defense it must be shown, not only that such contributory negligence was not such as the statute was intended to provide against, but that the infant was possessed of such wisdom, experience, and sagacity as to take him out of the class of boys under the prohibited age which the statute was intended to protect. This leading case, *Norman v. Coal Co.*, was decided by a divided court, on the point in question here (the unlawful employment and consequent injury constituting a prima facie case of negligence), and the conclusion was in the affirmative; Judges Brannon and Williams holding that inquiry as to the boy's capacity was immaterial, and

that contributory negligence would not avail as a defense. This question again arose on a count in the Daniel Case, supra, and also in the Griffith Case, supra, where the first point in the syllabus is:

"A count in a declaration for personal injuries, based on negligence in employing a boy under 14 years of age in a coal mine, inhibited by statute, is not bad on demurrer, for failure to allege in terms that such illegal employment was the natural and proximate cause of plaintiff's injuries. It is prima facie negligence to employ an infant within the prohibited age."

The question also arose in Mangus v. Coal Co., supra, where it was held:

"Injury of the employee in the course of his employment in such case makes out a prima facie case of injury to him by negligence on the part of the employer"—citing the Norman Case.

We can see no difference in principle in the statute prohibiting the employment of boys in a coal mine, and that under consideration prohibiting the employment of children between the ages of 14 and 16 years in gainful occupations, without the permit directed to be obtained by the employer and kept on file, under sections 3 and 4 of chapter 17, Acts 1919. The evils resulting from child labor have become so apparent and glaring in recent years that the public conscience has been awakened, and there has been an insistent demand for its prevention or strict regulation, resulting in the enactment of federal and state laws. The law under consideration is a result. It is the duty of the courts to effectuate its beneficent purpose. The work permit can be issued only upon proof of the intent of the prospective employer that he will legally employ the child, strict proof of age, a certificate of a public health physician or a public school physician, specifying what, in the opinion of such physician, is the physical age of the child, proof of sufficient schooling, and proof that the child has reached the normal development of a child of its age, is in sound health, and physically able to be employed in the intended occupation.

The state has this power of legislation for its own preservation, and for the protection of the lives, persons, health, and morals of its future citizens. The design of the Legislature is apparent. The fitness of the child for the contemplated employment is not left to the judgment or cupidity of the employer, nor to the parents or those in loco parentis,

whose judgment is often warped by necessity or inclination. It is to be determined by unbiased agencies, in order that the life, limb, and health of the child may be conserved. The employment of a child in a gainful occupation without such permit is as much of a violation as the employment of the child under the age prohibited by the statute. The object of each is the same. The principle accentuated in our decisions above cited controls here. We therefore conclude that the employment of such child without the work permit, and the subsequent injury in the course of the employment, makes a prima facie case of negligence on the part of the employer. To overcome this prima facie presumption of negligence, the burden is incumbent upon the defendant. Defendant asserts that the defense of contributory negligence is open to it, and therefore the count should specifically allege that the unlawful employment was the proximate cause, or make such allegations as would negative that defense. We have the pleading before us only, and cannot anticipate the evidence, or the defense. The count is sufficient to show prima facie negligence.

There are many recent decisions to the effect that failure to perform a statutory duty is negligence per se, and many others to the effect that such failure constitutes prima facie negligence. They can be found in L. R. A. 1915E, note, page 506, to Conway v. Monidah Trust (Montana). The case of Miller Mfg. Co. v. Loving, 125 Va. 255, 99 S. E. 591, holds that the employment of an infant between the ages of 14 and 16 years, without the work certificate provided for in the statute, creates the same presumption for unfitness for the employment as the statute prohibiting the employment of an infant under the age of 14 years. Other cases holding that the employment of children under certain ages without first obtaining certificates required by the statute is prima facie negligence in case of injury to the child are: Kircher v. Iron Clad Mfg. Co., 134 App. Div. 144, 118 N. Y. Supp. 823; Frorer v. Baker, 137 Ill. App. 588; Stetz v. Boot & Shoe Co., 163 Wis. 151, 156 N. W. 971, Ann. Cas. 1918B, 675; Perry v. Tozer 90 Minn. 431, 97 N. W. 137, 101 Am. St. Rep. 416.

In our opinion the third count in the declaration sufficiently states a prima facie case of negligence, and we so answer the question certified.

Demurrer overruled; case remanded.

(131 Va. 162)

INTERSTATE COAL CO., Inc. v. EATON, RHODES & CO.(Supreme Court of Appeals of Virginia.
Sept. 22, 1921.)**1. Judicial sales \S 54—Rights of purchasers stated.**

While a purchaser at a judicial sale cannot take advantage of mistakes whereby obligations of which he had notice were omitted from the decree, the court will correct the inadvertencies to require him to perform contracts of which he had notice, but not to impose additional obligations never assumed.

2. Judicial sales \S 54—Imposition upon purchaser of contract not assumed erroneous.

Where coal properties operated by receivers were ordered sold pursuant to an offer to purchase, and neither the offer nor the decree referred to certain contracts for the delivery of coke to a third party, it was error to impose upon the purchaser the burden of complying with such contracts; the purchaser never having expressly or impliedly assumed them.

Appeal from Circuit Court, Wise County.

Suit by Eaton, Rhodes & Co. against the Interstate Coal Company, Inc. Decree for plaintiff, and defendant appeals. Reversed, and petition dismissed.

Morison, Morison & Robertson, of Bristol, for appellant.

Mouligner, Bettman & Hunt, of Cincinnati, Ohio, and Morton & Parker, of Appalachia, for appellees.

PRENTIS, J. The properties of the Empire Coal Land Corporation were sold to the Interstate Coal Company, Inc., the appellant in a suit for the foreclosure of a mortgage, by decree of September 9, 1916. At the time of this sale and for some time theretofore, the properties had been operated by a receiver appointed in that suit, who had entered into a contract spoken of as contract 807—A, which provided for the sale and shipment of the entire production of coke by the receiver for the residue of the year 1915, with a minimum of 4,000 tons, for 8,000 tons per month for the first six months of 1916, subject to certain terms and conditions governing the shipments, and also gave to the party not in default the privilege of cancellation of the unshipped portion of any month's quota, the price being \$2.25 per ton of 2,000 pounds. George L. Carter, who was the owner of a large number of bonds of the Empire Coal Land Corporation, objected to this contract, and made a motion to set aside the order approving it. On January 11, 1916, the court overruled this motion of Carter, again ratified that contract, and in addition thereto approved another contract between the receiver and the appellees, dated December 31, 1915, designated as contract 843—A. This

contract provided for the delivery by the receiver of 6,000 tons, at \$2.60 per ton of 2,000 pounds, shipments to be 1,000 tons per month over the first half of the year 1916, subject to certain terms and conditions, among which was a provision that the party not in default had the option of canceling any unshipped portion of a month's quota by giving notice in writing to the party in default on or before the 10th of the following month, and that in the absence of such notice the unshipped portion of any month's quota was to be shipped immediately after the date fixed for expiration of the contract, unless some other date should be agreed upon.

The parties proceeded under these contracts, and neither appears to have demanded strict performance thereof, so that, while for one month there was a small overshipment, for most of the time the minimum quantities required by these contracts were not shipped. It is observed that under both contracts, by their terms, the shipments were to be during the first half of 1916. Thereafter, in July, August, and September, 1916, small quantities of coke were shipped, apparently under the contracts, but much less than the minimum monthly quantities thereby required. There was an interview between the receiver and the representative of the appellee, after July 1, 1916, from which it may be concluded that the receiver agreed to continue to sell and ship under those contracts. Whether this created a new contract or not is one of the questions raised. If it was a new contract, it was made by the receiver without authority, for it was apparently never reported to the court or approved. In our view of the case, it is unnecessary to determine this question. The receiver had also made contracts with Rogers, Brown & Co. and American Locomotive Company for the sale and shipment of 3,000 tons of coke per month, covering the last half of 1916.

This being the general situation on the 28th day of July, 1916, the special commissioners advised the court that they were in a position to effect a private sale of all of the property of every class and kind belonging to the Empire Coal Land Corporation, or to the receivers or receiver in the cause, at the price of \$425,000, to the Interstate Coal Company, Inc., upon terms and conditions which were fully set forth in the offer filed with their report. That offer in writing was clear and definite, provided for cash or its equivalent, for the payment of taxes, costs, etc., to be ascertained as of September 1, 1916, for the assumption of a certain vendor's lien, to be deducted from the specified purchase price, and covered other details the recital of which is unnecessary.

The seventh clause of this proposition contains a provision to this effect: That, if this

offer is accepted, the Interstate Coal Company, Inc., shall, after delivery of possession of the property to it, have the right to mine and ship coal and to manufacture and ship coke from the said premises, to use the timber therefrom in the construction of houses and for any other purposes upon said premises, to use the said premises, operate the mines now opened thereon, and to open and operate new mines, or lease the same or any part thereof for mining purposes, and to dispose of any machinery and equipment until default be made in the payment of the purchase-money notes or any part thereof.

It was thereupon decreed that action upon this report and proposed sale be suspended and held in abeyance until September 1, 1916, for such action thereon at that time as might to the court appear proper; and the cause was referred to a special commissioner to make report in vacation of the liens, debts, and other equities of said Empire Coal Land Corporation, or the receiver in this cause, M. Zeigler, as well as his predecessors, H. Hardaway and A. K. Morison, receivers, and also of the taxes and indebtedness both of the company and the receivers. Thereafter, on September 9, 1916, by decree drawn with great care and covering 15 printed pages of the record, in which the court apparently undertook to determine every question in the case ready for decision, the bid of appellees was accepted, using this language:

"Upon due consideration, the court is of opinion and finds from the proceedings had in this cause for the sale of the properties herein involved that not more than the sum of \$425,000 can be realized from a sale of the same; that it is to the best interest of all the parties concerned that this court decree a sale of the said properties for the sum of \$425,000 upon the terms offered by the Interstate Coal Company; and that the said offer of the said Interstate Coal Company be accepted instead of selling the property at public auction.

"Upon due consideration it is adjudged, ordered, and decreed that the offer of the said Interstate Coal Company for the purchase of the said properties be, and the same is hereby, accepted, ratified, and confirmed, and the said Interstate Coal Company is hereby declared to be the purchaser of all the properties of the aforesaid Empire Coal Land Corporation, including the properties owned or acquired by the receivers of this court in this cause, to wit, A. K. Morison and H. Hardaway, or their successor, M. Zeigler, of every class and kind, excepting only moneys, bills and accounts receivable due to the said Empire Coal Land Corporation or to any receivers or receiver in this cause."

Thereupon follows a general enumeration of the property of every class, kind, and description, concluding with clause (d), using this comprehensive and interpretive language:

"Any and all other properties of every class and kind belonging to the said Empire Coal

Land Corporation or the receivers in this cause of any character whatsoever not hereinbefore specifically enumerated or preferred to, it being the intention of this decree to sell, transfer, assign, and deliver to the said Interstate Coal Company every class and kind of property, rights, easement or privilege, and all equities of every class and kind owned by the said Empire Coal Land Corporation or by the receivers in this cause except such properties, real, personal, or mixed, as may be in the hands of R. S. Graham, the trustee in bankruptcy, and except moneys, bills, and accounts receivable in the hands of R. T. Irvine and D. D. Hull, Jr., special commissioners in this cause."

And these provisions are followed by this language:

"This sale is made subject to the contracts made by Zeigler, receiver, for the sale to Rogers, Brown & Co. of 2,000 tons per month of standard 48-hour furnace coke for the last half of 1916, at the price of \$2.50 per ton net f. o. b. ovens, to be shipped to Hanging Rock Iron Company, Hanging Rock, Ohio, and for the sale of the requirements of American Locomotive Company during last half of 1916, not to exceed a maximum of 1,000 tons of 72-hour foundry coke at the price of \$5.25 per ton f. o. b. Richmond, Va. For all shipments made upon said contract after September 2, 1916, payment thereafter shall be made to Interstate Coal Company."

Thereafter, on January 19, 1917, the appellees filed their petition, asking for a correction of the decree of sale, to which petition the appellant objected, and the court entered a decree thereon in which this language is used:

"* * * It appearing from the argument of counsel that the said petitioners are apprehensive that said decree of sale, by reason of express mention of the contracts with the Rogers, Brown & Co. and the American Locomotive Company, intended to and did exclude the contracts made by the receiver with said petitioners, the court hereby declares that no such exclusion was intended in said decree, and that the intention of said decree was that the Interstate Coal Company took the properties sold by the commissioners subject to all valid contracts entered into by the receiver and subsisting and enforceable at the time of said decree; that nothing contained in said decree nor in this order shall be construed as a finding or determination as to whether or not said contracts with the said petitioners were subsisting and enforceable contracts at the date of said decree; that, the court having construed said decree of sale, entered on September 9, 1916, so as to remove said apprehension of the petitioners, no further ruling upon said petition is necessary, and it is therefore dismissed."

In the meantime, before this decree was entered, the purchaser had repudiated the two contracts for the shipment of coke to the appellees, designated as 807-A and 843-A, hereinbefore referred to.

Nothing further appears in the record be

fore us until May, 1918, when the appellees filed their petition upon which the decree appealed from is based. The substance of that petition is the allegation that the appellant company purchased and holds the property of the Empire Coal Land Corporation, subject to the condition that it fulfill and completely perform said contracts by shipping the remaining undelivered tonnage of coke at the prices fixed therein, and that it has failed and refused to fulfill and perform said contracts, and that, notwithstanding such failure and refusal, it continues to hold, operate, and take the benefits of the said properties purchased by it under the decree of September 9, 1916; and they pray that a decree of specific performance be entered against the appellant, requiring it to perform specifically said contracts by shipping at once, in accordance with shipping orders of appellees, the remaining undelivered tonnage of coke as aforesaid, or that, by reason of the breach of said condition of purchase, the sale of said Empire Coal Land Corporation properties be set aside, canceled, and annulled, and that the appellant be required to restore the said properties to the receiver, and that the receiver be required to deliver in accordance with said shipping orders the said unshipped portions of the contracts, etc.

Appellant demurred to the petition, and answered, denying its substantial allegations.

After the taking of testimony, the court on February 15, 1920, entered the decree from which this appeal is taken. This decree grants one of the prayers of the petition, and holds that the Interstate Coal Company purchased the property of the Empire Coal Land Corporation, subject to the performance of all valid contracts theretofore entered into by the receiver, and subsisting and enforceable at the time of the sale, and especially that the two contracts with the appellees were valid and subsisting at the time of the sale, and were enforceable to the extent of the unfulfilled portions thereof, to wit, 2,474.30 tons of coke to be shipped under contract 807—A, and 1,688.10 tons to be shipped under contract 843—A; and inasmuch as it appeared that the purchaser of the properties had not complied with the terms of the sale, in that it had not shipped the coke found to be due under these contracts, it thereupon adjudged:

"That unless the said Interstate Coal Company, within 90 days from the entry of this decree fully comply with the terms of said sale and the decree of this court, heretofore entered, authorizing and confirming the same, by shipping or causing to be shipped, subject to the order of the said petitioners, as provided by and in said contracts, the amount of coke above set forth [specifying it], upon the terms and at the prices respectively provided in said contracts," that the property should be sold by special commissioners named in the decree at the cost of the Interstate Coal Company.

The case then involves the rights and obligations of the appellant, the purchaser under the decree of sale of September 9, 1916, which must be determined from a consideration of the facts recited. It is customary in such decrees for the court fully to protect all of the rights and equities of those who have dealt with the receiver. This is done sometimes by specifically requiring that the purchaser shall assume the obligations of all outstanding contracts with the receiver, and sometimes by providing for the filing of all claims arising thereunder with the court for satisfaction out of the proceeds of the sale thereby brought under the control of the court for distribution. This seems to have been fully realized by those who drew the decree of sale in this case, for it expressly provides that the sale is made subject to the contracts made by the receiver for the sale of coke to Rogers, Brown & Co. and to the American Locomotive Company, such contracts covering the last half of 1916. They were, therefore, current unperformed contracts at the time of the sale. It is noted that the contracts with Eaton, Rhodes & Co. here involved by their express provisions covered the first half of 1916, and therefore according to the record, had expired. This probably explains why they were overlooked, if in fact they were overlooked at that time.

The appellees rely upon the established rule that purchasers at a judicial sale may by summary process be required to perform the contract of sale, and cite many authorities for that proposition. The trial court evidently based its decree upon that undoubted proposition of law, and held that, because of its unquestioned power to require the purchaser to perform the contract of sale, it had authority to enter the decree appealed from. It therefore adjudged that, notwithstanding the fact that the period named for the performance of the contracts here involved had then expired, the purchaser made no reference to them in its offer to buy, and that the decree which accepted his unqualified offer also failed to refer to them, nevertheless they were subsisting contracts which the purchaser assumed, and hence was bound to perform, and that in case of his refusal the entire property should be resold.

[1] We are unable to find anything in the record which justifies this finding of fact. The complete contract for the sale is contained in the written offer of the purchaser and its acceptance in the decree of September 9, 1916. The irresistible conclusion from a consideration of the plain terms of the bid of the purchaser and the decree accepting it is that these contracts of Eaton, Rhodes & Co. were not referred to in the contract of sale, and that the purchaser assumed no obligation whatever with reference thereto. While it is true that a purchaser at a judicial sale cannot take advantage of a mere

mistake or inadvertence whereby some obligation of which he had notice or is fairly charged with notice has been omitted from the decree of sale, in such case the court applying equitable doctrines will correct such inadvertencies and inaccuracies, not, however, to do an injustice to the purchaser, nor to require him to perform a contract which he has not engaged to perform, but only for the purpose of requiring him to perform a contract of which he has notice and which in equity and good conscience he ought to perform so as to prevent him from taking an unfair advantage of a mistake to evade the obligation of his contract. Purchasers at judicial sales are not, however, more helpless than others with respect to their contracts, and courts have no authority to impose additional obligations in connection therewith which they have never assumed either in express terms or by necessary implication.

The doctrine governing judicial sales is thus stated in *Virginia Fire & Marine Ins. Co. v. Cottrell*, 85 Va. 861, 9 S. E. 183, 17 Am. St. Rep. 110:

"Until the sale has been confirmed the proceeding is in fieri; the bidder is not considered as a purchaser, and he is therefore not liable for loss to the property, by fire or otherwise, in the interim, nor is he compellable before confirmation to complete his purchase. But as soon as the sale is absolutely confirmed then the contract becomes complete; the bidder, by the acceptance of his bid, becomes a purchaser—that is to say, the owner of the equitable title in the lien on the property for the unpaid purchase money—and he may be compelled by the process of the court to comply with his contract. 2 *Daniell's Chancery Practice* (5th Ed.) 1275; *Hurt v. Jones*, 75 Va. 341; *Blossom v. Milwaukee, etc., R. R. Co.*, 3 Wall. 196.

"It is by no means, therefore, a matter of discretion with the court to rescind a sale which it has once confirmed, nor is the sale to be rescinded for mere inadequacy of price, or for an increase of price alone; but some special ground must be laid, such as fraud, accident, mistake, or misconduct on the part of the purchaser, or other person connected with the sale, which has worked injustice to the party complaining. After confirmation, the purchaser at a judicial sale is as much entitled to the benefit of his purchase as a purchaser in pais, and the sale in the one case can be set aside only on such grounds as would be sufficient in the other. There is no principle upon which any distinction between the two classes of cases can be drawn. * * *

In *Sloss Iron, etc., Co. v. South Carolina, etc., R. Co.*, 85 Fed. 133, 29 C. C. A. 50, 42 U. S. App. 748, it appeared that the receivers of a railroad had made a contract with a coal company for a year's supply of coal, with the option on the part of the coal company of renewing the contract. The foreclosure purchasers, who had knowledge of the contract and of the date of its termina-

tion, but not of the option clause, received coal under the contract until notified by the coal company of its intention to renew it at the expiration of the year. It was held that the purchasing company was not bound by the option clause of the contract.

In *Kansas City Southern R. Co. v. King*, 74 Ark. 366, 85 S. W. 1181, it was held that a statute providing that whenever any railroad company, corporation, individual, or individuals shall purchase any railroad from any other railroad company, corporation, individual, or individuals, the purchaser shall take and hold the same subject to all debts, liabilities, and obligations of the company from which said road was purchased, etc., does not apply to the sale of railroad properties by foreclosure, and that the purchaser at such sale takes the property freed from the debts, liabilities, and contracts of the mortgagor, except such as were prior liens, and such as the court may have provided for in its decree of foreclosure. 6 Ann. Cas. 86.

There are many cases in which the power, right, and duty of chancery courts to supervise sales ordered by their decrees and to protect the parties from all fraud, mistake, unfairness, and imposition by setting aside such sales is recognized. Indeed, it may be said that, for the prevention of fraud and imposition, the rule is universally recognized as applicable to such sales. Those cases, however, have no relation to a case like this where there is an absence of any fraud, collusion, misrepresentation, or inadequacy of price. In *re First Trust & Savings Bank of Billings*, 45 Mont. 89, 122 Pac. 561, Ann. Cas. 1913C, 1334.

In *Houston & Texas Cent. R. Co. v. Crawford*, 88 Tex. 277, 31 S. W. 176, 28 L. R. A. 761, 53 Am. St. Rep. 752, it appeared that the railroad property there sold was delivered by a receiver to a purchaser subject to the payment of some claims against the receiver, which might be established before the court which appointed him within a reasonable time, and it was held that an action against the receiver brought in another court for personal injuries within the limited time was not binding upon the purchaser because it was not presented, as required by the decree, to the court entering the decree and having control of the assets arising from the sale of the property; and this is there said:

"As a general rule, the purchaser of a railroad at a sale made under an order of the court holding the custody of the property by a receiver takes the property free from claims against the receiver arising out of the operation of the road; but the court ordering the sale may impose upon the purchaser liability for such debts, as a part of the consideration of his purchase. *Hicks v. International & G. N. R. Co.*, 62 Tex. 41; *Beach, Receivers*, § 735. A purchaser under such order can only be held liable according to its terms. In this case the order directing that possession be delivered to

the purchaser prescribed that he should take the property subject to the payment of such claims against the receiver as might be established before that court within a given time. This was a condition of liability, and the purchaser cannot be held by virtue of the order alone, except for the claims so ascertained and allowed. * * * It follows that the purchaser cannot be held in this case under the orders of the court; the plaintiff not having presented his claim in accordance with the orders imposing the liability."

That this is the general rule is assumed in *Olcott v. Headrick*, 141 U. S. 543, 12 Sup. Ct. 81, 35 L. Ed. 851. There, while the decree of sale provided that the purchaser should pay demands which were presented within six months, and that demands which were not presented within six months after confirmation of the sale should be barred, when the court came to confirm the sale, the decree of confirmation contained no such limitation as to time, and it was held that, inasmuch as the decree of confirmation which the purchaser accepted did not create that limitation, it did not exist, and he was held liable for a claim which was presented about eight months thereafter. In that connection it was said:

"If the purchasers had objected to the decree of confirmation because it destroyed the six months' limitation, they could either have asked the court not to insert such a provision, and, on its refusal, have appealed to this court, or have declined to be bound by the sale, on the ground that the new terms varied from those contained in the decree of sale."

The purchaser was held liable only because of the terms of the decree of confirmation.

[2] So that, as we view this case, it is clear that, whatever equities there may be in favor of appellees, there is no ground either upon reason or authority for imposing the burden thereof upon the purchaser of the properties of the Empire Coal Land Corporation. It is entitled to the benefit of the contract of sale and to hold the property in accordance with its terms. Under the circumstances of this case the court exceeded its power when it undertook to impose additional burdens which were not imposed by the contract itself, and which, by fair construction of its language, were excluded therefrom. It may be that, if the purchaser had been notified that the assumption of these contracts was required, it would have modified its bid for the property so as to provide therefor; and it is noted in this connection that the decree which accepted the bid adjudged it to be in every respect sufficient.

Our conclusion, therefore, is that the purchaser has not failed in any respect to comply with all of the terms of its contract of purchase, so far as this record discloses, and

therefore that the decree which adjudged otherwise is erroneous.

This conclusion makes it unnecessary in this case to consider the other questions which the record presents—such, for instance, as the suggestion that for breach of a contract for the delivery of personal property which is a common article of merchandise, such as coke is, the remedy is the recovery of the pecuniary damage sustained, and never specific performance, and further that the petition, which asks for specific performance of these contracts, was not filed for more than a year after their alleged breach, and it appears that in the interval the price of coke had risen from \$2.60 a ton to \$7 a ton.

For the reasons indicated, the decree complained of will be reversed, and the petition on which it is based will be dismissed.

Reversed.

(130 Va. 612)

APPALACHIAN POWER CO. v. TOWN OF PULASKI.

(Supreme Court of Appeals of Virginia. Sept. 22, 1921.)

1. Electricity \Leftrightarrow 4—Municipality and lighting company may amend franchise by agreement without additional consideration.

Municipal authorities and an electric lighting and power company may by agreement amend an ordinance conferring a franchise on the company and reduce the maximum rate thereby authorized, and no further consideration to the company would be needed other than the continuing privilege of conducting its business under the ordinance.

2. Electricity \Leftrightarrow 11—Lighting company held authorized to reduce rates without consent of municipality.

Where an electric light and power company is operating under a franchise fixing a maximum rate, the company may, without the consent of the town, establish a schedule of reduced rates and make them effective.

3. Electricity \Leftrightarrow 4—Burden upon municipality to show that lighting company's franchise had been amended.

Where a town claimed that the franchise of an electric light and power company had been amended by resolution, so as to reduce rates, the burden of proof was upon the town.

4. Electricity \Leftrightarrow 4—Lighting company's franchise cannot be amended without consent of both parties.

Like other contracts, a franchise of an electric light and power company cannot be amended without the consent of both the municipality and the company.

5. Electricity \Leftrightarrow 4—Lighting company's franchise held not amended by consent.

Where an electric light and power company, operating under a franchise fixing a maximum rate, proposed to the municipality to reduce

the rate, and the municipality by resolution agreed thereto, such acts did not constitute an amendment of the original ordinance, prohibiting an increase in rates, the company not having known of or consented to such amendment.

6. Electricity ~~6-4~~—Amendment of franchise held not ratified by lighting company.

Where an electric light and power company operating under franchise proposed to the municipality to establish a schedule of reduced rates, and the municipality agreed thereto by resolution, *held* that by charging the rates so fixed the company did not thereby ratify or approve the claimed amendment of the franchise by the passage of the later resolution; the company having the right to reduce rates without the municipality's consent.

Error to Circuit Court, Pulaski County.

Petition by the Town of Pulaski for a writ of mandamus against the Appalachian Power Company. Judgment for petitioner, and defendant brings error. Reversed and dismissed.

R. E. Scott, of Richmond, for plaintiff in error.

H. C. Gilmer, of Pulaski, for defendant in error.

PRENTIS, J. The essential facts out of which this controversy arises are these: On March 18, 1911, the council of the town of Pulaski granted a franchise to the Appalachian Power Company, whereby the power company, a public service corporation, entered into a contract to furnish electric light and power to consumers in the town, upon conditions expressed in the ordinance. The only clause of the franchise here involved is section 7, which reads thus:

"The meter rates charged by the —, its successors or assigns, for domestic and commercial lighting shall not exceed ten (10) cents per kilowatt hour, and the rates charged for power shall not exceed the rates charged in other places by said —, its successors or assigns for similar service under like condition as to cost of supply."

On August 12, 1911, the council received by mail the paper signed in type "Appalachian Power Company," which is embodied in the ordinance of August 15, 1911, reading thus:

"Pulaski, Va., August 15, 1911.

"Council met in special meeting this 15th day of August, 1911, at 4 p. m. Present: John T. Loving, Mayor & Councilman, Dr. O. G. Painter, John W. Eckman, Robert Bunts, J. H. Ratcliffe, J. W. Holmes and J. Smith. The meeting was called to order by the mayor, who explained that it was called for the purpose of receiving and considering a new schedule of rates for supplying the light consumers of the town with electric current offered by the Appalachian Power Company submitted August 12, 1911, which read as follows, to wit:

"To the Honorable Mayor and Council, Town of Pulaski, Va.

"The Appalachian Power Company respectfully requests you to grant them permission to change the rates for lighting as specified in their franchise, substituting therefor the following:

"Schedule for Lighting Rates.

"First 15 KWH at 10 cents each.

"Next 85 KWH at 8 cents each.

"All over 100 KWH at 6 cents each.

"5 per cent. discount allowed for payment on or before the tenth of month in which bills are issued.

"This request is made for the following reasons: There appears at present to be some misunderstanding as to how the rate now in effect should be figured. When the sliding scale rate is used it is contended that the rate is slightly in advance over the former one and when the overlapping method is used an extreme unfairness results, as a consumer using 99 KWH pays considerably more than one consuming 101 KWH.

"Furthermore, the Appalachian Power Company desires to put in effect similar rates throughout all its properties, and this proposed rate is one already in use at Bluefield and several of the other plants.

"With the new rate in effect a fairer charge may be made to all consumers and a slight reduction will result in the majority of the bills.

"Respectfully,

"Appalachian Power Company."

"After duly considering the proposition as set forth by the Appalachian Power Company it was moved and seconded and unanimously carried that the old rate for furnishing electric current to town consumers as agreed upon by council and said company be rescinded, and that the schedules presented by said company as of August 15, 1911, be adopted instead as set forth by them and made a part of this record to govern future charges by said company for electric lights."

Thereafter the rates therein named were made effective, and so continued until the company, on August 12, 1919, filed its schedule of higher rates to become effective September 15, 1919. This schedule reads thus:

"The State Corporation Commission of Virginia.

"Appalachian Power Company.

"Residence and Commercial Lighting Rate.

"Schedule B-6.

"Applicable to all consumers served in the state of Virginia.

"Rate:

"First 50 KWH per month at 10 cents per KWH.

"Next 250 KWH per month at 8 cents per KWH.

"Next 300 KWH per month at 7 cents per KWH.

"All over 600 KWH per month at 6 cents per KWH.

"Minimum charge seventy-five (75) cents per month.

"Discount of 5 per cent. bills are paid on or before the 10th of the month following that in which service is rendered.

"Reconnection charge one dollar (\$1.00).

"Appalachian Power Company,

"By R. E. Scott, Attorney."

The town thereupon filed its petition for mandamus against the company, claiming that by virtue of the action of the council on August 15, 1911, in response to the request for permission to change the rate authorized by section 7 of the original ordinance, that section of the original ordinance had been rescinded, and that the rates fixed on August 15, 1911, controlled the company and constituted the contract rates under the franchise which could not be exceeded. The petition prayed for a mandamus requiring the company to observe these rates.

The answer of the company, on the other hand, claimed that section 7 of the original ordinance had never been amended, and that by authority of that franchise the company had full power to charge reasonable lighting rates to consumers in the town of Pulaski within the limits fixed by the original ordinance—that is, not in excess of 10 cents per kilowatt hour—that if the action of the council on August 11, 1911, was intended by the council to operate as a rescission of section 7 and as an amendment of the original franchise, such a result had never been intended or contemplated by the company, and that the ordinance of 1911 so relied upon by the town had never been communicated to the company or accepted by it as an amendment of the franchise, and that no one had ever been authorized by it to propose any amendment of the original franchise.

At the meeting in August, 1911, G. C. Wilder, then district manager of the Appalachian Power Company in the district of which the town of Pulaski formed a part, appeared and requested action on the communication referred to. Wilder was succeeded as district manager two days later by one R. L. Pierce, on August 17, 1911, who was then told by Wilder that he had attended a council meeting on August 15, and shown the communication which he said he had written to the mayor and the town council on August 12, asking permission to change the rates for lighting, and that the council had given their permission for the change. At this time one M. Kahn was the general manager of the company, and H. M. Byllesby & Co., of Chicago, acting under the control of the board of directors, were in charge of the company. On August 22, 1911, Kahn, the general manager, reported to Byllesby & Co., which report, so far as is pertinent, reads thus:

"Mr. Arthur S. Huey, Vice President, H. M. Byllesby & Company, Chicago, Ill.—Dear Sir: I herewith submit a report of our operations for the week ending Friday, August 18, 1911.

"Matters of Interest.

"We have taken up with the mayor and the city council the matter of changing the Pulaski lighting rates to our Bluefield rates, which we have adopted as standard throughout this district, and the mayor and city council have agreed to same. The Pulaski franchise can remain undisturbed, for it merely recites that the maximum rate chargeable shall be 10c per K. W. H. and under this schedule our maximum rate is 10c with a 5 per cent. discount."

The case was submitted upon an agreed statement, showing what the testimony of the witnesses would be, and among the uncontradicted statements are these: That the business of the power company was, in 1911, conducted by M. Kahn, general manager, and G. C. Wilder, district manager; that Wilder was under the control of the general manager, who in turn was under the control of H. M. Byllesby & Co., of Chicago, acting under the control of the board of directors; that the manager of H. M. Byllesby & Co. and other officers of the company had no knowledge of the communication of August 12, 1911; that the ordinance of August 15, 1911, of the town of Pulaski was never communicated to the other officers of the company; that its existence was unknown to them; and that no authority was ever conferred upon any agent of the company to apply for or to accept any amendment to the franchise.

The trial court granted the prayer of the petition, and awarded the mandamus prohibiting the proposed increases in the rates, and a writ of error has been allowed to that order.

[1] The question presented by these facts is a very narrow one. It is in fact freely conceded that unless section 7 of the original ordinance has been amended by the resolution of August 15, 1911, then the company is within its rights in making the proposed increase of 1919 effective. It cannot be fairly doubted, we think, that the municipal authorities and the company could, by agreement, amend the ordinance and reduce the maximum rate thereby authorized, and no further or additional consideration to the company would be needed to support such an amendment other than the continuing privilege during the term of the ordinance to conduct its business thereunder. We have, however, a statute (Code 1919, § 3022), which it would be necessary to pursue if it were proposed to increase the rates authorized by such a franchise, but this statute would not preclude a decrease of such rates by mutual agreement.

[2] No sufficient reason appears for the request which was filed by Wilder for leave to establish the rates named in the application of August 12, 1911. It is perfectly manifest that the company had the right to make them effective without the consent of the town, for they were well within the maximum rate expressly authorized by sec-

tion 7 of the original franchise. That the maximum rate authorized by the franchise was not either the rate then charged or referred to is perfectly apparent from the document, which contains this language:

"This request is made for the following reasons. There appears at present to be some misunderstanding as to how the rate now in effect should be figured. When the sliding scale rate is used it is contended that the rate is slightly in advance over the former one, and when the overlapping method is used an extreme unfairness results, as a consumer using 90 KWH pays considerably more than one consuming 101 KWH."

The language just quoted is inapplicable, untrue, and meaningless if the company at that time had in effect a flat 10 cent rate per kilowatt hour. It is hence clearly inferable therefrom that on August 12, 1911, the company had in effect a varying scale of lighting rates within the maximum authorized by the franchise, and did not have in effect a flat rate of 10 cents per kilowatt hour, because manifestly if such a flat rate had been then in effect, there could have been no misunderstanding as to how the rate should be figured, nor could there have been any question as to a sliding scale rate, or a calculation of rates by the overlapping method; nor could there have been any extreme unfairness existing between a customer who used 90 KWH and one who used 101 KWH. This consideration leads us to the suggestion, at least, that what was intended by that application was to change the sliding scale rates which were then being charged, and that it was not thereby intended to affect the maximum rate authorized by the franchise which had been agreed to within the six months previous. It is not in accord with the customs of business that either the company or the municipal authorities would without legal advice have taken action intended thus radically to modify or rescind section 7 of the franchise so recently adopted, and, if acting upon legal advice, it is inconceivable to us that the action taken would have been so informal in its character and so doubtful in its import. We cannot readily credit the view that the municipal authorities would have accepted a typewritten signature of the company from the district manager as an application to modify and change the franchise, without any communication whatever with either the general manager at Bluefield, or with the officials or the agents in control of the company at Chicago.

All this is fully recognized by the learned counsel for the town, and to overcome the significance of these circumstances he rests his argument largely upon the letter of M. Kahn, general manager at Bluefield, to Bylesby & Co., at Chicago, of August 17, 1911, hereinbefore quoted, and he argues that this shows that both Kahn, the general manager,

and Bylesby & Co. were thereby notified of the proceedings in the city council, and should be charged with notice of the contents of the resolution of the council of August 15, 1911, although the letter makes no reference to any resolution. Its language is that—

"We have taken up with the mayor and city council the matter of changing the Pulaaki lighting rates to our Bluefield rates, which we have adopted as standard throughout this district, and the mayor and city council have agreed to same."

Inasmuch as under section 7 of the original franchise the company had the clear right to make its Pulaaki rates conform to the Bluefield rates so long as they did not exceed the maximum fixed by the franchise, there is nothing in this language which can be fairly construed as notice that any proposition had been by anybody made to rescind section 7 of the franchise. The succeeding sentence in the letter makes it absolutely certain that neither Kahn, the general manager at Bluefield, nor Bylesby & Co., at Chicago, had the slightest intimation of such a proposed rescission or any intention to consent thereto, for it reads thus:

"The Pulaaki franchise can remain undisturbed, for it merely recites that the maximum rate chargeable shall be 10c per K. W. H. and under this schedule our maximum rate is 10c with a 5 per cent. discount."

[3-5] The crucial inquiry in the case is whether or not section 7 of the franchise has been rescinded and the rates named in the communication of August 12, 1911, substituted therefor. This being claimed by the town, the burden is upon it to show that the franchise contract has thus been amended. Like other contracts a franchise of this character cannot be amended without the consent of both contracting parties. Whatever the intent of the city council by its resolution of August 15, 1911, that intent cannot operate to amend the contract except by agreement with the company. There is no evidence in the record in conflict with that which we have recited to show that the minds of the contracting parties ever met upon this alleged amendment, or concurred therein, and the resolution was never communicated either to the general manager or any other person authorized to act for the company.

[6] It is claimed, however, that the company should be held to have ratified and approved the amendment of its franchise, because from 1911 to 1919 it has charged and accepted the rates fixed by the resolution of the council of August 15, 1911. Of course there can be no doubt about the fact that a company may estop itself by its conduct from making a claim which is inconsistent therewith, and it is unnecessary to cite pertinent cases. There has, however, been no conduct

of the company here which is inconsistent with its claim to be conducting its business in the town of Pulaski by virtue of its original franchise. The rates charged since August, 1912, as well as the proposed increases therein specified in the schedule which was filed in 1919, are both well within the maximum limit fixed by the original franchise. There is nothing requiring explanation in the conduct of the company, acting upon the letter of August 22, 1911, when it is so apparent that the general manager at Bluefield then understood and wrote to Byllesby & Co. that the Pulaski franchise would remain undisturbed. That letter, as well as every subsequent act of the company shown by this record, is entirely consistent with its present claim here, namely, that none of its officials ever had any authority to consent to any modification of that franchise, and that none of them has ever so consented. There is evidence that the new proposed rates correspond with the rates for lighting elsewhere, and that the old rates had not yielded a rate sufficient to pay fixed charges of the company, and that the rates complained of are less than the service is fairly and reasonably worth, as well as less than fair, just and adequate. These questions, however, are referred to in the record only in general terms. The town is claiming that the company is bound by its franchise contract not to increase the rates referred to in the resolution of August 15, 1911, whether the rates be adequate or inadequate, and as to this, the chief and main contention, we are clearly of opinion that the trial court erred in its judgment. Our conclusion is that section 7 of the original contract authorizing a maximum lighting rate of 10 cents per kilowatt hour is still in effect and has never been amended or rescinded in the only possible way in which such amendment or rescission can be accomplished, that is, by the mutual agreement of the municipal authorities with the company.

For the reasons indicated, the order will be reversed, and the petition for mandamus dismissed.

Reversed.

(89 W. Va. 138)

LAMP et al. v. LOCKE et al. (No. 4271.)

(Supreme Court of Appeals of West Virginia.
Oct. 4, 1921.)

(Syllabus by the Court.)

1. Injunction \S 5—Mandatory injunction given only where right is clear and necessity urgent.

Relief by mandatory injunction will be given only where the right of the applicant is clear and the necessity urgent.

2. Injunction \S 5—Will lie to compel drilling of offset well where parties conspire to defeat plaintiff's right to royalties.

Such remedy will be awarded where there is a collusive agreement between a lessor and lessees of a tract of gas-producing land whereby the gas therein is being extracted and exhausted by a well five feet distant from the boundary line, and on an adjoining tract under lease and control of the parties to such collusive agreement, with the intended result that the plaintiff, who is a joint owner of one-half of the gas royalty in the first-named tract, is prevented from receiving any royalty therefrom, to his irreparable loss, especially where his right to such royalty has a time limit which will expire within one year. In such case a mandatory injunction will lie to compel the drilling of an offset well.

3. Equity \S 129, 132—Bill need not follow statutory form, and is not demurrable for indefiniteness as to parties if naming them with their interests in subject-matter and relief sought.

It is not essential that a bill in chancery shall follow the form given in section 37, c. 125, of the Code; a substantial compliance therewith is sufficient, and, if the bill in any of its parts names the parties thereto, their interest in the subject-matter, and relief sought, it is not demurrable for indefiniteness as to parties.

4. Equity \S 244—It is not error to require defendant to answer within a reasonable time after overruling demurrer to bill.

A defendant may appear and demur to a bill before it has matured for hearing, and, if he does so and the demurrer be overruled, it is not error to then require him to answer within a reasonable time.

5. Appeal and error \S 238(7)—Ruling on demurrer reviewed without motion to correct judgment, but not errors in decree after demurrer overruled.

"If a defendant in a bill files no plea or answer, but files a demurrer, simply on the ground that the plaintiff on the facts stated in the bill is entitled to no relief against him, and the court below overrules such demurrer and awards a rule against him to answer the bill at a specified time, and he fails to do so, and a decree is rendered against him, and he makes no such motion to have it reversed or corrected in the court below, and he appeals from such decree, solely on the ground that the court rendered any sort of a decree against him, this court will, though he did not make such motion, entertain his appeal, because such appeal though in form an appeal from the last decree, is in substance and in reality an appeal from the decree overruling his demurrer, and deciding that the plaintiff was entitled to relief on the statements in the bill against him, and is therefore not to be regarded as a decree on a bill taken for confessed. But, if the appellant in such case does not confine his appeal to the error committed by the court in overruling his demurrer simply carried out in the last decree, but insists that there are in addition thereto other and independent errors in the last de-

decree against him, which should be reversed, even though the appellate court held that the demurrer was properly overruled, this court will not entertain such appeal, because, so far as these additional and independent errors are concerned, this last decree is to be regarded as a decree on a bill taken for confessed, and cannot be reversed by this court till a motion to correct it has been made in the court below." *Watson v. Wigginton*, 28 W. Va. 533.

(Additional Syllabus by Editorial Staff.)

6. Contracts ¶170(1)—Parties' construction of instrument is often conclusive.

The construction placed upon the making of any instrument or any part thereof by the parties thereto is entitled to great weight and is often conclusive.

7. Equity ¶239, 325—Allegations of verified bill need not be proved on demurrer or when not denied.

Proofs of allegations of a bill duly sworn to are not necessary upon demurrer or when their verity is not denied.

8. Injunction ¶145—Bill may be sustained by affidavits.

Affidavits are proper to sustain a bill for preliminary injunction.

Appeal from Circuit Court, Pleasants County.

Action by Julia Israel Lamp and others against John T. Locke and others. From a decree awarding plaintiff a mandatory injunction and another decree refusing to reverse the first decree for alleged errors, certain defendants appeal. Affirmed.

William Beard, of Parkersburg, for appellants.

Frank J. Barron and G. D. Smith, both of St. Marys, for appellees.

LIVELY, J. From two decrees of the circuit court, one entered on the 14th of September, 1920, awarding to the plaintiff a mandatory injunction, and the other entered on the 2d day of December, 1920, refusing to reverse the first-named decree for alleged errors therein, some of the defendants prosecute this appeal.

The bill prays for a mandatory injunction against defendants compelling them to drill an offset well on what is known as the W. P. Jones 68-acre farm to protect the gas thereunder from depletion through another well within 5 feet of the dividing line between the W. P. Jones farm and located on another tract of 64 acres known as the C. A. Jones lease. The bill was filed August rules, 1920, and afterwards notice was served on defendants notifying them that on the 23d day of August, 1920, plaintiffs would move for a mandatory injunction, compelling them to drill an offset well on the W. P. Jones farm of 68 acres to protect drainage from a well

they had drilled within a few feet of the boundary line, on the C. A. Jones lease. A. S. McCullough, J. T. Locke, Dan H. Reynolds, and Addie L. Reynolds, appeared specially by William Beard, solicitor, to the notice and objected to the granting of the injunction because the bill was not sufficient in law to entitle the plaintiffs to the relief prayed for. The court overruled the demurrer and gave defendants 10 days to answer, who by counsel in open court then declined to make further answer. The motion was docketed and the hearing continued until the 3d day of September following, on which day, the defendants making no appearance and failing to answer, the court continued the hearing of the motion until its next term, to wit, the 14th day of that month, because the bill was not then matured at rules for hearing.

On the 14th of September, 1920, the bill having regularly matured for hearing, and no further appearance being made by defendants, the cause was heard upon the bill, exhibits, decree nisi, and the motion for the mandatory injunction, the affidavits filed in support thereof, and upon the proceedings theretofore had, the bill was taken for confessed as to the defendants, and the court entered the decree complained of against the defendants, the owners, lessees, and those who were in possession of the W. P. Jones 68-acre leasehold and in possession and ownership of the C. A. Jones 62-acre leasehold, commanding them to sink an offset well on the W. P. Jones lease to and through the oil and gas bearing sand found in that vicinity to sufficient depth to counteract and offset a gas well upon the C. A. Jones 62-acre leasehold, then producing gas, with privilege of inspection and measurement of the well, at its completion, to plaintiffs, and required them, the plaintiffs, to execute an injunction bond. Afterwards the defendants who had appeared and demurred to the bill on August 23d and other defendants, namely, Frank H. Cox, S. V. Riggs, C. P. Simonton, Alva McCullough, R. E. Hays, Albert Neely, the Pleasants County Bank, and Benwood Oil Company, gave notice to plaintiffs that they would move the court on a certain day for reversal of the decree of September 14, and dissolution of the injunction awarded thereby, stating the grounds on which the motion would be made. This motion was heard and overruled, on December 2, 1920.

Plaintiffs are heirs at law of J. L. Israel, who died intestate in 1913, and they aver that J. L. Israel on October 24, 1907, conveyed to A. N. Riggs a tract of 68 acres of land, known and designated as the W. P. Jones lease, for the sum of \$1,400, and in the granting clause thereof made the following provision: "Reserving therefrom 1/16 royalty in all minerals produced from said

farm for a period of 15 years from this date"—that on the same day said Riggs conveyed the same tract of land to W. P. Jones, in the granting clause of which he used these words: "Reserving therefrom one-sixteenth royalty in all minerals produced from said farm for a period of 15 years from this date, second party to use due diligence to have said land tested for oil, the aforesaid reservation of mineral rights is to recover reservation made by J. L. Israel and wife in deed made by them to A. N. Riggs of October 24, 1907"—that in 1915 defendant W. P. Jones leased said tract of land for oil and gas purposes to the defendant J. T. Locke, who associated with himself other named defendants in a mining company known as the Jones Farm Oil Company, and he and his associates in the year 1917 drilled on the W. P. Jones farm a small oil-producing well and paid to plaintiffs about \$100 as their one-sixteenth part of the royalty. The royalty provided for in the lease was one-eighth part of the oil and one-eighth of all gas produced and sold from the farm for each year so long as the gas is sold therefrom and payable quarterly when marketed. The bill avers that no further development has been made on the W. P. Jones lease, and further avers that defendant C. A. Jones, who is known as Cordelia Jones, the mother of defendant W. P. Jones, owns a tract of 62 acres adjoining the 68-acre W. P. Jones lease, and in the year 1915 also made and executed an oil and gas lease to defendant Locke on her 62-acre tract, who associated with himself certain other defendants, naming them, and also a number of the defendants associated with him in the Jones Farm Oil Company, as a mining company known as the Locke Gas Company, and proceeded to sink a well on the C. A. Jones 62-acre tract within 5 feet of the dividing line between the W. P. Jones farm and the C. A. Jones farm, which well is a good gas producer, averaging a daily production of about 1,000,000 feet, and through which, by means of its close proximity to the dividing line, the gas which underlies the W. P. Jones lease, in which plaintiffs are interested to the extent of one-sixteenth of such gas, is being rapidly drained and exhausted, to the great detriment and damage of plaintiffs' interest therein. The bill charges on information and belief that W. P. Jones and his mother, C. A. Jones, combined and conspired with Locke and the other defendants, who composed the Locke Gas Company, to drill the C. A. Jones well within 5 feet of the dividing line with the intent to draw the gas underlying the W. P. Jones 68-acre lease in order to do, as they have thereby done, irreparable injury and damage to the plaintiffs, and that the well was so located at the behest and request of W. P. Jones in order that he and his mother would be the

real beneficiaries in the royalty from said well and thus drain the W. P. Jones lease without paying plaintiffs the one-sixteenth royalty therein to which they were entitled. The bill alleges refusal on the part of defendants, after request, to drill an offset well on the W. P. Jones tract of 68 acres to protect the depletion of the gas therefrom, that plaintiffs have no adequate relief save in a court of equity, that they are suffering irreparable loss, that large quantities of gas are being taken from them without payment of their royalty, and they pray for a mandatory injunction to compel defendants to drill an offset well, and for general relief.

The deeds and leases are filed as exhibits with the bill. To support the application for mandatory injunction, two affidavits are filed by plaintiff, one sworn to by W. L. Israel, one of the plaintiffs, to the effect that the well complained of is producing a large amount of gas in paying quantities and was drilled in in February, 1918, and is located within 5 feet of the dividing line between the two farms, the other by D. L. McCullough, who has no interest in the litigation, to the effect that he was present when the well complained of was located by W. P. Jones and certain of the other defendants, and who stated that the well was to their knowledge very close to the W. P. Jones dividing line; that the well was drilled in in February, 1918, was gauged at over 1,000,000 feet, and that he was afterwards informed by A. S. McCullough that the first check received by the company, the Locke Gas Company, from the Hope Natural Gas Company from the first sale of gas was over \$900. The principal ground of error is predicated on the insufficiency of the bill, and on this assignment the case turns. For that reason the allegations of the bill have been set out at more length than usual.

Is the bill sufficient? It is contended that plaintiffs do not have such an interest in the gas under the 68-acre W. P. Jones tract as will entitle them to an action for protection, and we are cited to *Feather v. Baird*, 85 W. Va. 267, 102 S. E. 294. That decision holds that, where a deed grants all the right, title and interest in and to minerals in a certain tract for a valuable consideration, a covenant on the part of the grantee to pay one cent royalty per ton on all coal mined, payable as soon as the coal is mined and shipped, was not a condition subsequent, but only an additional consideration for the grant, which the vendee was bound to pay. The grantor conveyed all his title to the coal, but retained an interest therein, enforceable when the coal was mined, which the grantee was obligated to pay. The Israel deed expressly "reserves from the grant one-sixteenth royalty in all minerals produced from said farm for a period of 15 years from this date," and conveys the land and

minerals with this incumbrance on the minerals. The grantee does not bind himself to pay except by implication. If, perchance, he should extract the mineral, he would be required to pay the reserved one-sixteenth royalty. Any one holding under him either by purchase or lease, and extracting the mineral, would be likewise bound. But whether this clause should be construed as a retention of a part of the mineral in place, or whether in the nature of the usual covenant for payment of royalty in mining leases, or whether as an additional consideration for the grant, it is immaterial to inquire for the proper disposition of this case. It is plain that the vendor has a property right expressly reserved to him in the conveyance of which all subsequent purchasers or lessees are bound to take notice. Whether plaintiffs can protect this property right by mandatory injunction is the vital inquiry. On the same day this deed was made to Riggs (October 24, 1907) the latter made conveyance of the same land (acknowledging before the same notary) to defendant W. P. Jones, expressly referring to the Israel deed therein, Jones assuming the payment to Israel of the purchase money as the consideration for the grant, and in the granting clause used the following language:

"Reserving therefrom one-sixteenth royalty in all mineral produced from the said farm for a period of 15 years from this date, second party to use due diligence to have land tested for oil, the aforesaid reservation of mineral rights being made to cover the reservation made by J. L. Israel and Margaret Israel, his wife, in the deed made by them to A. N. Riggs bearing date October 24, 1907, the said party of the first part hereby conveying to said party of the second part all rights of every kind and character conveyed to the said A. N. Riggs by J. L. Israel and Margaret Israel, his wife, in the deed aforesaid."

Defendant W. P. Jones and his lessees were fully aware of Israel's interest in the mineral, and assumed the obligation to pay his royalty reserved in case the minerals were removed by them. It is argued by counsel for appellants that Israel, in order to protect his reservation, should have expressly reserved a vendor's lien in the face of his deed as for a balance of purchase money. Unquestionably, no. Indicative of the knowledge of Israel's reservation and vested right, defendant Jones and his lessees with whom he formed a mining partnership to exploit the farm for oil and gas in the year 1917 drilled a producing oil well on the farm, and, recognizing plaintiffs' interest in the oil produced, paid to them their one-sixteenth royalty, amounting to about \$100, and continued to pay royalties to them. So states the bill and it is not controverted.

[8]. The construction placed upon the meaning of any instrument or any part thereof by the parties thereto is entitled to great

weight, and is often conclusive. *Lovett v. W. Va. Central Gas Co.*, 73 W. Va. 40, 79 S. E. 1007; 13 C. J. p. 546.

[1, 2] Courts are extremely cautious in considering applications for and awarding mandatory injunction, and a clear right must be shown, and the case be one of necessity or extreme hardship. *Powhatan C. & C. Co. v. Ritz*, 60 W. Va. 395, 56 S. E. 257, 9 L. R. A. (N. S.) 1225. But the power to grant is undoubted, and, if it were not so, the remedial and restraining power of courts of equity would be greatly impaired, if not partially destroyed. Does the bill set up a case of necessity or extreme hardship? Plaintiffs' right to royalty in the W. P. Jones tract is rapidly nearing extinguishment by the expiration of the 15-year period; and by conspiracy defendants have caused a cessation of development thereon for the purpose of destroying their right, and at the same time are appropriating a part of it through a well on adjoining property. Coupled with this fleeting right of plaintiffs is the uncertainty of damages in an action at law. Under the circumstances an action at law would be inadequate, and the delay practically a denial of justice. From the peculiar characteristics of oil and gas in place, their elusive and migratory nature, their tendency to find an escape in the direction of least resistance, how far they will travel under given pressure to find an escape has been found entirely too problematical for any degree of certainty. In practical experience no one will approximate with reasonable certainty, and experts widely differ. Damages in such cases are largely speculative and uncertain. The true measure is most difficult to find. A remedy at law is not adequate, in the sense to deprive equity of jurisdiction, unless it is as certain, prompt, and efficient to the ends of justice as the remedy in equity. Besides, fraud and collusion are charged, always elements of equitable jurisdiction. It is clear that an injunction will not lie against the defendants composing the mining company owning the C. A. Jones lease from developing their property. *Archer on Oil & Gas*, p. 782. Neither would an action at law lie against those members solely interested in that lease.

As above stated, W. P. Jones and his lessees had notice of plaintiffs' royalty in the 68-acre tract. In the operation and development it is their duty to protect plaintiffs' interest, not to destroy it. The principle of law expressed in the Latin maxim applies, "*Sit utere tuo et alienum non lœdas*," meaning, "So use your own property as not to injure or destroy the property of another." There was an implied covenant when they leased this property that they would, having full knowledge and notice, protect plaintiffs' rights reserved, and pay them one-sixteenth royalty on all mineral taken therefrom. These plaintiffs, under

the facts, are entitled to the same protection of their royalty interest as their co-owner of the royalties, W. P. Jones. When the lessee of oil and gas lands begins exploration, there is an implied covenant that he will diligently proceed, and, if oil or gas is found, he will protect the lines and develop the property. *Archer on Oil and Gas*, p. 393. But Jones has conspired with his lessees to take the gas out by a well on an adjoining tract. He has procured this to be done for apparent reasons. The bill charges that he induced his lessees so to act. It is well settled that Jones could compel his lessees to build an offset well to protect his royalty. Cannot plaintiffs, co-owners of the royalties, demand and receive the same protection, especially when their right will soon expire? A lessee in the operation of his lease must act in good faith. Where he owns adjoining land, he has no right, under the guise of ownership, to drain the land leased by putting down wells on the adjoining property, without sinking offset wells on the lease sufficient to protect it from such drainage, when the lessor is entitled to royalties in the oil or gas taken from the leased premises. *Thornton on Oil & Gas* (3d Ed.) § 108. A lessee of two or more adjoining tracts cannot collusively, fraudulently, or evasively drill wells on one tract so as to drain the oil from the adjoining tracts, and equity will furnish relief to those injured thereby. *Barnard v. Monongahela Gas Co.*, 216 Pa. 362, 65 Atl. 801; *Kleppner v. Lemon*, 176 Pa. 502, 35 Atl. 109. In this last case the defendant was required to sink an offset well forthwith, under penalty of forfeiture. See, also, *Jennings v. Carbon Co.*, 73 W. Va. 217, 80 S. E. 368. A decree of forfeiture cannot be given plaintiffs. They are not parties to the lease; and a forfeiture or abandonment would, as a practical result, extinguish their right, already nearly lost by flight of time, and would perpetuate the very condition brought about by the collusion of defendants—depletion of the gas through adjacent wells. Under the allegations of the bill charging fraud and collusion, justice would not permit a forfeiture or an abandonment of the W. P. Jones lease. Then what adequate remedy remains except through mandatory process of a court of equity? We think that the facts alleged, with the necessary inferences therefrom, are sufficient to justify such remedy, unusual and harsh though it may be. The case is one of necessity and extreme hardship.

[7, 8] Appellants urge that the demurrer (termed an objection to the granting of the mandatory injunction) should have been sustained because there is no allegation in the bill that the oil well on the W. P. Jones tract was not a sufficient offset to protect drainage from the well near the dividing line; that it is not averred therein with precision that there is sufficient territory in the W. P. Jones

tract underlaid with sand from which the said well obtains its gas, and that the nature of the sand is such as to allow drainage; that it was error for the court to read *ex parte* affidavits submitted to sustain the motion for injunction; and that such affidavits, when read, did not supply adequate proof to sustain the decree of September 14, 1920. The only well on the W. P. Jones tract is alleged to be an oil well, how far away from the C. A. Jones lease does not appear, but the bill states facts which lead to the conclusion that the gas in large volume is being drawn from the W. P. Jones land without adequate protection to plaintiffs' interest. The prayer for an offset well negatives the presumption that one is already there. It would be a violent and unreasonable presumption to say that a well of 1,000,000 feet flow, within 5 feet of a tract of land, would not draw gas from that tract. The character of the sand under both tracts would be presumed to be the same. Without an actual test a statement to the contrary would be imaginative. Proofs of the allegations of the bill, duly sworn to, are not necessary upon demurrer, or when their verity is not denied. Affidavits are always proper to sustain a bill for preliminary injunction. The decree is alleged to be erroneous because it gives plaintiffs the privilege of going upon the premises to inspect the drilling of the offset well and to measure its flow when finished. What harm there can be in such a privilege we fail to perceive. It does not vitiate the decree. If it be exercised to the detriment of defendants, the court would remedy that condition when it arises. It is a privilege which fair-minded business dealing would readily accord.

[3] Criticism is directed to the form of the bill. It is claimed that it is not in the form required by section 37, c. 125, of the Code, or in the usual form of chancery practice prior to the enactment of that section, and is therefore fatally defective. A bill is not necessarily defective because it does not follow the form found in the Code. That section expressly says that the bill may be in that form or in the substance thereof. It is not mandatory. The bill, in what purports to be its caption, names each of the plaintiffs and each of the defendants. Then follows the words:

"To the Honorable Homer B. Woods, Judge of the Circuit Court of Pleasants County, West Virginia: The bill of complaint of Julie Israel Lamp et al., plaintiffs, against John T. Locke et al., defendants, filed in your honor's said court at August rules, 1920. The plaintiffs represent and show unto your honor," etc.

In the prayer of the bill all of the defendants are again named as such. While the bill is inaptly drawn, as to the naming of parties, we think it sufficient to show who are the plaintiffs and defendants, their respective interests in the subject-matter, and

the relief sought. The criticism is technical.

[4] Further error is asserted because, it is claimed, no proper time was given defendants in which to answer the bill after their appearance on August 23 to the notice for injunction, at which time they objected to the granting of the injunction. The claim is to the effect that the bill had not matured for hearing, and the demurrer interposed to the bill and then overruled would not justify a rule to answer until after the bill had fully matured. The bill is for mandatory injunction only, and defendants were summoned to answer it at August rules, when the bill was filed. The action was pending, and a motion for preliminary injunction could have been made at any time. It could have been made upon presentation of the bill before filing and before process.

"A preliminary injunction is an extraordinary proceeding in which the statute dispenses with some things indispensable in regular proceedings." *Cooper v. Bennett*, 70 W. Va. 112, 73 S. E. 261, Ann. Cas. 1913D, 851.

The appearance of defendants to resist the motion for injunction was an appearance to the bill, and they were entitled to demur and answer if they deemed it advisable. They waived maturity of the bill.

"A defendant who appears and answers at a term when the cause is improperly on the docket because not set for hearing at rules waives such irregularity." *McDermitt v. Newman*, 64 W. Va. 185, 61 S. E. 800.

But counsel contends that they did not demur, but simply objected to the granting of the injunction on the preliminary motion thereof, and that the court improperly treated their objection as a demurrer. The record shows that defendants appeared, objected to the granting of the injunction, "and they and each of them say that the plaintiffs' said bill is not sufficient in law to entitle plaintiffs to the relief by injunction prayed for in their said bill." This was clearly a demurrer. The court properly treated it as such. In the subsequent proceedings, and in the petition for appeal, counsel for defendant treats it as a demurrer. Upon overruling the demurrer time was given defendants to answer, and counsel in open court declined to answer, and made no further appearance. The motion for injunction was docketed, and the hearing thereon continued, and no action was taken thereon until after the cause had fully matured. Where a demurrer is argued and overruled, and the demurrant is ruled to answer on a day certain, if on that day he fails to appear and answer, plaintiff is entitled to a decree against him for the relief prayed. Section 30, c. 125, Code. Defendants could have answered at any time before final decree, under section 53 of chapter 125, notwithstanding the court's order giving them 10 days to

make answer. *Waggy v. Waggy*, 77 W. Va. 144, 87 S. E. 178.

[5] Appellees contend that no assignment of error except to the decree overruling the demurrer should be considered as to these defendants who appeared, demurred, and then refused to answer; that they stand in this court upon their demurrer. If an appeal had been taken by them without first making motion under section 5, c. 134, Code, to correct errors, then they could not be heard upon any assignment of error committed after the demurrer was overruled; they would stand upon the questions raised by the demurrer. *Steenod's Adm'r v. Railroad Co.*, 25 W. Va. 133; *Ferrell v. Camden*, 57 W. Va. 401, 50 S. E. 733. But they, as well as their codefendants, have made the motion in the lower court to reverse and correct errors under said section of chapter 134 as to both decrees, and the errors, if any, committed in both decrees will be considered. The rule is stated by Judge Green as follows:

"If a defendant in a bill files no plea or answer, but files a demurrer, simply on the ground that the plaintiff on the facts stated in the bill is entitled to no relief against him, and the court below overrules such demurrer and awards a rule against him to answer the bill at a specified time, and he fails to do so, and a decree is rendered against him, and he makes no such motion to have it reversed or corrected in the court below, and he appeals from such decree, solely on the ground that the court rendered any sort of a decree against him, this court will, though he did not make such motion, entertain his appeal, because such appeal, though in form an appeal from the last decree, is in substance and in reality an appeal from the decree overruling his demurrer and deciding that the plaintiff was entitled to relief on the statements in the bill against him, and is therefore not to be regarded as a decree on a bill taken for confessed. But, if the appellant in such case does not confine his appeal to the error committed by the court in overruling his demurrer simply carried out in the last decree, but insists that there are in addition thereto other and independent errors in the last decree against him, which should be reversed, even though the appellate court held that the demurrer was properly overruled, this court will not entertain such appeal, because so far as these additional and independent errors are concerned, this last decree is to be regarded as a decree on a bill taken for confessed, and cannot be reversed by this court till a motion to correct it has been made in the court below." *Watson v. Wigginton*, 28 W. Va. 533.

A. N. Riggs has no interest in the litigation and is not a necessary party. He was evidently only an intermediary between J. L. Israel and W. P. Jones in the transfer of the title to the W. P. Jones tract.

We affirm the decrees of September 14, 1920, and of December 2, 1920.

Affirmed.

(89 W. Va. 211)

FARR v. WEAVER. (No. 4103.)(Supreme Court of Appeals of West Virginia.
Oct. 11, 1921.)*(Syllabus by the Court.)***1. Notice \Leftrightarrow —Means of knowledge, with duty to use, equal knowledge.**

In equity means of knowledge with the duty of using them are equivalent to actual knowledge itself.

2. Principal and agent \Leftrightarrow 147(2), 160 $\frac{1}{2}$ —Third party is bound to know extent of agent's authority, and may not apply principal's property to agent's personal indebtedness.

One dealing with an agent is bound to know the extent of his authority, and with notice of such agency one dealing with him will not be allowed to receive the money or property of the principal in payment of the agent's individual indebtedness, and in equity will be required to restore the same to the principal or make the application thereof as intended and directed by the principal.

Appeal from Circuit Court, Cabell County.

Suit by John S. Farr against J. S. Weaver. Decree for plaintiff, and defendant appeals. Decree reversed, and bill dismissed.

J. H. Strickling, of Huntington, for appellant.

Marcum & Shepherd, of Huntington, for appellee.

MILLER, J. We settled the principles applicable to this case in response to questions arising upon the pleadings and formerly certified to us by the circuit court. 84 W. Va. 182, 99 S. E. 395.

As shown by the report of that case the suit was to enforce a mechanic's or material-man's lien claimed by plaintiff against defendant's real estate situate in the city of Huntington, amounting as the present record shows to about \$1200.00.

It is conceded that plaintiff furnished to Watts-Castle Construction Company, a co-partnership, contractors, who built the house on defendant's lot, the material covered by plaintiff's alleged lien and that the contractors owed him therefor, but as shown in the former and present record, the defendant, on September 11, 1917, while the work of building the house was still in progress, executed to the construction company his note for \$1200.00, on account of the labor and material which went into the building, and which note they turned over to the plaintiff, as plaintiff claims, on account of another debt represented by a past due note discounted by him at a bank in Huntington, in which he was a stockholder and director, and payment of which was then being demanded of the makers and endorser by the bank. And it is contended by plaintiff that

the payees of the note made particular application thereof to the payment of their past due note.

[1] On the former hearing we distinctly decided that if as pleaded by defendant the Watts-Castle Construction Company received from him the \$1200.00 note in part payment for the work and material going into the construction of his house, and plaintiff had notice of such fact, neither he nor the contractors could lawfully make a different application thereof. The evidence taken and considered upon the hearing in the court below, and now before us, shows clearly that plaintiff knew and was bound to know that the note was Weaver's note given to the Watts-Castle Construction Company, and it is admitted that he knew from his books that he had furnished material to these contractors for the construction of the house on defendant's lot. The dray slips, so called, sent out by him with the draymen delivering the material so furnished, showed the time and place of delivery and the name of the owner of the lot. His books of account also indicated where or for whose job the materials were furnished, and as he admitted, it was from these slips and from his books that he afterwards took the items in making up his account and filing his lien against defendant's property. The fact of Farr's knowledge and notice of the source and purpose of the note, we think is fully established by the evidence, and such being the case it was his duty to make the proper application of the note to the discharge of his incipient lien then existing on Weaver's property, and not apply it or allow the contractors to apply it on the old debt and attempt to perpetuate the lien on defendant's property. As suggested in argument, the court below may have been misled by the notion that defendant was bound by the former decision to show actual notice to Farr of the maker's purpose when accepting the note from the contractors. But in equity means of knowledge with the duty of using them are equivalent to knowledge itself, and Farr could not shut his eyes to the facts in his possession, which if pursued would have fully informed him. See the many cases cited for this proposition in 10 Enc. Dig. Va. & W. Va. Rep. 486. That Farr had actual knowledge is evident from the fact that shortly after receiving Weaver's note he called him up on the telephone to ask him how he stood with the Watts-Castle Construction Company, and being told, he notified Weaver that he proposed to hold him and his property liable for all the material furnished them in the construction of his house. This he could not do without first applying the Weaver note pro tanto to his debt, as in law and equity he was bound to do. If this had been done, plaintiff's lien would have been discharged in full, and he would have had no lien to enforce against Weaver's property.

[2] Another proposition affirmed on the former hearing and become applicable to the case now presented, is that the Watts-Castle Construction Company were the agents of Weaver in the construction of the house on Weaver's lot, and they and Farr were charged with notice that an agent can not lawfully misapply his principal's money in payment of his individual debts. The evidence satisfies us that Farr had knowledge of the financial condition of the contractors and had taken time by the forelock in an effort to cover his probable losses. It was inequitable and unjust for him to have attempted to do so at the expense of Weaver with the knowledge of the facts or means of knowledge at his hands.

For the foregoing reasons we are of opinion to reverse the decree and dismiss the plaintiff's bill with costs to appellant incurred here and in the circuit court.

(89 W. Va. 221)

**GOODBAR v. WESTERN & SOUTHERN
LIFE INS. CO. (No. 4227.)**

(Supreme Court of Appeals of West Virginia,
Oct. 11, 1921.)

(Syllabus by the Court.)

1. Insurance \S 141(2)—Insurer, by unconditional delivery and giving credit for premium, waives policy provision against liability before actual payment.

An express provision in a policy of life insurance that the insurer shall not be liable thereon until the premium is actually paid, may be waived by the unconditional delivery of the policy to the insured as a complete and executed contract under an express or implied agreement to give credit for the premium, or for a part thereof, and in such case the insurer is liable in case of the death of the insured before the expiration of the time given for payment.

2. Insurance \S 665(6)—Circumstantial evidence to establish suicide must exclude every other reasonable hypothesis.

Where, in a suit on a policy of life insurance, the defendant relies upon a provision of the policy defeating recovery if the insured dies from suicide, while sane or insane, within two years from the date of the policy, the evidence to show that the insured's death was suicidal must be clear and satisfactory, and where circumstantial evidence is relied upon for such purpose, such circumstances must establish that death resulted from suicide to the exclusion of every reasonable hypothesis consistent with death from natural causes.

3. Insurance \S 291(7)—Life policy held void for insured's misstatement as to previous injury.

A policy of life insurance issued upon an application in which is contained a representation by the insured that he had never had any

illness, injury, or disease, will be rendered void upon a showing that the insured, prior to the time of making the application, had suffered an injury resulting in the loss of one of his feet.

4. Insurance \S 300—Life policy void for misrepresentation in application as to having been refused insurance.

A policy of life insurance issued upon an application in which is contained a representation by the insured that he had never applied to a company or agent for insurance without receiving a policy of the exact kind and amount applied for, will be rendered void, where it is shown that the insured had in fact applied to other companies for life insurance, and that such other companies had refused to issue the same.

(Additional Syllabus by Editorial Staff.)

5. Trial \S 233(1)—Instruction, if defendant failed to establish any of its defenses, verdict must be for plaintiff, held error.

In an action on a life policy, an instruction on false representations in the application held erroneous because telling the jury that, if defendant failed to establish any of its defenses, the verdict must be for the plaintiff, while exactly the reverse of this is true.

6. Insurance \S 256(2)—Whether insured intended to deceive by false statements of facts is immaterial.

False answers in an application for a life insurance policy as to matters of fact and not of opinion render the policy void, whether applicant had any intention of deceiving or not.

Error to Circuit Court, Cabell County.

Action by Zorada Goodbar against the Western & Southern Life Insurance Company. Judgment for plaintiff, and the defendant brings error. Judgment reversed, verdict set aside, and cause remanded for new trial.

Fitzpatrick, Campbell, Brown & Davis, of Huntington, for plaintiff in error.

J. H. Strickling and Jean F. Smith, both of Huntington, for defendant in error.

RITZ, P. The plaintiff brought this suit to recover the indemnity provided in a policy of insurance issued by the defendant upon the life of her husband, Harry Goodbar. To review a judgment in her favor for the amount of said indemnity this writ of error is prosecuted.

On the 1st day of December, 1913, according to the plaintiff's contention, and on the 1st day of January, 1914, according to the contention of the defendant, Harry Goodbar applied to an agent of the defendant for a policy of life insurance in the sum of \$3,000. This application was in writing, and is introduced in evidence in this case. Upon this application the defendant issued the policy of insurance desired, and sent it to its agent at

Huntington, who delivered it to the insured. At the time the application was taken Goodbar paid the sum of \$5 as an advance on the premium charged, which was \$58.80. At the time of the delivery of the policy on the 8th of January, 1914, Goodbar was not able to pay the balance of the premium, and the plaintiff states that the agent accepted another payment of \$2, for which a receipt was given, and Goodbar's note or due bill for \$51.80, and delivered the policy unconditionally, while the agent swears that he delivered the policy to Goodbar accepting the \$2 as a conditional payment, with the understanding that the policy was simply delivered for examination, and would be returned unless the full premium was paid within 30 days, and he says that he took a written statement from the insured showing this fact. This writing, however, is not produced, and the defendant shows that it is unable to locate the same if, indeed, it ever existed. On the 9th of January, 1914, Goodbar became very sick from bichloride of mercury poisoning, presumably taken with suicidal intent, and on the 15th of that month he died as a result thereof. At the time the application for insurance was made, and on the same day, Goodbar was taken before the company's local medical examiner, Dr. Shafer, who examined him and submitted his result of the examination to the company with the application for insurance. This same doctor was called to attend Goodbar in his last illness, and discovering while giving this attention that Goodbar only had one foot, and recalling that this did not appear from the medical examination which he submitted, he told Goodbar that he ought to return the policy of insurance, and have the same corrected so as to show the fact in that respect. Prior to this, however, the agent of the company had come to Goodbar's house to secure the return of the policy. Mrs. Goodbar says that both of these parties represented that it would not affect the validity of the policy in the least, but that they simply wanted it for the purpose of making it speak the truth. The Goodbars refused to return it to the agent, but they did return it to the doctor, and he sent it to the company with the explanation that the insured had only one foot. It never was returned by the company, but a copy was furnished to the plaintiff, upon which this suit was brought.

The defendant interposed to the declaration four defenses. The first asserted that the insured had committed suicide by taking bichloride of mercury within two years of the date of the issuance of the policy, and that because of a provision in the policy to the effect that in case of the suicide of the insured, while sane or insane, within two years from the date of the issuance of such policy, the limit of recovery would be the amount of the premiums paid, it was only liable for

the sum of \$7, the amount actually paid by Goodbar as premium. The second defense is that the insured, at the time he applied for said insurance, made an application and appended thereto, over his signature, a statement that the representations made therein were true, and were offered to the company as representations upon which they might rely in issuing the said policy; that among the questions asked him in said application was: "Have you ever had any illness, injury or disease other than stated by you above?" That he had not theretofore indicated that he had had any disease or injury, and that the answer to the question was, "No." That in fact and in truth the insured had prior to that time suffered an injury which resulted in the loss of one of his feet, which fact he concealed from the defendant. Third, that he also represented in said written application that he had never applied to a company or agent for insurance without receiving a policy in the exact amount and of the kind applied for, when in fact and in truth within less than one year prior to the issuance of this policy, and the making of this application, he had been rejected and refused insurance by two other companies. Fourth, that the policy provides that it shall continue in force only for the period actually paid for, and that no premium could be paid for a less period than three months, and that the policy was simply delivered to Goodbar for examination, and because of his failure to make the payment of the premium provided by the terms of the policy prior to his death his beneficiary was not entitled to recover thereon. The replication to these defenses denies that the insured committed suicide; asserts that while the premium had not been paid, this requirement had been waived by the company's agent by accepting the duebill or note from the insured for such premium, and unconditionally delivering the policy; and that the representations by the insured that he had received no injury prior to the application for insurance, and had never been refused insurance by any other company, were in effect waived by the defendant because it, through its agent, was fully advised of the facts in regard thereto.

[1] As before indicated, the evidence upon the question of delivery of the policy and waiver of the payment of the premium is conflicting. The agent says that he delivered the policy for examination upon condition that it would be returned if the premium was not paid within thirty days, and that at the time he so delivered it Goodbar signed a writing showing this understanding. This writing, however, is not produced. This agent admits that Mrs. Goodbar was present at the time of delivery. She testifies that when the agent came to deliver the policy he was advised that they did not have

the money to pay the premium at that time; that he told them that he would deliver the policy and accept a note or duebill for the balance of the premium, and that this would put the policy in immediate effect; that he did deliver the same, and that he was paid \$2 in money and given a note or duebill by the insured, which note or duebill was not paid prior to Goodbar's death. She says that the insurance company's agent also promised on that occasion to indorse a note for them for a larger amount than the balance of the premium, upon which they could secure the money and pay off this duebill, and that she went to his office a day or two afterward to get him to indorse this note, but that he refused to do so. Upon this showing the jury, under the instructions of the court, found that the requirement as to the payment of the premium had been waived by the company. The defendant's counsel do not contend that such a requirement as this could not be waived. That such can be done seems to be well established. 14 R. C. L. title "Insurance," § 362. Nor is it doubted that the testimony of Mrs. Goodbar would constitute a waiver, if true, it being purely a question whether she or the agent correctly reported the facts. The jury's finding is conclusive upon that question.

[2] The next defense relied upon is that of suicide. One of the conditions of the policy is:

"In case of suicide, while sane or insane, within two years from the date on which this insurance begins, the limit of recovery shall be the amount of premiums paid thereon."

Goodbar died within a very few days after the issuance of the policy, and the defendant insists that his death was caused by bichloride of mercury poisoning, self-administered. That his death resulted from bichloride of mercury poisoning there would seem to be no doubt. Dr. Shafer, who attended him at this time, testifies that this was so, and Dr. Steenbergen, who was called in consultation, is likewise positive that Goodbar's death resulted from bichloride of mercury poisoning, and there is no effort to contradict the testimony of these witnesses, or to account for his death upon any other theory. It is stated by these doctors that when they told Goodbar that he had taken bichloride of mercury he denied it, but they attach no significance to this denial, expressing the view that they expected him to make this answer. There is no direct evidence as to how or by whom this poison was administered to the insured. It is within the realm of possibility that it was taken by mistake, or that it was administered to him by some one else innocently, or with a homicidal intent. There is no attempt to show that he procured the poison at any time previous to his death, or how it came into his possession, if in fact it ever did. The tenacity with which men

cling to life is so great that suicide will not be presumed unless the state of facts under which death occurs practically excludes every other reasonable hypothesis, and the court so instructed the jury in this case. There is no indication that Goodbar was not in his right mind up until the time of his death. In fact, the evidence shows that he was entirely rational, and was suffering from no sort of delusion or hallucination at any time. While the evidence tending to show death by suicide was very strong, still when we consider that the poison was never traced into Goodbar's possession, and the possibility that it may have been taken innocently by mistake, or been administered to him by some one else under the belief that it was another substance, it may be that the jury's verdict upon this question can be justified. *South Atlantic Life Ins. Co. v. Hurt's Adm'r*, 115 Va. 398, 79 S. E. 401, and authorities there cited.

[3] In the application for insurance the insured represented that he had never suffered any injury. It appears from the uncontradicted evidence that the insured at the time had only one foot, and the plaintiff, his wife, testified that the missing foot had been off for 12 or 13 years. From this it satisfactorily appears that some 12 or 13 years before the insured had suffered an injury which resulted in the loss of his foot. This representation is a statement of fact within the knowledge of the insured. It is in no sense an expression of opinion upon his part. As we have repeatedly held in cases like this, the company, by asking and demanding answers to certain questions, and the insured, by making answers and asserting their correctness, agree as to their materiality, and make any false statement in regard to a matter within the insured's knowledge ground for vitiating the policy. Of course, if the answer was such as only called for the opinion of the insured, and he gave an honest opinion, he could not be charged with a false representation. There is no opinion called for, however, so far as this question is concerned. It called for a statement from the insured of something that he knew, and his answer is coupled with an assurance upon his part that the defendant could rely upon the truthfulness thereof. The replication attempts to escape the effect of this false representation by asserting that the defendant or its agent, knew the facts when the application was given. It suffices to say that this contention is supported by no evidence whatever. On the contrary, it is shown by the agent that he never saw Goodbar before he came to his office and made application for the insurance, and that he did not know until after the policy was delivered that the insured had only one foot. The medical examiner states that he had no knowledge of Goodbar's condition; that in examining him

for the insurance he did not make such an investigation as would disclose this injury, and only discovered it when he subsequently came to attend him while he was sick in bed suffering from the bichloride of mercury poisoning.

[4] The next ground of defense is that the insured represented that he had never applied for and been refused insurance in any other company. This representation is likewise one of fact, and is material, and if false will avoid the policy issued upon an application containing it. 25 Cyc. 819; 14 R. C. L. title "Insurance," § 258; Bacon on Life and Accident Insurance, § 293. The facts proved on this issue are that on the 3d day of December, 1913, Goodbar made an application for a policy of \$3,000 in the Ohio National Life Insurance Company. This application was in writing and was signed by Goodbar, and is introduced in evidence in this case with the testimony of the medical director of that company, who likewise testifies that on the 27th of December the application was rejected; that the agent who took the application was at once notified of this fact and directed to return to Goodbar the advance payment of \$5 made by him at the time of taking the application, and take up the receipt given him therefor; that this was done, and the receipt given to Goodbar for the \$5 returned to the home office of the company at Cincinnati on the 31st of December, 1913. The plaintiff, however, attempts to escape the effect of this refusal by asserting that the application in this case was made on the 1st day of December, 1913, two days before the application made to the Ohio National Life Insurance Company, and she introduced in evidence a receipt which was given by the agent at the time the application was taken, and which is dated December 1, without indicating any year, and she asserts that this was given to her husband by the agent on the 1st day of December, 1913. The application, it is admitted, was taken at the same time. It is dated January 1, 1914, and signed by Goodbar. The medical examination it is shown was made upon the same day, and it is dated January 1, 1914. The agent who took the application, and the physician who made the medical examination, both testify that these dates are correct. The agent admits that the receipt produced was given by him, but he says that the date December 1 is a mistake, and occurred by his writing the name of the previous month from force of habit. This explanation is entirely plausible. Very often those who are in the habit of frequently writing dates, in changing from one month to another, make mistakes like this. If, however, the plaintiff's contention is correct that the transaction was really had on the 1st of December, 1913, we are entirely at a loss to understand why the application signed by

Goodbar is dated on the 1st of January following, and the medical examination likewise bore that date. It is quite possible that in writing the date on the first day of the month by mistake the name of a preceding month might be used, but it is without the realm of possibility that the name of a succeeding month and a new year would be inserted. However, this is not so material in this case, as it appears that on the 12th day of June, 1913, the insured made an application in writing to the Conservative Life Insurance Company for a policy of \$1,000 on his life. This application is in writing, and is introduced in evidence with the testimony of the secretary of that company who likewise testifies that the insurance asked for was refused, and this fact communicated to the agent who solicited and secured the application, who in turn testifies that he delivered in person to Goodbar the letter advising him of the refusal of the company to issue the policy long before the application in this case was made. There is no attempt to explain this. This false representation unexplained was sufficient to defeat plaintiff's recovery.

[5, 6] This disposes of the several defenses relied upon, but inasmuch as the case will have to go back for a new trial, it is necessary for us to pass upon the instructions. Instruction No. 1 given for the plaintiff told the jury that inasmuch as the defendant relied upon false representations to defeat recovery it must appear from the evidence that such representations were made by the insured, Harry Goodbar, willfully, and with the intent to deceive the insurer, and that such false representations were relied upon by the company; or that the answers to the questions asked were not only false, but that the thing inquired about was peculiarly within the knowledge of the insured; and that if the defendant had failed to establish its defenses of fraudulent representations, or any of them, then the verdict must be for the plaintiff. It was error to give this instruction because it told the jury in the first place that if the defendant failed to establish any of its defenses the verdict must be for the plaintiff, while exactly the reverse of this is true. If the defendant established any one of its defenses, it was entitled to a verdict. It is also misleading in that it submits to the jury the question of the intent with which Goodbar made the representations, and tells the jury that he must have made them willfully, and that they must find that they were relied on: Now the representations relied upon for defense in this case do not call for opinions, and the court should not have submitted the question of the insured's good faith to the jury. These defenses were based upon misrepresentations of facts, of which the insured was bound to have knowledge, and as we have repeatedly held

the parties made these questions and answers material by their contract, and if the insured gave false answers to them the policy is vitiated, even though he may have done so with no intention of deceiving, and under the impression that they were not matters of any importance, or even temporarily have forgotten the facts in regard to the transactions inquired about. If it was the purpose of this instruction to submit to the jury the question of the good faith of the insured where a matter of opinion was inquired about, then there was no evidence in the case which justified it. It was, therefore, misleading, and should not have been given. If it was the intention to submit to the jury the question whether these representations were matters of opinion, or whether the answers made thereto were made in good faith, then it was wrong because the questions did not call for any opinion, and as matter of law the good faith of the insured in making the answers was not material. *Schwarzbach v. Protective Union*, 25 W. Va. 622, 52 Am. Rep. 227; *Logan v. Assurance Society*, 57 W. Va. 384, 50 S. E. 529; *Myers v. Life Ins. Co.*, 83 W. Va. 390, 98 S. E. 424; *Harris v. Ins. Co.*, 86 W. Va. 688, 104 S. E. 121.

Instruction No. 2 given on behalf of the plaintiff presented the theory that the defendant might waive the requirement of payment of the premium, and tells the jury that if a duebill or note was accepted and the policy delivered unconditionally, this requirement of payment was thereby waived. This instruction, we think, properly propounds the law upon this question.

Instruction No. 3 is on the question of suicide. It tells the jury that if there is a doubt whether the insured came to his death by suicide or natural causes, and there is no convincing evidence upon the cause of his death, the law presumes that his death was produced by natural causes; that the law requires more than a preponderance of the evidence to establish suicide; that every hypothesis consistent with death from natural causes must be excluded. This instruction is a fair statement of the law as to the character of proof required to establish death by suicide, and while the defendant assigns as error the action of the court in giving it, no reason is given or argument adduced to support the assignment.

On the part of the defendant the court gave a number of instructions correctly presenting its various defenses. These instructions, so far as they apply to the false representations made by the plaintiff in his application, are in direct conflict with the plaintiff's instruction No. 1. We think they very clearly present the correct theory to the jury, and that there was no error in refusing to give other instructions offered by the

defendant covering the same ground. An instruction was, however, offered by the defendant calling for the judgment of the court upon defendant's defenses, and asking the court to tell the jury as matter of law that defendant had made good defense to the suit, and that the jury should so find. This instruction was refused. In the view of the case we have above outlined it should have been given.

We will reverse the judgment of the circuit court of Cabell county, set aside the verdict of the jury, and remand the cause for a new trial.

(89 W. Va. 214)

MALLEABLE COAL CO v. POTTER et al.
(No. 4222.)

(Supreme Court of Appeals of West Virginia.
Oct. 11, 1921.)

(Syllabus by the Court.)

1. Appeal and error \S 242(3)—Demurrer incorporated with answer but not filed or acted upon will be disregarded.

A demurrer incorporated in a paper with an answer, but not in any way filed nor acted upon as a demurrer, is disregarded and treated as a fugitive paper, because not shown to have been brought to the attention of the court, notwithstanding the filing of the paper as an answer to be used as an affidavit, on a motion to dissolve an injunction.

2. Railroads \S 216—Cannot be compelled to operate temporarily constructed side track on land under privilege terminable at landowner's will.

A common carrier railroad cannot be required by any judicial process, to reconstruct and operate a side track or other facility temporarily constructed and operated on land adjoining its right of way, under a verbal and gratuitous permission of the owner of the land and an agreement between him and the owner of the railroad, that the privilege so granted should be terminable at the will and option of the owner of the land.

3. Railroads \S 216—Side tracks constructed under lease held removable by landowner.

Uncontradicted testimony of such owner and the operators of such railroad, to the effect that such track or facility was not constructed and operated within the limits of a lease executed by the former to the latter, which is very general and indefinite as to the land covered by it, aided by conduct amounting to a practical construction of the lease, excluding the location in question from it, warrants the dissolution of an injunction inhibiting the landowner from tearing up such track and commanding the railway company to resume the use of it.

Appeal from Circuit Court, Lincoln County.

Suit by the Malleable Coal Company against James Potter and others, and from

a decree dissolving an injunction inhibiting the defendant Roman Pickens from interfering with the operation of a railway, plaintiff appeals. Affirmed.

Price, Smith, Spilman & Clay, of Charleston, and D. E. Wilkinson, of Hamlin, for appellant.

Murray Briggs, of Charleston, for appellee.

POFFENBARGER, J. Appellant, the Malleable Coal Company, complains of an order of the circuit court of Lincoln county, entered in vacation, dissolving an injunction inhibiting the appellee Roman Pickens from interfering with the operation of what is called the tipple track of the Cobbs Creek Railway, and especially from tearing up that track, and commanding the appellees James Potter and Charles Morgan, alleged owners and operators of said railway, without discrimination against said Malleable Coal Company, to haul its coal over said tipple track, for dumping into railway cars on a side track of the Coal River Branch of the Chesapeake & Ohio Railway.

The theory of the bill and of the injunction order awarded thereon is that the Cobbs Creek Railway is a common carrier, and, as such, wrongfully ceased and refused, on or about September 18, 1920, further to haul coal of the plaintiff from its mine situated somewhere on the main line of the railway, in the Cobbs Creek Valley, over said tipple track, at the instance and by reason of the protest of the defendant Roman Pickens, on whose land said tipple track is located; and, that, soon after September 27, 1920, the Public Service Commission of this state having ordered said railway company to resume the hauling of the plaintiff's coal, Pickens and his employees wrongfully tore up portions of that track and thus prevented obedience to the order.

The temporary injunction inhibited Pickens from further molestation of the track and required the railway company to restore the portion of it that had been torn up and resume and continue the hauling of the coal.

[1] If the facts disclosed by the pleadings and the depositions taken and filed justified dissolution of the injunction, it will be unnecessary to enter upon any inquiry as to the propriety of the remedy invoked by the plaintiff. Sufficiency of the bill was not tested by any demurrer thereto. In a paper filed by him, the defendant Pickens demurred to the bill and answered it, but that paper was not filed as a demurrer. On the hearing of the motion, it was filed as an answer, together with the answer of Charles Morgan filed in the same way, and treated as an affidavit. A demurrer incorporated in the body of an answer, but not mentioned or referred to in the caption thereof, nor in any decree or order in the

cause, is disregarded and treated as a fugitive paper, because it does not appear to have been brought to the attention of the court. *Pheasant v. Hanna*, 63 W. Va. 613, 60 S. E. 618. It is not perceived that mention of the demurrer in the caption can make any difference. The paper was never filed as a demurrer and the caption is not material. Nothing in the order suggests consideration of the bill as to its sufficiency.

The Cobbs Creek Railway is a narrow-gauge road built primarily for the hauling of logs and lumber, about the year 1908, by the Mohler Lumber Company, in conjunction with one W. W. Smoot; the former furnishing the materials and the latter doing the construction work, with the understanding that he should have 45 per cent. of the profits arising from the operation of the road, and the lumber company 55 per cent. Near the mouth of Cobbs creek, it connected with what was then the Coal River Railroad, now the Coal River Branch of the Chesapeake & Ohio Railway. At that point, it was necessary to pass over the land of Pickens, for some distance, and the Mohler Lumber Company procured a lease of about two acres of the Pickens land, within which the main line and a side track called the loading track and some other terminal facilities were located. The track now in controversy, the tipple track, was not built at that time, nor until the year 1917. Nor is the Mohler Lumber Company lease very important now, since it expired in the year 1913. Lumber and timber transportation over the road, by the Mohler Lumber Company, seems to have terminated about the year 1909, and, early in that year, the operators of the road began to transport oil well supplies over it up into the Cobbs Creek region of country. Thereupon a controversy is said to have arisen between Pickens and the lumber company, as to right in the latter to transport anything other than timber and timbering supplies over the land. Smoot says he became the sole owner of it in July, 1918, and operated it until September 1, 1919, on which date it passed into the hands of James Potter & Co., under a contract of purchase, made about July 1, 1919. Smoot may have owned the road individually at an earlier date.

[2,3] He operated it under the arrangement between himself and the Mohler Lumber Company, or as his own, and constructed what is known as the tipple track in 1917, when he was paying Pickens rent at the rate of \$75 per month. It seems to be about 500 feet long and turns off from the main line near the point at which that line emerges from the Cobbs Creek Valley, and crossing level land between that line and the hill, runs up along the hillside to a point at which the tipple used by the Malleable Coal Company stands apparently on the right of way of the Chesapeake & Ohio Railway, in part, and on

the land of Pickens, in part. The ownership of the tipple seems to be conceded to the Malleable Coal Company, but by whom it was erected is not clearly disclosed. This track was never used for any purpose other than the transportation of the Malleable Coal Company's coal from its mine somewhere up Cobbs creek to this tipple. Both Smoot and Pickens testify that it was constructed under a verbal permit given by the latter and without charge for the use and occupation of the land. Smoot says he hauled coal for the Malleable Coal Company until December, 1918, at which time that company closed its mine, but that Pickens had interrupted his use of it on two occasions, before he ceased to use it by reason of the closing of the mine. Pickens says he gave Smoot permission to use the land for that track until he should need it himself. Under the impression that he would have no further use for the track, Smoot took up the rails from it in March, 1919. Between that date and July 1, 1919, he entered into negotiations with James Potter & Co., for sale of the railway to them for use in connection with their oil and gas operations in the Cobbs Creek country in which they had a lease of 12,900 acres of oil territory. The sale seems to have been made as of July 1, 1919, but late in June of that year a flood damaged the railway, and Smoot had to repair it before the purchasers would consummate their contract. In doing so, he used the rails taken from the tipple track.

On July 1, 1919, the date of the purchase of the railway, and after the rails had been taken from the tipple track and while the mine of the Malleable Coal Company was closed, James Potter & Co. leased from Pickens, for a period of five years, at a rental of \$100 per month, what is described as about a quarter of an acre of land, as being the same tract of land which was occupied by the terminal of the Cobbs Creek Railway, as having one office building, one hoisting house, one small freighthouse, and one sandhouse on it, and as being then under lease by the month to the Cobbs Creek Railway Company. Under this lease the lessee has the privilege of renewal for an additional five years and also the privilege of termination, upon three months' notice and the payment of all rentals, at any time within the term. Having coal in the land of the leased premises, Pickens made this reservation: "Right to load coal on and over the eastern part of the property hereby leased where the coal dumps are now located"—if he should desire to do so. The only dumps disclosed by the evidence, as being located on the eastern part of the leased property, are the loading tipple of the Malleable Coal Company and what is called the Jarrett and Wright coal chute. At a date not disclosed, Pickens had leased his coal to Jarrett and Wright and they had opened a mine in the hillside, near the right of way of

the Chesapeake & Ohio Railway, and constructed a chute leading to a side track. Finding the dip of the coal to be in the direction of their mining, they discontinued their operation. At a date not given, Pickens leased his land to Smoot and Carter for mining, and they opened a mine and erected a tipple near the main line of the Cobbs Creek Railway, with intent to load the coal into the narrow-gauge cars of that road, for transportation over the main line and the tipple track and transfer thereof, by means of the Malleable Coal Company's tipple, into the standard-gauge cars of the Chesapeake & Ohio Railway Company.

In August, 1919, under a verbal permission given by Pickens, to James Potter & Co., operators of the Cobbs Creek Railway, the Malleable Coal Company replaced the rails on the tipple track, and began the shipment of coal over it to their tipple. At about the same time, Smoot and Carter endeavored to obtain permission of the Malleable Coal Company to load their coal into Chesapeake & Ohio cars from the same tipple. Their request having been refused, they endeavored to obtain permission for the placing of box cars on the Chesapeake & Ohio Railway Company side track, apparently owned or controlled by the Malleable Coal Company. This privilege having been denied, Pickens notified James Potter & Co. not to haul any more coal over the tipple track for the Malleable Coal Company, and, in obedience to this order, they ceased to do so. Thereupon the Malleable Coal Company applied to the Public Service Commission of this state for an order requiring the railway to transport its coal. A temporary order was awarded, and then Pickens took up some of the rails from the track and thus prevented resumption of transportation. In this state of affairs, the Malleable Coal Company applied for and obtained said injunction.

It is manifestly unnecessary to determine whether or not the Cobbs Creek Railway is a common carrier. If it is, it does not follow that the tipple track is permanently or irrevocably located upon the land of Pickens. Whether the track in question belongs to that company or not is left in doubt by the evidence. It desired to haul the coal, and the producer of the coal wanted it hauled. It obtained permission for restoration of the track, and the coal producing company restored it under that permission. It was originally built by the railway company as a tenant at will of Pickens and restored and the use thereof resumed in the same manner, except as to the reconstruction. The contention that Pickens leased the tipple to James Potter & Co. is not well founded. The argument is that he must have leased it, because he reserved the right to use it, and that the lease of the tipple impliedly included a lease of the means of using it, namely, the tipple track. The terms of the reservation in

the lease do not warrant this conclusion. Pickens reserved the right to load coal on and over the eastern part of the property at the point where the coal dumps were located. There are no words in the reservation fairly indicative of intention to reserve right to use the Malleable Coal Company's tipple. The reserved right was to load coal over the eastern part of the property. The mention of the dumps was mere matter of description of the portion of the land the lessor reserved the right to use.

The indefinite lease giving no boundary lines, interpreted by the evidence bearing upon its meaning, found in the record, does not include the land on which the tipple is located. If the terms, "Now under lease by the month to the said Cobbs Creek Railway Co.," could be treated as a reference to the lease given the Mohler Lumber Company, the land on which part of the tipple track is located is not within that lease, and that track was no part of the Cobbs Creek Railway terminal while the lease was in force, nor between the year 1913, in which it expired, and the year 1917. If the lease was continued as a verbal holding over from year to year, on payment of rental, it still cannot be regarded as embracing all of the land on which the tipple track is located. If the payments of rental from 1913 until 1917 were made merely for terminal facilities and did not continue the lease, the terminal facilities did not then include the tipple track. They included only the main track, the loading track, sandhouse, freight house, office, and hoist. In the new lease taken July 1, 1919, the area of the leased land is described as being about a quarter of an acre. In the Mohler Lumber Company lease of 1906, the area is described as embracing about two acres. Hence, it is clear that there was no intention to lease, on July 1, 1919, all of the land that was in the former lease. Moreover, in 1919, the tipple track was not one of the terminal facilities of the railway. It was not then in operation. The rails had been taken from it and used for repair of the main line. Besides, it was not used for general railway purposes, but only for the hauling of the Malleable Coal Company's coal to its tipple. According to the evidence of Smoot and Pickens, it was not constructed under the monthly lease referred to in the later lease. It was a mere privilege outside of the lease, gratuitously and temporarily conferred. No witness expressly contradicts this testimony, nor do any established facts or circumstances overthrow it. The grant and acceptance of this privilege amounted to a practical construction of the monthly lease by the parties thereto. Likewise, the conduct and circumstances attending the restoration of the track practically construed both the monthly lease and the new lease of July 1, 1919.

Upon this view of the evidence, including the situation, purposes, and relations of the parties, we are of the opinion that the court below did not err in its dissolution of the injunction. The order under review is an interlocutory one, entered upon proof that is very incomplete as to some of the vital issues involved. It does not appreciably tend to sustain the contention of the appellant. Additional evidence to be taken for the final hearing and disposition of the cause may be sufficient to establish right to the relief sought, if the remedy adopted is appropriate.

For the reasons stated, the decree complained of will be affirmed.

(152 Ga. 156)

RAINES v. STOKELY et al. (No. 2307.)

(Supreme Court of Georgia. Sept. 30, 1921.)

(Syllabus by the Court.)

1. Specific performance \S 14(2)—Description of land in petition held sufficient.

The description in the petition of the lot of land for the conveyance of which specific performance was sought was sufficiently definite to identify the subject-matter of the contract of sale.

2. Specific performance \S 123—Whether evidence showed parol contract for sale of land beyond a reasonable doubt was for the jury.

Under the evidence in the case it was a question for the jury to decide whether the parol contract for the sale of the land was made out so clearly, strongly, and satisfactorily as to leave no reasonable doubt as to the agreement.

3. Specific performance \S 121(11)—Evidence held sufficient to warrant finding that tender of balance of purchase money on lot in controversy was made.

There was a general statement in the plaintiff's testimony to the effect that she "offered her [the defendant of whom specific performance is sought] what the balance was on the lot that I was claiming; * * * she didn't take the money, but I am still willing to pay it to her;" and, besides, a letter was introduced in evidence from the plaintiff to the defendant, stating that she makes tender of the money; and this testimony in regard to tender was uncontroverted. Such evidence would have authorized the jury to find that a tender of the balance due of the purchase money for the lot in controversy was duly made.

4. Parties \S 84(4)—Whether purchaser could proceed against vendor's sole heir for specific performance without making administrator a party should have been raised by demurrer, and not motion for nonsuit.

If the defendant in the case had desired to challenge the right of the plaintiff to proceed against the widow of the vendor of the land, who is alleged to be the sole heir of her deceased husband, and to have specific perform-

ance of the husband's contract, without making the administrator of the latter a party, this question should have been raised by demurrer, and not by a motion for nonsuit.

5. Pleading ⚡212—Where a question was properly raised by demurrer and presumably abandoned, it cannot avail defendant in motion for nonsuit.

While there was a general demurrer to the petition, and also a special demurrer upon the ground that no definite or special time was alleged within which the plaintiff was to make payment of the unpaid balances of the purchase money, no ruling upon this demurrer seems to have been invoked, and the question thus properly raised by demurrer and presumably abandoned could not avail the defendant in his motion for a nonsuit.

6. Evidence in specific performance action held sufficient for submission.

Under all the evidence in the case, the same should have been submitted to the jury under proper instruction from the court.

Error from Superior Court, Oglethorpe County; W. L. Hodges, Judge.

Suit by Leila Raines against E. M. Stokeley and others for specific performance of a contract to sell "all that tract or parcel of land lying, situated, and being in Crawford district, in said state and county, on the south side of the public road leading from Crawford to Athens, about one (1) mile west of the Georgia Railroad station at Crawford, containing one (1) acre, more or less, and fronting said public road, which bounds it on the north, and adjoining on the west land of Austin Chambers, colored, on the south lands of Betsy Gales, colored, and the lot whereon said Gales now resides, and on the east lands of the estate of Dr. George Little, deceased, and being the lot of land cultivated by Betsey Gales in cotton during the year 1919." Judgment of nonsuit, and plaintiff brings error. Reversed.

Phil W. Davis, Jr., of Lexington, for plaintiff in error.

W. W. Armistead, of Crawford, Hamilton McWhorter, Jr., of Lexington, and Tutt & Brown, of Elberton, for defendants in error.

BECK, P. J. Judgment reversed. All the justices concur, except HILL, J., absent.

(27 Ga. App. 512)

HENDERSON v. COOK. (No. 12294.)

(Court of Appeals of Georgia, Division No. 2. Oct. 24, 1921.)

(Syllabus by the Court.)

1. Witnesses ⚡397—Jury may believe testimony of impeached witness and disbelieve previous contradictory statements.

Although a witness may have been successfully impeached, in that the jury believe

that he has previously made statements contradictory to his sworn testimony as to matters relevant to the case, it is not required of them that they should disregard such of his sworn testimony as is in conflict with his previous statements, since the jury are still entitled to determine the credit to be given any portion of his testimony when thus impeached, including the part thus contradicted; and this is true although, in order to accept his sworn testimony, they must reject as untrue the previous contradictory statements which they believe to have been made. *Waycaster v. State*, 136 Ga. 95 (8), 102, 70 S. E. 883. It was therefore error for the judge to charge as follows: "In this case the court instructs you that a witness may be impeached by proof of contradictory statements previously made by him as to matters relevant to his testimony and to this case. If an attempt has been made by proof of contradictory statements previously made by any witness in this case to impeach that witness, you may determine, from all the testimony, first, whether any such statements have been made, and, secondly, whether such statements were contradictory statements to those which have been made by the witness on the stand, and, thirdly, whether they are material to his testimony and the case; and if any witness has been successfully impeached by proof of contradictory statements, you would disregard any statement in conflict with statements previously made, unless corroborated by other testimony, direct or circumstantial; and the credit to be given the balance of the testimony would be for the jury to determine." See *Purvis v. Atlanta Northern Ry. Co.*, 136 Ga. 852, 72 S. E. 343; *Ga. Ry. & Electric Co. v. Cocke*, 137 Ga. 720, 74 S. E. 244, in which the charges held to be erroneous were very similar to that excepted to in the instant case.

2. Trial ⚡296(1)—Specific erroneous instruction not cured by general.

Where the court gives to the jury an instruction which is plain, specific, and erroneous within itself, such as might tend to prejudice the rights of a litigant upon one of the material questions in the case, the fact that subsequently, and in connection with his charge upon another and kindred phase of the law, he may use language so general that it might possibly be construed as correctly covering the principle of law originally but erroneously charged upon cannot properly be taken as correcting or curing the original error. Thus, the harmful effect of the charge referred to in the first division of the syllabus was neither corrected nor cured by this instruction immediately following: "If a witness swears willfully and knowingly false, his testimony should be disregarded by the jury, unless corroborated by other witnesses' testimony. It is a question for the jury to determine whether a witness has been impeached, and the credibility of such witness, and the weight his testimony shall receive in the consideration of the case." Even if such general instruction as is contained in the last sentence just quoted could properly be taken as sufficient to cure the plain and specific error complained of, when directly applied to and given in immediate connection with the erroneous charge (see ruling and dissent in *Scog-*

gins v. State, 23 Ga. App. 366, 98 S. E. 240), such could not be the rule where, as here, the language which is relied upon as a correction does not follow the erroneous charge, but could reasonably and naturally be taken as having reference to the intervening instruction relative to another phase of the law of impeachment. Central of Ga. Ry. Co. v. Deas, 22 Ga. App. 425 (3), 96 S. E. 267. No question as to the correctness of the rules stated in the subsequent clause of the charge, which is thus relied upon purely as a correction of the previous error, is presented for determination.

3. Trial \S 296(4, 5)—Jury held not misled by language used in charge in view of rest of charge.

In charging the law upon the degree of care required of the plaintiff, a child under the age of 14 years, the court fully and clearly drew the distinction between the diligence required by such a plaintiff and the general rule applicable to adults; and later, in connection with the language excepted to, referred to the distinction which he had already pointed out, and instructed the jury to apply the rule previously given to the instructions then given. The jury could not therefore have been reasonably misled by the language complained of. The remaining exceptions to the charge fail to show any prejudicial error.

4. Exception without merit.

The exception taken to the admission of testimony is without merit, treating the statement complained of as having been made by the plaintiff himself. If, according to the peculiar, ambiguous language used, such statement be taken as having been made by a mere bystander, it would be inadmissible. But as the ambiguity is not likely to recur in a succeeding trial, it is not necessary to elaborate that phase of the exception.

Error from Superior Court, Campbell County; J. B. Hutcheson, Judge.

Action by Fred Henderson, by next friend, against H. H. Cook. Judgment for defendant, and plaintiff brings error. Reversed.

Brewster, Howell & Heyman, of Atlanta, and Neil P. Sterne, of Anniston, Ala., for plaintiff in error.

Dickson & Camp, of Fayetteville, and Napier, Wright & Wood, of Atlanta, for defendant in error.

JENKINS, P. J. Judgment reversed.

STEPHENS and HILL, JJ., concur.

(27 Ga. App. 494)

FINCHER v. DAVIS. (No. 12108.)

(Court of Appeals of Georgia, Division No. 2.
Oct. 24, 1921.)

(Syllabus by the Court.)

1. Physicians and surgeons \S 14(1), 18(7,9)—Physicians liable for want of care; degree of care exercised question for jury; attendant facts and circumstances considered.

"A person professing to practice surgery or the administering of medicine for a compen-

sation must bring to the exercise of his profession a reasonable degree of care and skill. Any injury resulting from a want of such care and skill will be a tort for which a recovery may be had." Civil Code 1910, \S 4427. "The exercise of this degree of care and skill is the measure of professional duty in all cases; and whether this degree of care and skill has been exercised in a given case is a question of fact for the jury." Edwards v. Roberts, 12 Ga. App. 140, 76 S. E. 1054. In determining such an issue, "the jury may consider all" the attendant facts and circumstances "which may throw light on the ultimate question." Pace v. Cochran, 144 Ga. 261, 265, 86 S. E. 934, 936.

2. Physicians and surgeons \S 18(6), 24(3)—Burden on physician suing for price to show services and reasonable price; presumed that medical services are performed in skillful manner.

In an action by a physician and surgeon to recover the value of professional services rendered, the burden is on him to prove that he is a physician, that he was employed as such, that he rendered the services alleged, and to show the value of such services as represented by the ordinary and reasonable price for services of that nature. 30 Cyc. 1601; 9 Enc. of Evidence, 823, 829. In such an action (as well as in a suit brought by a patient for malpractice) the presumption is that the surgical or medical services were performed in an ordinarily skillful manner, and the burden is on the person receiving the services to show a want of due care, skill, and diligence. Ga. Northern Ry. Co. v. Ingram, 114 Ga. 639, 640, 40 S. E. 708; Akridge v. Noble, 114 Ga. 949, 958, 41 S. E. 78; 30 Cyc. 1602; 21 R. C. L. 406; 9 Enc. of Evidence, 834. The court did not err in so charging.

3. Husband and wife \S 19(15)—Husband liable for professional services for wife.

Where a physician or surgeon renders necessary professional services for a wife, with her consent, the husband is primarily liable therefor, even in the absence of any express consent on his own part. Civil Code 1910, \S 2296, 2297; Wrightsville & Tennille R. Co. v. Vaughan, 9 Ga. App. 371, 372(4), 71 S. E. 691. The charge of the court, that if the operation was performed "wholly without any authority from this defendant, then the plaintiff would not be entitled to recover a fee for such operation," was more favorable to the defendant than the rule required.

4. Evidence \S 506, 548, 550(1) — Physician could testify that operation in his presence was done skillfully; expert may give opinion, based on testimony of others, or on own observation.

The private physician and surgeon of the wife, who was familiar with the case and all the attendant facts and circumstances, and who witnessed the operation, was asked and answered the following question: "Q. Was this operation done in a skillful manner? A. Yes, sir." The question and answer were objected to upon the ground that they trench upon the province of the jury in seeking and eliciting a conclusion upon the main issue in the case. Held,

the opinion of an expert on any question relating to his profession, trade, or business is always admissible, when given in response to a hypothetical question based upon the testimony of witnesses other than himself, or where, as here, the expert has himself observed the facts, and gives his opinion based upon his own observation. Civil Code (1910), §§ 5876, 5874; *Yates v. State*, 127 Ga. 813(4), 817, 56 S. E. 1017; *Taylor v. State*, 135 Ga. 622(6), 70 S. E. 237; *Crankshaw v. Schweizer Mfg. Co.*, 1 Ga. App. 363, 58 S. E. 222.

5. Appeal and error \S 1064(1)—**Physicians and surgeons** \S 14(1)—**Trial** \S 253(9)—**Instruction as to expert testimony in action for malpractice held harmless, and not subject to objection that it ignored other evidence.**

The court charged the jury: "In considering whether the plaintiff in his diagnosis, care, and treatment of defendant's wife exercised ordinary care and skill, the jury may not set up a standard of their own, but must be guided in that regard solely by the testimony of physicians; and if you are unable to determine from the testimony of physicians and surgeons what constitutes ordinary care and skill under the circumstances of this case, then there is a failure of proof upon the only standard for your guidance, and the evidence is insufficient to sustain the defendant's plea, and you should find for the plaintiff a reasonable amount for the services rendered." Error is assigned as to this instruction because "It limited the jury to a consideration of the testimony of physicians and surgeons only in determining whether or not plaintiff was guilty of negligence, when the law requires that all of the testimony introduced in the trial of a case be considered by the jury in determining whether or not a party has exercised the degree of care, skill, and diligence required by law." *Held*, the standard of duty and diligence to which physicians and surgeons are amenable is prescribed solely by section 4427 of the Civil Code of 1910, and requires that in the practice of their profession they exercise "a reasonable degree of care and skill," but this, the invariable standard when applied to the facts and circumstances of any particular case, must be taken and considered to be such a degree of care and skill as, under similar conditions and like surrounding circumstances, is ordinarily employed by the profession generally. The trial judge was manifestly seeking to impress upon the jury that they were unauthorized to impose any other capricious standard; and while the language may not have been strictly accurate, in that the recognized methods employed by physicians and surgeons in the performance of such an operation might conceivably be shown by persons other than members of the medical profession, yet, since in point of fact the only testimony introduced along that line was that of physicians and surgeons, the inaccuracy of expression must necessarily have been harmless. The charge complained of, while it may have sought to limit the methods of proving the specific duties owing by the plaintiff, by confining such proof to testimony of physicians and surgeons, did not, as urged, thus limit the proof of negligence.

6. Appeal and error \S 1001(1)—**Findings of jury on abundant evidence not interfered with.**

The only negligence charged by the plea and answer being that of infection in the operation in question, and the jury, under the evidence, being abundantly authorized, if, indeed, not absolutely compelled, to find adversely to such plea, this court will not interfere.

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by E. C. Davis against T. C. Fincher. Judgment for plaintiff, and defendant brings error. Affirmed.

Hill & Adams, of Atlanta, for plaintiff in error.

Burress & Dillard and J. W. Ward, all of Atlanta, for defendant in error.

JENKINS, P. J. Judgment affirmed.

STEPHENS and HILL, JJ., concur.

(27 Ga. App. 509)

GILLESPIE v. ANDREWS et al.
(No. 12265.)

(Court of Appeals of Georgia, Division No. 2
Oct. 24, 1921.)

(Syllabus by the Court.)

1. Negligence \S 62(1), 111(3), 136(25)—**Petition must show defendant's act caused injury; question of proximate cause for jury; injury need not result from defendant's acts alone.**

While the determination of questions of negligence lies peculiarly within the province of the jury, and in the exercise of this function the question as to what constitutes the proximate cause of the injury complained of may be directly involved as one of the essential elements and disputed issues in the ascertainment of what negligence, as well as whose negligence the injury is properly attributable to; and while it is also true that the mere fact that the injury would not and could not have resulted by reason of the defendant's acts alone will not of itself be taken to limit and define the intervening agency as constituting the proximate cause (*Rollestone v. Cassirer & Co.*, 3 Ga. App. 161, 173, 59 S. E. 442; *Ga. Ry. & Power Co. v. Ryan*, 24 Ga. App. 288, 100 S. E. 713), yet a demurrer to a petition should be sustained where it appears from the plaintiff's pleading that the negligence charged against the defendant was not the proximate and effective cause of the injury. *Southern Ry. Co. v. Barber*, 12 Ga. App. 286, 77 S. E. 172. The most generally accepted theory of causation is that of natural and probable consequences (*Mayor and Council of Macon v. Dykes*, 103 Ga. 847, 848, 31 S. E. 443); and, in order to hold the defendant liable, the petition must show either that the act complained of was the sole occasion of the injury, or that it put in operation other causal forces, such as were the

direct, natural, and probable consequences of the original act, or that the intervening agency could have reasonably been anticipated or foreseen by the original wrongdoer. *Southern Ry. Co. v. Webb*, 116 Ga. 152, 42 S. E. 395, 59 L. R. A. 109; *Hardwick v. Figgers*, 26 Ga. App. 494, 106 S. E. 738.

2. Electricity \Leftrightarrow 16(7)—Telephone line owner not liable for injury occasioned by cutting of tree.

The mere fact that the defendant might have allowed his line of telephone wire to touch the limb of a tree cannot be taken to have as a natural and probable consequence that some other person would fell a tree across the properly strung line of electric wires stretched six feet above the telephone wire, so as to bring the two lines in contact, and by such a concurrence of events complete a short circuit, or that such intervening agency could have been reasonably foreseen or anticipated by the defendant.

Stephens, J., dissenting.

Error from City Court of Albany; Clayton Jones, Judge.

Action by J. W. Gillespie against Homer Andrews and others. Judgment for defendants, and plaintiff brings error. Affirmed.

D. H. Redfearn, of Albany, for plaintiff in error.

Lippitt & Burt, of Albany, for defendants in error.

JENKINS, P. J. Judgment affirmed.

HILL, J., concurs.

STEPHENS, J., dissents

(27 Ga. App. 512)

ANDERSON v. ANDERSON. (No. 12505.)

(Court of Appeals of Georgia, Division No. 2.
Oct. 24, 1921.)

(*Syllabus by the Court.*)

1. Partition \Leftrightarrow 51—Statutory notice sufficient to bring parties into court.

In applications for partition of "lands and tenements in this state the party applying for the writ of partition shall give to the other parties concerned at least 20 days' notice of his intention to make application." No other process is necessary than this statutory notice in order to bring the respondent into court to meet the application. Civ. Code 1910, § 5360; *Cock v. Callaway*, 141 Ga. 781, 82 S. E. 286.

2. Partition \Leftrightarrow 55(1)—Application to be made by petition setting forth facts and circumstances.

In statutory procedure for partition of lands and tenements in this state, in so far as the application is concerned, it is only necessary that the "application shall be by petition, setting forth plainly and distinctly the facts and

circumstances of the case, describing the premises to be partitioned, and defining the share and interest of each of the parties therein." Civ. Code 1910, § 5358. The petition in the instant case complies fully with these essentials, and the demurrers thereto were properly overruled.

3. Partition \Leftrightarrow 55(4)—Application praying for a partition of proceeds of a sale sufficient.

"Whenever application is made for partition of lands and tenements, * * * and either of the parties in interest shall make it satisfactorily appear to the court that a fair and equitable division of the lands and tenements cannot be made by means of metes and bounds, * * * or that the value of the entire lands and tenements will be depreciated by the partition, * * * the court shall order a sale of such" premises. Civ. Code 1910, §§ 5365, 5366. A petition, otherwise complying with the statutory requirements, which alleges that on account of improvements a fair and equitable division could not be made by means of metes and bounds, and that to do so would cause the value of the entire lands and tenements to depreciate, and therefore praying for a sale and division of the proceeds, constitutes in substance and effect a petition for the partition of lands and tenements. A partition of the proceeds of the sale of the lands and tenements is in all essential particulars a partition of the lands and tenements, and it is immaterial whether the applicant prays for a partition by sale or a partition by metes and bounds. In an application in either form and with either prayer the issues are the same.

4. Partition \Leftrightarrow 77(1)—Evidence \Leftrightarrow 568(4)—Jury or trial judge can form own opinion as to value of land.

Testimony as to value of property is opinion evidence, and is entitled to weight in proportion to the intelligence, experience, information, and character of the witness. Its probative value is entirely for the judgment and decision of the trier (whether judge or jury), who may form his own conclusion and rely upon his opinion, irrespective of the evidence of the witnesses, provided that in the facts submitted there is enough to enable the trier to form an opinion. On the question as to the value of lands and tenements, arising on the hearing of an application for partition either by a sale or by means of metes and bounds, when the physical topography and construction of the lands and tenements are in evidence, along with opinions of the value of the premises as a whole or in division, the trial judge can form his own opinion, and order a sale or division by means of metes and bounds, as in his opinion will be to the best pecuniary interests of those concerned. Civ. Code 1910, § 5875; *Baker v. Richmond City Mill Works*, 105 Ga. 225, 31 S. E. 426; *Mitchell v. State*, 6 Ga. App. 558, 85 S. E. 326; *Choice v. State*, 31 Ga. 425.

5. Appeal and error \Leftrightarrow 1054(3)—Admission of written guaranty tendered by party in partition suit to give certain sum for land, if sold, not prejudicial error.

On the hearing by the court of an application for partition of lands and tenements, either

by sale or by metes and bounds, where only two parties owned the property, and one tendered, for the purpose of being made a part of the record, a written guaranty, secured by collateral, that, in case of a sale of the property as a whole, he would give a certain sum for it, and over the objection of counsel that it was not evidence and without probative value the judge considered the instrument and made it a part of his judgment, and a lien on the interest of the guarantor was created thereby to secure its payment, this, in view of the wide discretion which the statute lodges in the trial courts in the partition of lands and tenements, was not harmful error, if error at all. It might have been regarded as opinion evidence of the offeror or guarantor as to the value of the property when sold as a whole. Whether this be true or not, the acceptance and consideration of the instrument was immaterial, as the judgment of the court is expressly based on the "evidence" that it was for the pecuniary interest of both parties that the property be sold.

6. Partition \S 77(3)—In kind to be had, if possible, without pecuniary damage.

Joint owners of land are entitled to have partition in kind, each to have his share allotted to him in severalty, unless this right be waived. Whether in equity or under the statutes, the court has no right to decree or order a sale of lands and tenements without consent, unless it finds two concurring conditions: (1) That partition in kind cannot be conveniently made; and (2) that the interest of the parties owning the land will be promoted by a sale. Partition in kind is the rule, and should be followed if it can be done without pecuniary damage. Sentimental considerations should have great weight, especially in the preservation of the home, but pecuniary interests should be the determining factor. *Tucker v. Parks*, 70 Ga. 414; *Croston v. Male*, 58 W. Va. 205, 49 S. E. 138, 107 Am. St. Rep. 918; *Clason v. Clason*, 6 Paige (N. Y.) 541.

7. Appeal and error \S 1009(2)—Finding that land should be sold in partition proceeding not interfered with, if supported by evidence.

An adjudication by a trial court, after hearing the evidence, that the conditions require a sale on a petition for partition, and that the lands and tenements in question cannot be partitioned by means of metes and bounds without depreciation in value, is entitled to great weight. Unless such a decision is wholly without evidence to support it, or the result of an erroneous view of the law, this court is powerless to interfere. *Civ. Code* 1910, §§ 5368, 6502, 6108; *High Co. v. Adams Co.*, 5 Ga. App. 363, 63 S. E. 1125; *Hixon v. Callaway*, 5 Ga. App. 416(2), 63 S. E. 518.

Error from Superior Court, Bibb County; H. A. Mathews, Judge.

Proceeding by J. R. Anderson against E. G. Anderson for partition. Judgment for petitioner, and defendant brings error to the Supreme Court, which transfers the case to the Court of Appeals. 107 S. E. 334. Affirmed.

Hall, Grice & Bloch, of Macon, for plaintiff in error.

Jno. R. L. Smith and Grady C. Harris, both of Macon, for defendant in error.

HILL, J. Judgment affirmed.

JENKINS, P. J., and STEPHENS, J., concur.

(27 Ga. App. 510)

SHERROD v. ATLANTA, B. & A. R. CO.
(No. 12278.)

(Court of Appeals of Georgia, Division No. 2
Oct. 24, 1921.)

(Syllabus by the Court.)

1. Negligence \S 98 — Rule of comparative negligence under Employers' Liability Act stated.

Under the Employer's Liability Act of this state (*Civ. Code* 1910, § 2782 et seq.), a railway employee is not required to be wholly blameless in order to recover damages for injuries received, but the rule of comparative negligence obtains, and the plaintiff may be able to recover partial damages on account of the negligence of the railway company, notwithstanding his own fault, which might in some less degree have contributed to the injury, provided the fault of the plaintiff did not amount to a lack of ordinary care, and provided also that he did not fail to exercise ordinary and reasonable care and diligence to avoid the consequences of the defendant's negligence after it had or should have become known. *Wrightsville & Tennille R. Co. v. Tompkins*, 9 Ga. App. 154, 70 S. E. 965.

2. Master and servant \S 289(31)—Negligence \S 136(26) — Contributory negligence question for jury.

Since questions of negligence, including contributory negligence, lie peculiarly within the province of the jury, they cannot, except in plain and indisputable cases, be determined otherwise. *Western Union Tel. Co. v. Spencer*, 24 Ga. App. 471, 101 S. E. 198. The mere fact that a person should attempt to mount or leave a moving train or locomotive will not be accounted negligence as a matter of law; but whether or not such an act constitutes negligence, and, if so, the degree of negligence, depends upon the particular facts and circumstances of danger and of justification attending the transaction. *Suber v. Ga. Carolina & Northern Ry. Co.*, 96 Ga. 42, 23 S. E. 387; *Travelers' Protective Ass'n v. Small*, 115 Ga. 455, 41 S. E. 628; *Central of Ga. Ry. Co. v. Weathers*, 27 Ga. App. —, 108 S. E. 558.

3. Negligence \S 101 — Rule of comparative negligence under Employer's Liability Act applied.

Under the evidence disclosed by the record in this case, it was for the jury to say whether the engineer of the defendant company suddenly and without warning applied a great increase of steam to the locomotive, so as suddenly and without warning to increase its speed

while the plaintiff was attempting to remount it after having changed the switch. If this be not so found, the plaintiff's case must fail; but if so found, they should then determine whether or not the engineer knew or ought to have known that the plaintiff was then and there attempting to remount the moving locomotive, and, if so, whether or not the engineer was negligent in thus applying the steam under such circumstances. If, under the evidence, the jury should find that the defendant was not thus negligent, the plaintiff's case would fail for that reason. If, however, the finding of the jury should be against the defendant on these questions, the plaintiff would then be entitled to recover in some amount, unless the evidence should show one of four things: (1) That the defendant's negligence did not contribute to the injury; or (2) that the plaintiff, under the circumstances, was himself guilty of a lack of ordinary care contributing to the injury, in seeking to remount the moving locomotive; or (3) that in so doing, he was guilty of a degree of contributory negligence equal to or greater than that of the defendant; or (4) that he could by the exercise of ordinary care have avoided the consequences of the defendant's negligence after it had or should have become known. In any of these events the plaintiff could not recover. If, however, the jury should find against the defendant on the issue of its negligence, and in favor of the plaintiff upon the last-mentioned questions, then the plaintiff would be entitled to recover either full or partial damages, according to whether the jury might find the plaintiff entirely blameless, or negligent in some less degree than the defendant.

Error from Superior Court, Ben Hill County; O. T. Gower, Judge.

Action by O. C. Sherrod against the Atlanta, Birmingham & Atlantic Railroad Company. Judgment for defendant, and plaintiff brings error. Reversed.

Hines, Hardwick & Jordan, of Atlanta, and A. S. Bradley, of Swainsboro, for plaintiff in error.

Wall, Grantham & Kasewitz, of Fitzgerald, Fitzgerald, Brandon & Hynds, of Atlanta, and Crum & Jones, of Cordele, for defendant in error.

JENKINS, P. J. Judgment reversed.

STEPHENS and HILL, JJ., concur.

(27 Ga. App. 502)

FLEETWOOD v. SWIFT & CO. (No. 12246.)

(Court of Appeals of Georgia, Division No. 2, Oct. 24, 1921.)

(Syllabus by the Court.)

1. Food §25—Duties of retailer as to sale of wholesome products contained in unbroken packages.

A retailer or one acting as the mere distributor to the retail trade of a food product

contained in unbroken packages as put up by and procured from a reputable dealer, distributor, or manufacturer is not prima facie liable in damages to a consumer for injuries occasioned by a deleterious condition of the product, since he could not in the exercise of ordinary diligence be expected to open for inspection the individual packages thus prepared by another; but in an action against either the retailer or the distributor, upon proof of such an injury and that the product was handled by the defendant, he is required to show his own diligence to the extent that he had in good faith purchased the merchandise from a reputable dealer, distributor, or manufacturer, as an article reasonably sound and safe for the use intended. Especially would this be true where the package containing the product fails to disclose the identity of the manufacturer or packer responsible for the quality and condition of the product. *Atlanta Coca-Cola Bottling Co. v. Danneman*, 25 Ga. App. 43, 102 S. E. 542 (3); *Payne v. Rome Coca-Cola Bottling Co.*, 10 Ga. App. 762, 73 S. E. 1087.

2. Food §25—Plaintiff confined to issue raised by pleadings.

The plaintiff having brought a common-law action for damages on account of the alleged negligence of the defendant in packing and distributing the food product, and not having set up or invoked the criminal provisions of the state "pure food law," nor alleged any acts constituting a violation thereof, the case must be tried and determined upon the basis of the issues raised by the evidence under the pleadings, and the plaintiff cannot be permitted in his exceptions to go outside of the issues to which he is thus confined. *Flessner v. Carstens Packing Co.*, 81 Wash. 241, 142 Pac. 694; *Hoffman v. Watkins*, 78 Wash. 118, 138 Pac. 664; *Acres v. Frederick & Nelson*, 79 Wash. 402, 140 Pac. 370.

(Additional Syllabus by the Editorial Staff.)

3. Food §25—One professing to act as distributor in guaranteeing weight not liable for injuries from defects in quality.

Printing on a package of butter, whereby defendant professed to act as distributor of such brand of butter and guaranteed the correctness of the weight when packed, cannot be construed as an adoption by the defendant of the product as its own so as to render it liable for a deleterious condition of the butter, if acquired in good faith from a reputable manufacturer.

Error from Superior Court, Colquitt County; W. E. Thomas, Judge.

Action by O. L. Fleetwood against Swift & Co. Judgment for defendant, and plaintiff brings error. Reversed.

This action was for damages on account of certain injuries to the plaintiff and certain expenses connected with the illness and burial of his infant child, all alleged to have been occasioned by the part consumption of a package of butter containing a decomposed

mouse head, which the plaintiff had bought of a local firm of retail grocers, branded as "Brookfield Creamery Butter," and which had been packed and distributed to the grocer for retail sale by the defendant, Swift & Co. By paragraph 2 of the petition it is alleged that:

"Said defendant is engaged in the business of manufacturing, packing, and selling to the retail dealers, for sale by them to the general public, meats and other products, including butter, to be used as food, and did prior to the 4th day of July, 1919, pack and distribute certain butter or compound branded by said defendant as 'Brookfield Creamery Butter,' in cartons containing one pound net weight."

The defendant, in answer to this paragraph, pleaded as follows:

"In answer to paragraph 2 of plaintiff's petition, this defendant admits the following portion of said petition, to wit: 'Said defendant is engaged in the business of manufacturing, packing, and selling to the retail dealers, for sale by them to the general public, meats and other products, including butter, to be used as food,' but this defendant denies the remainder of said paragraph."

It denied all allegations of the petition setting up damage to the plaintiff and liability on its part, and denied that "any of said items sued for are traceable to, or in any wise due to, negligence on the part of this defendant." On the trial the evidence of the grocerymen showed that the package of butter sold by them to the plaintiff on July 4, 1919, had been purchased from the defendant, Swift & Co., on June 27, 1919, as a portion of a 60-pound order; that the butter was packed in one-pound cartons after each cake had been wrapped in tissue paper; that these pound packages were shipped together in one large carton or box; and that, when received by them, the merchandise appeared to be in the same condition as when manufactured and placed in the cartons. The carton which contained the butter sold to the plaintiff was introduced in evidence and upon it was printed:

"Brookfield Creamery Butter. One pound net weight. The within contents weighed one pound when packed. Owing to the natural shrinkage due to evaporation and other causes, the contents are not guaranteed to weigh, at the time of sale, the amount marked on the package, but the sale is made at the packed weight. [Signed] Swift & Co., U. S., Distributors."

The evidence for the plaintiff was such as could be taken to establish an injury to the plaintiff, occasioned by the existence of the alleged deleterious substance. Upon the conclusion of the testimony offered in his behalf, a nonsuit was granted.

Dowling & Askew, of Moultrie, for plaintiff in error.

Hill & Gibson, of Moultrie, for defendant in error.

JENKINS, P. J. (after stating the facts as above). [1, 2] It is the contention of the defendant that the nonsuit was proper, on the theory that, since the defendant in its answer has denied that it manufactured or packed the shipment, and since, as he contends, the plaintiff's evidence shows that the defendant was but the mere distributor of the merchandise, the defendant could not be held liable for any negligence, since it could not be the duty of a mere distributor to open up, cut into, and inspect the sealed packages; and it is urged that, without doing so, there could manifestly be nothing to indicate the deleterious nature of the contents of the sealed packages. We agree in large part with the position taken by counsel for defendant. In Ruling Case Law, vol. 11, p. 1124, § 29, the rule is stated as follows:

"The early rules of law were formulated upon the theory that the provision dealer and the victualer, having an opportunity to observe and inspect the appearance and quality of the food products offered to the public, were accordingly charged with knowledge of their imperfections. But no knowledge of the original or present contents of a perfect appearing can or sealed package is possible in the practical use of such products. They cannot be chemically analyzed every time they are used. Accordingly, the reason for the rule having ceased, a new rule should be applied to the sale and use of packed goods that will more nearly harmonize with what is rational and just. While there is authority to the contrary, it comports better with justice to hold that, where a dealer sells to his customer an article in the original package in which it is put up by the manufacturer, and the customer knows as much about the article as the dealer, and buys it without any representation from the dealer or reliance upon his judgment, knowing that there has been no inspection of it by the dealer, there is no implied warranty, although the dealer knows that the customer buys it for food. No rule of law should imply a warranty of that which it is impossible for a defendant to know by the exercise of any skill, industry or investigation, however great. In other words, neither law nor reason should require impossibilities. Accordingly it has been held that a retailer of mill feed in original packages is not liable for injury to the cattle of a customer because of glass in the food, if the customer did not rely on the retailer's judgment as to the fitness of the food, and he made no inspection of the material and had no notice of its unfitness. The situation of the retailer and consumer of packed products is properly governed by the rules of negligence law. The retailer owes to the consumer the duty to supply goods packed by reliable manufacturers and such as are without imperfections that may be discovered by an exercise of the care, skill, and experience of dealers in such products generally. This is the measure of the retailer's duty, and, if he has discharged it, he should not be mulcted in damages because injuries may be produced by unwholesomeness of the goods. As to hidden imperfections, the consumer must be deemed to have relied on the care of the packer or manu-

facturer or the warranty which is held to be implied by the latter."

[3] It would seem to be true, as contended by the defendant, that the evidence fails to show that Swift & Co. was the manufacturer or the packer of the merchandise. While the fact that it was received by the retail grocer in unbroken sealed packages cannot be taken to throw any light upon who manufactured or packed the product, still the statement printed on the carton that Swift & Co. were distributors thereof would seem to thus limit their connection with it. If, under the evidence, it could be taken as shown that the defendant over its name had impressed the packages with its own individual trade or proprietary brand, this would be equivalent to vouching for the product as its own. We do not think, however, that merely professing to act as distributor of a named brand of a commodity, and guaranteeing the correctness of the weight when packed, can be construed as an adoption by the defendant of the product as its own, or as throwing light upon the identity of the manufacturer or packer. There is no other evidence going to show that at the time the purchase by plaintiff was made the defendant was engaged in manufacturing or packing butter under the designated trade-name. We do think, however, that, since the evidence is undisputed that the article was actually handled by the defendant, it was incumbent on it to exculpate itself to the extent of showing that it had in good faith procured it from some reputable manufacturer, distributor, or dealer, as an article reasonably safe for the use intended especially so since there is nothing on the package to indicate who, as manufacturer or packer, was ultimately responsible for the alleged tort.

Judgment reversed.

STEPHENS and HILL, JJ., concur.

(182 N. C. 835)

STATE v. CROUSE. (No. 351.)

(Supreme Court of North Carolina. Nov. 2, 1921.)

1. Criminal law \S 752 $\frac{1}{2}$ —If evidence, construed most favorably for state, is sufficient to convict, motion to dismiss must be overruled.

A motion to dismiss a criminal action must be determined by whether the evidence, when construed most favorably for the state, is legally sufficient to convict, and, if so, or there is any evidence in the record to sustain the counts on which defendant was convicted, exceptions to the overruling of such motion must be overruled.

2. Criminal law \S 552(1)—Jury's finding on circumstantial evidence not dependent entirely on belief in truth of testimony.

When a fact is to be proved by circumstantial evidence, the jury's finding is not dependent entirely on their belief in the truth of the testimony, since they must not only believe the witnesses, but also draw from their testimony the inferences arising from the facts proved.

3. Criminal law \S 552(1)—In drawing inferences from circumstantial evidence, jury must consider all circumstances.

In drawing inferences from circumstantial evidence, all the circumstances must be considered and weighed by the jury.

4. Intoxicating liquors \S 238(1) — Evidence held sufficient to require submission of issues to jury in prosecution for keeping and manufacturing for sale.

In a prosecution for manufacturing and possessing spirituous liquor for sale, evidence held sufficient to require submission of the issues to the jury, so that, on a motion to dismiss, defendant's evidence in rebuttal did not need to be considered.

5. Criminal law \S 762(3)—Instruction to consider location of distillery on another's land as tending to show defendant not guilty of manufacturing properly refused as invading province of jury.

In a prosecution for manufacturing and possessing spirituous liquors for sale, an instruction that the location of the distillery on the land of another should be considered as tending to show that defendant was not guilty was properly refused as invading the province of the jury and expressing an opinion on the weight and effect of the evidence.

6. Criminal law \S 371(10)—Testimony as to prior discovery of another still than that charged in indictment admissible to show intent.

In a prosecution for manufacturing and possessing spirituous liquors for sale, testimony as to the prior discovery near defendant's house of another still than that alleged was admissible; evidence of circumstances sufficiently connected with the main charge being competent to show purpose or intent.

7. Criminal law \S 1170 $\frac{1}{2}$ (5)—Questions as to whether witness found any liquor growing on his own premises, etc., in rebuttal of defendant's disclaimer of knowledge as to how liquor came to be on his premises, held harmless.

In a prosecution for manufacturing and possessing spirituous liquors for sale wherein defendant disclaimed knowledge as to how liquors came to be on his premises, questions asked on cross-examination of a neighbor as to whether he found liquor growing on his own premises or cans, kegs, and jars thereof, though immaterial, were not reversible error, being harmless.

Exceptions from Superior Court, Forsyth County; Long, Judge.

S. W. Crouse was convicted of manufacturing and having in possession for sale spirituous liquor. Defendant's motion to dismiss overruled, and he excepts. No error.

The state, to rebut defendant's disclaimer of knowledge as to how the liquor came to be on his premises, asked a neighbor on cross-examination whether he found any liquor growing on his land, or any cans, jars, or kegs thereof, to the overruling of objections to which questions defendant excepted.

The defendant was convicted of manufacturing spirituous liquor and having it in possession for the purpose of sale in violation of law. At the close of the state's evidence and again at the close of all the evidence the defendant moved to dismiss the action as in case of nonsuit. The motion was overruled. Defendant excepted. Other exceptions appear in the record.

James S. Manning, Atty. Gen., and Frank Nash, Asst. Atty. Gen., for the State.

John D. Slawter, Swink & Hutchins, and O. O. Efrd, all of Winston-Salem, for defendant.

ADAMS, J. [1] The defendant's motion to dismiss the action must be determined by the question whether the evidence, when construed most favorably for the state, is legally sufficient to convict. If it is, or if there is any evidence in the record to sustain the counts on which the defendant was convicted, the exception must be overruled. *State v. Carmon*, 145 N. C. 482, 59 S. E. 657; *State v. Walker*, 149 N. C. 528, 63 S. E. 76; *State v. Carlson*, 171 N. C. 823, 89 S. E. 30.

[2] In the absence of direct and positive proof the state is often required to rely upon circumstantial evidence; and, when a fact is to be proved by such evidence, the finding of the jury is not dependent entirely upon belief in the truth of the testimony, since the jurors must not only believe the witnesses, but must also draw from their testimony the inferences arising from the facts proved. *Snowden v. Bell*, 159 N. C. 500, 75 S. E. 721.

[3] All the circumstances disclosed by the evidence, taken in their entirety, must be considered and weighed by the jury in drawing such inferences, and in determining the guilt or innocence of the defendant.

[4] There was evidence for the state tending to show that on June 24, 1921, Newsome, Pulliam, Scott, Flynn, Wooten, and Dunnigan, deputies of the sheriff, went to the defendant's home with a search warrant; that Newsome went down the branch on the right of the defendant's home and found a furnace under which there had been a fire; that a few hundred yards away he found tubs in a thicket, and a place from which a still had been removed; that 25 or 30 steps nearer the defendant's home and about 200 yards therefrom he saw a still (which meantime had been discovered by Pulliam) under which fire

had recently been burning, and tubs in which there had been a quantity of beer; that there was a path leading from the still house toward the defendant's dwelling; that two kegs and several fruit jars which contained liquor were found, one of the kegs containing two or three gallons and the other about five; that after two of the officers had gone to the defendant's house they saw the defendant's wife go into a room and put under the bed a fruit jar which contained more than a quart of whisky, while another found a small quantity in the cellar; that the jars found in the house corresponded in size with those found in the field. There was evidence tending to show that the defendant's character was bad as to the manufacture of liquor, and there were various other circumstances tending to show his guilt. This evidence was clearly of sufficient probative force to require its submission to the jury on each count, and on a motion to dismiss the defendant's evidence in rebuttal need not be considered. *State v. McMillan*, 180 N. C. 742, 105 S. E. 403; *State v. Bush*, 177 N. C. 551, 98 S. E. 281; *State v. Horner*, 174 N. C. 789, 94 S. E. 291. *State v. Prince*, 108 S. E. 330, decided at this term, is easily distinguishable in that there was an absence of evidence which could reasonably be construed as connecting the defendant in that case with the offense charged. The motion to nonsuit and the defendant's prayer that, if the jury believed the evidence, they should acquit the defendant, and that there was no evidence tending to show that the defendant aided another in the unlawful enterprise, were properly declined.

[5] His honor could not have granted the defendant's request to instruct the jury that the location of the distillery on the land of another should be considered as tending to show that the defendant was not guilty on either count, without invading the province of the jury, and expressing an opinion upon the weight and effect of the evidence.

[6] Newsome, a witness for the state, was permitted to testify, over the defendant's objection, that about 90 days before the trial, or possibly in the preceding September, he found a still at night about 800 yards from the defendant's house, and that it had been in operation during the night. It will be borne in mind that the defendant was convicted of the manufacture of liquor and of having it in possession for the purpose of sale. If he owned or controlled or had in possession the still or the liquor, the question of his purpose or intent at once became both relevant and material. Evidence of circumstances sufficiently connected with the main charge are competent to show purpose or intent. They are regarded as part of a series of circumstances which when connected and correlated, are deemed to be competent in proof of the main fact. This principle is illustrated by the opinion *State v. Stancill*, 178 N. C. 686, 100 S. E.

241, in which it was held that proof of the commission of other like offenses to show the scienter, intent, or motive is generally competent when the crimes are so connected or associated that such evidence will throw light upon that question. A discussion of the authorities may be found in *State v. Simons*, 178 N. C. 679, 100 S. E. 239, in which the same principle is stated with clearness by the Chief Justice.

[7] The defendant's exceptions to questions propounded by the solicitor to the witness Dean on cross-examination manifestly constitute no ground for a new trial. If the evidence elicited was immaterial, it was also harmless. We have examined the defendant's objections to the testimony of the witness Swain and find them to be without merit. Upon the whole record we find no error. No error.

(182 N. C. 323)

STOKES v. DIXON. (No. 190.)

(Supreme Court of North Carolina. Nov. 2, 1921.)

1. Perpetuities § 6(1) — Clause restraining grantee's right to alienation void.

Deed conveying land to grantee "during his natural life and then to his heirs with no right to him the said B. (grantee) to convey the same" held void as to clause restraining grantee's right of alienation, it being repugnant to the estate conveyed, and in contravention of public policy.

2. Deeds § 128—Held to vest in grantee a fee simple under rule in *Shelley's Case*.

Deed conveying land to grantee "during his natural life and then to his heirs with no right to him the said B. (grantee) to convey the same" vested in grantee a fee simple, under the rule in *Shelley's Case*.

Appeal from Superior Court, Craven County; Lyon, Judge.

Submission of controversy without action by B. H. Stokes against J. J. Dixon. Judgment for plaintiff, and defendant excepts and appeals. Affirmed.

The facts agreed are as follows:

(1) That B. H. Stokes is in possession and claims title to two certain tracts of land described in a deed dated the 11th day of March, 1910, which reads as follows:

"State of North Carolina, Craven County.

"This deed, made this the 11th day of March, 1910, by R. B. Stokes and wife, Rebecca Stokes, of Craven county and state of North Carolina, of the first part, to B. H. Stokes of Craven county and state of North Carolina, of the second part, witnesseth, that the said R. B. Stokes and Rebecca Stokes his wife, in consideration of parental love and one dollar to them paid by the said B. H. Stokes, the receipt of which

is hereby acknowledged, have bargained and sold and by these presents do bargain, sell and convey to the said B. H. Stokes and his heirs and assigns, two certain tracts or parcels of land in No. 1 township, Craven county, state of North Carolina, described as follows: * * *

"With the exception the said R. B. Stokes reserves his life estate in the above two described tracts of land and the timber on the same. Also if R. B. Stokes dies before his wife, Rebecca Stokes, she, the said Rebecca Stokes is to have and to hold a life estate in the home place or first tract above described, it being the home place the said Rebecca's life estate to cease in case she marries again. The said home place, it being first tract described above, is hereby given to the said B. H. Stokes during his natural life and then to his heirs with no right to him the said B. H. Stokes, to convey the same, also that he is to have no part in any future division of the said R. B. Stokes land.

"To have and to hold, the aforesaid tract or parcel of land and all the privileges and appurtenances thereto, belonging to the said B. H. Stokes, and his heirs and assigns, to their only use and behoof forever.

"And the said R. B. Stokes and Rebecca Stokes, covenant to and with the said B. H. Stokes, and his heirs and assigns, that they are seized of the said premises in fee, and have a right to convey the same in fee simple; that the same are free and clear from all incumbrances, and that they will warrant and defend the said title to the same against the claims of all persons whatsoever.

"In testimony whereof the said R. B. Stokes and Rebecca Stokes, have hereunto set their hands and seals the day and year first above written.

"R. B. X Stokes. [Seal.]
mark

"Rebecca Stokes. [Seal.]"

Verified March 11, 1910.

(2) That R. B. Stokes and Rebecca Stokes are both dead.

(3) That B. H. Stokes and J. J. Dixon have entered into an agreement by which the said J. J. Dixon agreed to purchase the said land and pay therefor the sum of \$6,800, and B. H. Stokes agreed to sell said land and convey a good and indefeasible title in fee simple.

(4) That B. H. Stokes has tendered to said J. J. Dixon a deed, conveying the said land with the usual covenants of warranty, purporting to convey a fee-simple estate, and that J. J. Dixon has refused to accept said deed or pay for the land for the reason that he is advised that said B. H. Stokes cannot convey a good title.

Upon the facts agreed his honor rendered judgment declaring the plaintiff the owner in fee of the tracts of land described in the deed, with right to convey to the defendant a title in fee simple. The defendant excepted and appealed.

Whitehurst & Borden, of New Bern, for appellant.

Moore & Dunn, of New Bern, for appellee.

ADAMS, J. [1, 2] R. B. Stokes, one of the grantors, reserved a life estate for himself in the two tracts of land described in the deed, and in case his wife Rebecca survived him, a life estate for her in the first tract, known as the home place. Both R. B. Stokes and his wife are dead, and the reservation of the life estate, for the present purpose, is inoperative. The controversy therefore depends upon the proper construction of the following paragraph:

"The said home place, it being the first tract described above, is hereby given to the said B. H. Stokes during his natural life and then to his heirs with no right to him the said B. H. Stokes, to convey the same."

The clause purporting to restrain the grantee's right of alienation is repugnant to the estate conveyed, and is void as in contravention of public policy. *Munroe v. Hall*, 97 N. C. 209, 1 S. E. 651; *Hardy v. Galloway*, 111 N. C. 520, 15 S. E. 890, 32 Am. St. Rep. 828; *Pritchard v. Bailey*, 113 N. C. 521, 18 S. E. 668; *Latimer v. Waddell*, 119 N. C. 370, 26 S. E. 122, 3 L. R. A. (N. S.) 668; *Wool v. Fleetwood*, 136 N. C. 461, 48 S. E. 785, 67 L. R. A. 444; *Schwren v. Falls*, 170 N. C. 251, 87 S. E. 49, L. R. A. 1916B, 1235. The grantors, then, conveyed the home place to B. H. Stokes during his natural life, and then to his heirs, and thereby vested in their grantee a fee simple under the rule in *Shelley's case*. *Tucker v. Williams*, 117 N. C. 119, 23 S. E. 90; *Nichols v. Gladden*, 117 N. C. 498, 23 S. E. 459; *Tyson v. Sinclair*, 138 N. C. 24, 50 S. E. 450, 3 Ann. Cas. 397; *Smith v. Smith*, 173 N. C. 124, 91 S. E. 956; *Nobles v. Nobles*, 177 N. C. 243, 98 S. E. 715.

The judgment is affirmed.
Affirmed.

(182 N. C. 316)

**PRINGLE et al. v. WINSTON-SALEM
BUILDING & LOAN ASS'N et al.**
(No. 355.)

(Supreme Court of North Carolina. Nov. 2, 1921.)

Mortgages §377—Where sale vacated by order of resale, trustee entitled only to allowance for trouble and advertising expenses.

Where sale under deed of trust was vacated by order of resale under C. S. § 2591, because of an advanced bid, the trustee was not entitled to commissions on the vacated sale, but only to an allowance for his trouble and expenses of advertising, which could be assessed by the clerk subject to review on appeal, or by the judge.

Appeal from Superior Court, Forsyth County; Webb, Judge.

Action by Cynthia Pringle and others against the Winston-Salem Building & Loan

Association and T. W. Watson, trustee. Judgment for plaintiffs, and the last-named defendant appeals. Affirmed.

On January 18, 1919, the plaintiffs executed to Watson, trustee for Winston-Salem Building & Loan Association, a deed of trust to secure \$800. This debt not being paid at maturity, upon the request of the beneficiary the trustee advertised the property for sale, and on May 9, 1921, sold it for \$3,000. Pursuant to C. S. 2591, an advance bid being filed with the clerk, on May 12 he ordered a resale, which was advertised to take place June 4, 1921. After the resale was ordered, on June 3, 1921, the plaintiffs tendered to Watson, trustee, the amount due on the note and the cost of advertising the two sales, amounting to \$735.10, but declined to pay the trustee a commission of \$150, which he demanded as 5 per cent. upon the \$3,000 bid, and on the same day paid into the office of the clerk of the superior court said sum of \$735.10 and upon a summons issued procured a temporary restraining order against a resale, which was later continued to the final hearing by Judge Webb, who also refused the prayer of the defendant Watson to dismiss the action, and he appealed.

Manly, Hendren & Womble, of Winston-Salem, for appellant.

Jones & Clement, of Winston-Salem, for appellees.

CLARK, C. J. Chapter 146, Laws 1915, and amendments, now C. S. 2591, was intended for the protection of mortgagors where sales are made under a power of sale without a decree of foreclosure by the court. In the latter cases there was always an equity to decree a resale when a substantial raise in the bid, usually 10 per cent., had been deposited in court. There being no such protection as to mortgages with power of sale, this statute was passed to extend to mortgagors whose property had been sold under power of sale without a decree of foreclosure the same opportunity of a resale, when there has been an increased bid of 10 per cent. when the bid at the first sale did not exceed \$500 and of 5 per cent. where the bid of the first sale was more than \$500.

This statute has been construed at this term in *Re Sermons*, 108 S. E. 497; not to require a report to the clerk of every sale made under a mortgage with power of sale, but that in all such cases, if the prescribed amount of the raise in bid is guaranteed, or paid, to the clerk he shall require the mortgagee or trustee to advertise and resell on 15 days' notice. In short, the condition of a mortgagor in a mortgage with a power of sale is assimilated to the condition of property sold under a decree of foreclosure so far as the right to set aside the bid at the first sale and to require a resale. Therefore

the decisions upon the right of the commissioner to commissions on a sale under a decree of foreclosure is applicable in these cases.

In *Pass v. Brooks*, 118 N. C. 398, 24 S. E. 736, it was held that after the trustee had advertised, but before the sale day the trustor, with the knowledge and consent of the trustee, paid off the debt and interest and costs of advertisement, the trustee was not entitled to any commissions. In *Fry v. Graham*, 122 N. C. 773, 30 S. E. 330, where the trustee in a deed of trust with power of sale advertised the land for sale and the sale was postponed, and before the day of the adjourned sale, the debt was paid in full, the trustee can not recover commissions on the amount of the debt, but is entitled to a just allowance for time, labor, services, and expenses, and that these could be assessed in an action by the trustee for the same but in the present case, the matter being before the clerk under C. S. § 2591, by virtue of the order of resale made by him, we are of opinion that these charges can be assessed by the clerk subject to review on appeal, or by the judge in this proceeding as in *Fry v. Graham*.

In *Whitaker v. Guano Co.*, 123 N. C. 370, 31 S. E. 629, it was held that where there is no sale a just allowance can be allowed the commissioner for his time, labor, and expenses. All these cases cite *Boyd v. Hawkins*, 17 N. C. 336. In *Turner v. Boger*, 126 N. C. 303, 35 S. E. 592, 49 L. R. A. 590, the above three cases were cited, and the court affirmed the dissenting opinion in *Cannon v. McCape*, 114 N. C. 584, 19 S. E. 703, 20 S. E. 276, in which it was pointed out that—

Originally "when property was levied on and advertised for sale under execution, if payment was made before sale, the sheriff was allowed no commission on the sale (*Dawson v. Grafflin*, 84 N. C. 100), and it took a statute to change this (Code, § 3752), but there has been no statute as yet extending this rule to trustees or mortgagees when the debtor pays before sale. It is to be feared that such practice, if adopted, will result in oppression in very many instances."

The order of resale vacated the first sale absolutely, and under the above authorities the trustee at most would only be entitled to an allowance for his trouble and expenses of advertising, which last has been paid in to the clerk's office. The trustee claims that he was entitled to 5 per cent. upon the \$3,000 which the land brought at the vacated sale. The question is not before us whether if the sale had not been set aside the trustee would have been entitled to commissions on the \$3,000 or only upon the amount collected and paid over on the indebtedness, in analogy to the sale by the sheriff upon execution, who receives commission, not upon the price the property has brought, but only upon the

amount collected (C. S. 3908), or like the allowance to an administrator who in selling land under a decree to make assets is entitled to commissions only on so much of the proceeds of the sale as is applied to the indebtedness of the intestate, and there are other instances. In *Smith v. Frazier*, 119 N. C. 158, 25 S. E. 866, it was held that formerly no commissions were allowed commissioners for making sale under judicial decree, but only a just allowance for time, labor and expenses and a decree, allowing 5 per cent. on the purchase price instead of on the amount of debt collected, was reversed. This was cited and approved in *Turner v. Boger*, 126 N. C. 303, 35 S. E. 592, 49 L. R. A. 590, which intimated that by analogy to sales in partition the allowance (even when the sale is not set aside) might follow the rate allowed by that statute, now C. S. 3896. *Ray v. Banks*, 120 N. C. 389, 27 S. E. 28; *Williamson v. Bitting*, 159 N. C. 321, 74 S. E. 808.

Though this matter is not strictly before us, and we do not decide it, it would seem that the spirit of the statute is to protect mortgagors, like defendants in executions, against the payment of commissions on more than the debt that is collected by the sale.

The restraining order against the resale was properly continued, and the amount of allowance to the trustee for his labor and trouble can be fixed by the judge at the final hearing, or, if so advised, application for such allowance can be made by the trustee to the clerk with the right of appeal.

Affirmed.

(123 N. C. 267)

WILLIAMS v. RANDOLPH & C. RY. CO. et al. (No. 332.)

(Supreme Court of North Carolina. Oct. 26, 1921.)

1. Railroads \S 259(1)—Lessor and lessee jointly liable for lessee's torts.

Lessor and lessee of a railroad are jointly and in the same degree liable for lessee's torts.

2. Assignment \S 31—Landlord and tenant \S 20—"Lease" and "assignment" distinguished.

The elements of a lease are the creation of a lesser estate from the greater, the reservation of rent, the retention of some interest or estate after the termination of the term, and the recognition of lessor's ownership of the property, while an assignment transfers the whole estate and reserves no rent nor any interest in the property assigned.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Assignment; Lease.]

3. Railroads \S 259(3)—Agreement held a lease so as to render parties jointly liable for injuries.

An agreement between the successor in interest of a lessee of railroad property and a

sublessee thereof demising it to the latter for a term less than that for which part of it was acquired from the owner, requiring sublessee to make no traffic arrangements with any other railroad without grantor's consent, to pay taxes and insurance, to return the property on expiration of the term, and indemnify grantor against loss or damage arising out of the operation of the road, and reserving the right to declare a forfeiture on nonpayment of rent, was a lease, and not an assignment, and therefore the parties were jointly and severally liable to one injured at a crossing.

4. Death ⚡62—Dying declarations of one struck at crossing held admissible under statute.

In view of C. S. § 160, as amended by Laws 1919, c. 29, declaring dying declarations of deceased as to the cause of death by wrongful act admissible in like manner as in criminal actions for homicide, a statement of an automobilist struck by a train at a public crossing: "I am broken all to pieces. I want you to see to it that they pay you for this"—was competent as expressing deceased's conviction that death was rapidly approaching, and as being an integral part of his dying declaration.

5. Constitutional law ⚡109—Dying declaration in action for death from wrongful act held admissible, though made prior to law authorizing admission.

A dying declaration by one struck by a train at a railroad crossing, though made prior to the enactment of the amendment of 1919 (Laws 1919, c. 29) to C. S. § 160, authorizing the admission of dying declarations of deceased in actions for death caused by wrongful act in like manner as in criminal actions for homicide, was admissible, the statute being a general one changing the rule of evidence, in which no one has a vested interest, and which the lawmaking power can extend, alter, or repeal at will.

6. Railroads ⚡347(7)—Evidence as to condition of track at crossing held admissible.

In an action for the death of an automobilist struck by a train at a public crossing, evidence as to the condition of the track and rails was admissible to show that death was proximately caused by negligence in failing to maintain warning notice, and failure to remove soil from the track and clear undergrowth obstructing the view of the cars which were pushed in front of the engine without warning.

7. Railroads ⚡330(3)—Negligence not imputed to traveler induced to proceed by omission of warning at obstructed crossing.

If a traveler's view is obstructed or his hearing of an approaching train is prevented, and especially if this is done by the fault of the railroad company and the failure to warn him, and, being lulled into security, he attempts to cross the track and is injured, having used his faculties as best he could under the circumstances, negligence will not be imputed to him, but to the company; its failure to warn him being regarded as the proximate cause of the injury.

Appeal from Superior Court, Orange County; Horton, Judge.

Action by Lena S. Williams, administratrix, against the Randolph & Cumberland Railway Company and the Seaboard Air Line Railway Company. From a verdict for plaintiff, defendants appeal and from an order setting aside the verdict and entering a nonsuit as to the Seaboard Air Line Railway Company, plaintiff and defendant, Randolph & Cumberland Railway Company, appeal. Order striking out verdict reversed, and judgment entered for plaintiff against both defendants.

This was an action for the death of the defendant at a railroad crossing at Cameron, N. C., caused by a train which was being operated at that time by the defendant Randolph & Cumberland Railway Company, lessee of the defendant. Both defendants answered, denying negligence and pleading contributory negligence, and the defendant Seaboard Air Line R. R. Co. denying that it was liable as lessor. The jury found upon the issues submitted that the plaintiff's intestate was killed by the negligence of the defendants, and that the plaintiff was not guilty of contributory negligence, and assessed damages.

The court set aside the verdict on the second issue as against the Seaboard Air Line Railroad Company as a matter of law, and entered a nonsuit as to it. The said company, having, however, assigned errors on the trial to the evidence and the charge, appealed, as did also the Randolph & Cumberland Railway Company, and the plaintiff.

Williams & Williams, of Sanford, Brogden & Bryant, of Durham, W. S. Roberson, of Chapel Hill, and A. L. Brooks, of Greensboro, for plaintiff.

Walter H. Neal, of Laurinburg, and Murray Allen, of Raleigh, for defendant Seaboard Air Line Ry. Co.

U. L. Spence and R. L. Burns, both of Carthage, for defendant Randolph & C. Ry. Co.

OLARK, C. J. In August, 1917, the Randolph & Cumberland Railway Company were operating a railroad between Cameron and Carthage in Moore county, which crosses the National Highway at right angles just inside the corporate limits of the town of Cameron at a point where the railroad track crosses this highway from a deep cut, which was 8 to 10 feet high on the north side and 12 to 15 feet high on the other. On the banks of this cut for some distance on each side of the railroad bushes, trees, and thick growth had been permitted to grow, obstructing the view of the approaching train.

The plaintiff's intestate, driving along this highway on August 22, 1917, in an automobile going south, crossed a bridge north of the railroad, and was approaching this crossing. The railroad train was approaching the

crossing from the west with a box car at the front end nearest the crossing, then two or three gondola cars, then the passenger car, and the engine attached to the rear was pushing the cars over the crossing at a speed of 8 to 10 miles per hour, the engine being in the cut. There was evidence that the engineer did not ring the bell, blow the whistle, or give any warning of the approach as the train emerged from the cut on the west and entered on the highway. The train collided with the automobile, and plaintiff's intestate sustained severe injuries, from which he died next day.

On August 23, 1888, the Carthage Railway Company leased its roadbed franchise, etc., to the Raleigh & Augusta Air Line Railway Company for 99 years. In 1890 the latter company leased the property acquired from the Carthage Railway Company, together with its own franchise rights, powers, and other privileges and some other property to W. C. Petty for a term of 97 years. Petty operated the road for some time, and after his death the trustees named in his will in 1906 leased all the property acquired under his lease as above to the defendant Randolph & Cumberland Railroad Company. In 1901 the defendant Seaboard Air Line Railway Company succeeded to the rights of the Raleigh & Augusta Railroad Company.

On September 20, 1907, the defendant Seaboard Air Line Railway Company and the defendant Randolph & Cumberland Railroad Company executed a lease agreement, set out in the record, releasing Petty's estate and substituting the defendant Randolph & Cumberland Railway Company as lessee of the property, specifically readopting and reaffirming all stipulations and terms of the lease from the Raleigh & Augusta Air Line Railway Company and Petty, expressly providing that the defendant Randolph & Cumberland Railway Company pay rent direct to the defendant Seaboard Air Line Railway Company, and should make no traffic arrangements or business connection with any other railroad company except with the written consent of the Seaboard Air Line Railway Company, and that the latter may declare the term forfeited and re-enter upon the property, and that the Randolph & Cumberland Railway Company shall indemnify the Seaboard Air Line Railway Company against loss by reason of damage arising out of the operation of the road, and return the property to the Seaboard Air Line Railway Company at the expiration of the term.

Appeal by the Plaintiff.

This appeal presents for review the action of the judge in setting aside as a matter of law the verdict as to the second issue which held the Seaboard Air Line Railroad Company liable, and his instruction to the jury under which they found that the liability

of the Seaboard Air Line Railway Company was secondary, and entered judgment of nonsuit as to that company.

[1] In these particulars there was error. This court has repeatedly held that the lessor and lessee of a railway company are jointly liable for the torts of its lessee, and both defendants, the Randolph & Cumberland Railway Company and the Seaboard Air Line Railway Company are liable equally and in the same degree, to the plaintiff.

In *Aycock v. Railroad*, 89 N. C. 321, the court held:

"The defendant company, leasing the use of its road or permitting the use of it by another company, remains liable for the consequences of the mismanagement of the train in charge of the servants of the latter and the injury thence resulting to the same extent as if such mismanagement was the act or neglect of its own servants operating its own train."

In a very full opinion the court says, in *Logan v. Railway*, 116 N. C. 947, 948, 21 S. E. 961, that—

"The lessor company * * * remains liable for the performance of public duties to private parties for the nondelivery of goods received by it for delivery, and for all acts done by the lessee in the operation of the road, notwithstanding the lease is authorized by the lessor's charter." * * * No matter how many leases and subleases may be made, the law attaches to the actual exercise of the privilege of carrying passengers and freight the compensatory obligation to the public to use ordinary care for the safety both of persons and property so transported. * * * On the other hand, the carrier, who simply substitutes, with the consent of the state, another in his place, cannot establish his own right of exemption from responsibility for the wrongs of the substitute, unless he can show, not only explicit authority to lease the property, but to rid itself of such responsibility."

In *Harden v. Railroad*, 129 N. C. 362, 40 S. E. 187, 55 L. R. A. 784, 85 Am. St. Rep. 747, in which case the authorities are collected and approved the court said:

"If a railroad corporation could relieve itself of liability by leasing, it would follow that leases could be made to another corporation with no tangible assets—as, indeed, the lessee in this case, if a foreign corporation, has none in this state—leaving the travelers and shippers over its line, the general public, and its employees alike, without recourse on the property of the corporation which was chartered to operate the road, and which is left in receipt of the rent, which might readily be made high enough to cover the profits. Thus the company would, by a device of a lease, receive the profits without incurring the liabilities of its business."

Among the many cases to the same effect besides *Aycock v. Railroad*, supra, and *Logan v. Railroad*, supra, and *Harden v. Railroad*, supra, will be found *Tillett v. Railroad*, 118 N. C. 1043, 24 S. E. 111; *James v.*

Railroad, 121 N. C. 528, 28 S. E. 537, 46 L. R. A. 306; Norton v. Railroad, 122 N. C. 910, 29 S. E. 886; Kinney v. Railroad, 122 N. C. 961, 30 S. E. 813; Benton v. Railroad, 122 N. C. 1009, 30 S. E. 833; Pierce v. Railroad, 124 N. C. 93, 32 S. E. 399, 44 L. R. A. 316; Perry v. Railroad, 128 N. C. 471, 39 S. E. 27; Id., 129 N. C. 333, 40 S. E. 191; Raleigh v. Railroad, 129 N. C. 265, 40 S. E. 2; Smith v. Railroad, 130 N. C. 344, 42 S. E. 139; Id., 131 N. C. 616, 42 S. E. 976; Brown v. Railroad, 131 N. C. 455, 42 S. E. 911; Mabry v. Railroad, 139 N. C. 388, 52 S. E. 124; Parker v. Railroad, 150 N. C. 433, 64 S. E. 186; Zachary v. Railroad, 156 N. C. 496, 72 S. E. 858; Railroad v. Zachary, 232 U. S. 258, 34 Sup. Ct. 305, 58 L. Ed. 591, Ann. Cas. 1914C, 159; and there are many others since, among them Mitchell v. Lumber Co., 176 N. C. 645, 97 S. E. 628; Hill v. Director General of Railroads, 178 N. C. 607, 101 S. E. 376.

[2, 3] In this case the relationship of lessor and lessee is fully shown by the allegations in the complaint and the admissions in the answer and the lease contract as set out in the record, in which there are all the elements of a lease, i. e., the creation of a lesser estate from the greater; the reservation of rent, the retention of some interest or estate after the termination of the term, and the recognition by the terms of the lease of the ownership of the demised property by the lessor. A lease is distinguished from an assignment in that the latter is a conveyance which transfers the whole and entire estate. An assignment makes no reservation of rent, and reserves no interest in the property assigned. In this case, the term for which the property was demised is less than the term for which part of the property was acquired from the Carthage Railway Company; and the terms of the lease create the direct relationship of lessor and lessee; substituting the Randolph & Cumberland Railroad Company for the former lessee; the Seaboard Air Line Railroad Company expressly retains absolute control over the operation of the road by the Randolph & Cumberland Railway Company, its lessee, and the right and power to say with whom, how, when, or on what terms the Randolph & Cumberland Railroad Company may make traffic arrangements or business connections with any other railroad, thus securing to the lessor the benefit of operating the road, and protects the lessor against payment of taxes levied against the demised property and franchise rights, requiring the lessee to pay the same.

The lessor by its contract requires that the demised property shall be returned to it upon expiration of the terms specified, and that during the lease it shall be insured for its benefit, thus recognizing a present interest in the term. The lease demises the "rights, powers, privileges, easements and franchises" of the lessor, who also reserves the right

to declare a forfeiture of the term and make re-entry and retake the property demised upon nonpayment of rent, and the lessee agrees to indemnify the lessor against loss or damage arising out of the operation of the road by the lessee.

The cases relied upon by the defendant (Dunn v. Railroad Co., 141 N. C. 521, 54 S. E. 416, and Gregg v. Wilmington, 155 N. C. 18, 70 S. E. 1070), differ radically as to the facts from the case at bar, and are not in point.

There being a lease, the court erred in charging the jury that the liability of the Seaboard Air Line Railroad Company was secondary. The liability of lessor and lessee is joint and several, and in equal degree, and there was also error in setting aside the verdict as against the Seaboard Air Line Railroad Company as a matter of law.

Appeal by Defendants.

In view of what has just been said, the appeal of the two defendants as to the other exceptions should be considered jointly.

[4] The defendants except to the evidence as to the physical condition of the plaintiff's intestate and the dying declarations made by him a short time before his death. The Legislature of 1919 (Laws 1919, c. 29) amended C. S. § 160, which authorizes recovery of damages for death caused by wrongful act, by adding to said section the following clause:

"In all actions brought under this section the dying declarations of the deceased as to the cause of his death shall be admissible in evidence in like manner and under the same rules as dying declarations of deceased in criminal actions for homicide are now received in evidence."

This amending clause has been construed in *Tatham v. Mfg. Co.*, 180 N. C. 627, 105 S. E. 423, in which the power of the Legislature to so enact was sustained in an opinion by Mr. Justice Hoke. The circumstances under which dying declarations are competent in criminal actions are set out fully in *State v. Mills*, 91 N. C. 594, which has been repeatedly cited and approved since. See citations in *Anno. Ed.*

The entire dying declaration of plaintiff's intestate is as follows:

"I am going to die. I am broken all to pieces. I want you to see to it that they pay you for this. I did not see the train. I did not know that it was anywhere near until my car was going over."

The attendant circumstances were fully set out in evidence, and leave no question as to the death of the plaintiff's intestate being caused by the collision of the train with the car which he was driving. He died on the following day. That part of the declaration to which the defendants except:

"I am broken all to pieces. I want you to see to it that they pay you for this."

—was competent as expressing the conviction of the deceased that he knew that death was rapidly approaching, and that he had abandoned all hope, and as being also an integral part of the dying declaration.

[5] It can make no difference that the act authorizing the admission of dying declarations in such action was passed after this occurrence. It is a general statute changing the rule of evidence, in which no one has a vested interest, and which the lawmaking power can extend, alter, or repeal at will.

[6] The exceptions as to the evidence showing the condition of the track and rails at the crossing at the time of the injury to plaintiff's intestate cannot be sustained. This evidence tended to show that the death was proximately caused by the want of care and the negligence on the part of the defendants, as alleged in the complaint, in failing to maintain at said public crossing some notice to warn the public and failure to remove the soil from the rails and track and to clear away and keep down the undergrowth and other obstructions which concealed from view the railroad track at the point where it crossed the public highway; also failure to sound the whistle or ring the bell or give other suitable warning as the box car in front of said train was being pushed over the crossing at a point where its approach was obscured by the growth of trees and other obstructions, and by pushing the train of cars in front of the engine across the public highway in the town of Cameron, without giving warning, and when those in charge of said train could not see the danger to plaintiff's intestate and avoid injuring him.

[7] The duty of the respective parties at a crossing have been so often stated by this court that it would be supererogation to do more than give the summary of the rules governing such occasion as stated by the late Mr. Justice Allen in the recent case of Perry v. Railroad, 180 N. C. 295, 104 S. E. 675:

If the view of the traveler "is obstructed or his hearing an approaching train is prevented, and especially if this is done by the fault of the defendant, and the company's servants fail to warn him of its approach, and, induced by this failure of duty, which has lulled him into security, he attempts to cross the track and is injured, having used his faculties as best he could, under the circumstances, to ascertain if there is any danger ahead, negligence will not be imputed to him, but to the company, its failure to warn him being regarded as the proximate cause of any injury he received."

There was evidence fairly submitted to the jury to justify their finding this state of facts, and the charge is almost in the exact language of the court in Perry v. Railroad, which followed the previous decisions in

Goff v. Railroad, 179 N. C. 216, 102 S. E. 320; Shepard v. Railroad, 166 N. C. 544, 82 S. E. 872; Jenkins v. Railroad, 155 N. C. 203, 71 S. E. 213; Hinkle v. Railroad, 109 N. C. 472, 13 S. E. 884, 26 Am. St. Rep. 581.

Upon examination of the entire case, the court directs that the order striking out the verdict on the second issue must be reversed and the verdict on that issue reinstated; and judgment must be entered in favor of the plaintiff for the amount of the verdict against both defendants, jointly and severally, without any priority as to liability between them.

In appeal by plaintiff error. In appeal by defendants no error.

ADAMS, J., not sitting.

(118 S. C. 309)

McFADDEN v. ANDERSON MOTOR CO.
(No. 10734.)

(Supreme Court of South Carolina. Oct. 10, 1921.)

Municipal corporations \S 706(6)—Whether automobile was driven at excessive speed on wet pavement in danger zone held for jury.

In action for injuries to girl, struck by defendant's automobile while crossing street, question of whether automobile was being driven at an excessive rate of speed on wet pavement within danger zone surrounding approach to public school held for the jury.

Watts, J., dissenting.

Appeal from Common Pleas Circuit Court of York County; Edward McIver, Judge.

Action by Aline McFadden, by her guardian ad litem, Allie McFadden against the Anderson Motor Company. Judgment of nonsuit, and plaintiff appeals. Reversed and remanded.

The reasons assigned by the trial court for granting a nonsuit are stated in the "case and exceptions" as follows:

"A nonsuit is never granted, if there is any evidence at all to sustain the allegation—specifications of negligence set out in the complaint. Realizing that, if there is any evidence at all to go to the jury of negligence, I have had the stenographer read over to me practically all of the testimony of Mr. Pressly, who is the only witness that testified anything about this accident. I can't find in his testimony any evidence of negligence at all; unless we could assume from the fact that one was hit by an automobile, that the automobile was negligently run, why, then there is certainly no evidence of negligence here. The law doesn't raise the presumption of negligence on account of the fact that the automobile was running. Now, Mr. Pressly, in his testimony, says he didn't see any car at all; the only information he got was

from some one else who told him; that wasn't competent. I don't know that it was ruled out, but it got in, what this boy had said. He said that he didn't see any car; the only thing he saw was the girl lying down on the right-hand rail, going in the direction the car was going; he was going on the right-hand rail of the street car line. He says he doesn't know whether the car stopped or not, as he didn't look for any car, and didn't see it. As far as his testimony, the car may have stopped at once, and may have reversed back, turned around; but he does say, as soon as he looked, he saw this girl the instant after it occurred; he saw the girl lying in that position. He went back there, and then saw the car turn around, as he expressed it, after he came back. As a matter of fact, he doesn't testify it is the same car. I suppose the inference would be it was the same car. He does say he testified the car stopped. He didn't see any car; didn't pay any attention to whether there was a warning given, or horn blown, or not; he doesn't know; he doesn't remember hearing any. He doesn't say there was one, and therefore there is no testimony on his part that the driver was driving that car in a negligent way at all; absolutely none. Now, cars have a right to drive; they have the right to drive in the street that way. From all we know, from the testimony, the car may have been going at five, six or even four miles; no testimony to the contrary. Now, counsel argues, because he struck this child, he must not have been observing a sufficient outlook. That doesn't follow as a matter of law because, if that were true, the law would be, the mere fact of injury raises the presumption that there was negligence of the driver of the car. That is not the law.

"I have asked counsel to try to point out to me any act of negligence but none have been able to show it. I have examined the testimony for myself. Of course, if there was a negligent driving of that car, there ought to be damages for the plaintiff; but you can't give damages to the plaintiff unless there is negligence upon which to predicate that. Therefore, as I am going to grant a nonsuit in this case, might want in this, in form of nonsuit or in direction of verdict and have granted motion, that merely upon the accident so far as the testimony is offered, it may be that another suit could supply the proof that is absolutely lacking in this case. I can't see where there is any negligence at all. I am obliged to do it; I regret to do it but I am obliged to grant a nonsuit in this case. You just take a simple order: Nonsuit on ground of lack of proof."

J. Harry Foster, of Rock Hill, and Thomas F. McDow, of York, for appellant.

Wilson & Wilson, of Rock Hill, and McDonald & McDonald, of Winnsboro, for respondent.

COTHRAN, J. Action for \$20,000 damages on account of personal injuries alleged

to have been sustained by the plaintiff in being struck by an automobile of the defendant at Rock Hill, S. C., February 18, 1919. The case was tried at York, S. C., at December term, 1920, before Judge McIver and a jury. At the close of the testimony for the plaintiff the circuit judge ordered a nonsuit, and from the judgment entered thereon the plaintiff appeals.

The plaintiff, a schoolgirl, was on her way to school, and while upon the street near the school was run over by an automobile of the defendant, operated by one Frank Hall. The circumstances of the collision are very meagerly detailed in the testimony, but there was sufficient evidence of the negligent operation of the car to require the submission of the issue to the jury, and the order of nonsuit was erroneous.

The witness Pressly testified that he was walking on the north side of East Main street, and was in the act of crossing Reid street, which intersects East Main; that he was with a young man, Sam Fant; that Sam Fant exclaimed, "There goes Frank's car," and immediately thereafter, "Watch out there; he is going to hit that little girl." Pressly looked around, the car was out of sight, and the little girl was lying on the ground. If Fant could see the danger, why could Hall have not seen it? If the car was out of sight when Pressly looked around, its speed was a question of fact for the jury. The fact that Hall did not stop means either that he did not see the little girl (upon the presumption of his humane feelings), or that he was going at such a speed on a wet pavement that he could not stop in time to avoid the collision, all of which were questions for the jury to decide. It was also for them to decide whether, under the circumstances, within the danger zone which should surround the approach to a public school, the driver exercised that degree of care which was required of him. The wet street, the presence of school children, the unobstructed view, were elements which the jury had the right to consider in determining the presence or absence of negligence.

The judgment of this court is that the judgment of the circuit court be reversed, and that the case be remanded to that court for a new trial.

GARY, C. J., and FRASER, J., concur.

WATTS, J. (dissenting). For the reasons assigned by his honor, Judge McIver, in granting nonsuit, I think that the exceptions should be overruled and the judgment affirmed.

(117 S. C. 312)

(198 S.E.)

SAMS v. SAMS et al.**Ex parte SAMS.**

(No. 10716.)

(Supreme Court of South Carolina. Sept. 28, 1921.)

1. Husband and wife \S 283(2)—Husband held guilty of desertion.

Where plaintiff wife learned a few days after her marriage that two days before the marriage her husband had conveyed away nearly if not all his real estate, worth from \$75,000 to \$139,000, to relatives, in contemplation of his marriage, and thereafter he rented out his house and sent her to another home without paying her board there, and, on her going to her own home until he could provide a home for her, failed to do so, *held* that he was guilty of deserting her.

2. Limitation of actions \S 100(10)—Suit to set aside deeds to husband's relatives held barred.

Wife's action in April, 1920, to set aside as in fraud of her rights her husband's deeds to relatives shortly before his marriage in 1906 was barred by limitations, where she knew the facts in 1906.

3. Husband and wife \S 283(2)—Offer to take wife back not sufficient to defeat alimony.

Where a husband's conduct had been consistently calculated to keep his wife away from his home, he could not escape payment of alimony on the ground he had offered to take her back, where the offer did not stop at that point, but alleged that he had always been willing to allow her to return, thereby indicating that his attitude remained unchanged, so that his offer could not be deemed bona fide.

Appeal from Common Pleas Circuit Court of Allendale County; H. F. Rice, Judge.

Action by Moylin M. Sams against D. Sams and others, in which Pauline O. Sams and others petitioned to be made parties, but their petition was refused. From judgment for plaintiff, defendants appeal, and petitioners also appeal. Affirmed in part and reversed in part.

James M. Patterson, of Allendale, for appellants.

R. P. Searsen, of Allendale, and Harley & Blatt, of Barnwell, for respondent.

FRAZER, J. The record shows:

"The plaintiff, Moylin M. Sams, and the defendant D. Sams are husband and wife. They were married on February 14, 1906. The defendant Miss Emma L. Sams is a sister of the defendant D. Sams. The petitioners, Emmie C. Sams, Annie Lou Sams, and Pauline O. Sams, are children of the defendant D. Sams by a former marriage. For 13 or 14 years the

said husband and wife have been living separate and apart.

"In April, 1920, the plaintiff, Mrs. Moylin M. Sams, brought this action asking for the following relief:

"(1) For a legal separation between herself and her husband.

"(2) For reimbursement for the money which she has spent on her support during the years of separation up to the commencement of this action.

"(3) For alimony during the lifetime of the defendant D. Sams.

"(4) That the courts declare fraudulent and void as against her rights certain deeds made by the said D. Sams, conveying all of his real estate to his brother and sister, the defendants Miss Emma L. Sams and R. O. Sams.

"(5) For temporary alimony pending this action, and suit money and attorney's fees."

The plaintiff, a young lady then about 22 years old, taught school in Allendale county, in this state, and among her pupils were the three daughters of the defendant. For the space of about 1 year the plaintiff boarded in the home of the defendant. The plaintiff and the defendant became engaged to be married, and were married, on the 14th day of February, 1906. It seems that a few days after the marriage, the plaintiff learned that her husband, two days before the marriage, to wit, on February 12, 1906, had conveyed away nearly if not all of his real estate. It is alleged and not denied that these conveyances were made in contemplation of marriage and to get the property out of the reach of any possible interference by the plaintiff when she should become his wife. The property conveyed is estimated to be worth anywhere from \$75,000 to \$139,750. The master recommended judgment in favor of the plaintiff against the defendant for arrears of alimony in the sum of \$7,925 and found that the deeds, so far as the plaintiff is concerned, are a legal fraud; recommends \$125 per month for future alimony, and also temporary alimony and counsel fees. From the findings of the master, the defendant appeals to the court of common pleas. The three daughters asked to be made parties, but their petition was refused. With some slight modifications not material here, the report of the master was affirmed. From this judgment the defendant appealed.

[1] I. The first assignment of error is that there was error in holding that the husband deserted his wife. This assignment of error cannot be sustained. The desertion, to a woman of any sort of refinement of feeling, was absolute. The defendant conveyed his property by conveyances that did not deprive him of its use, but only sought to prevent the accruing of any rights to the wife. These deeds were recorded, and said to all the world:

"I am about to marry a woman in whose honesty and fair dealings I have not the slightest confidence."

It was a cruel blow, uncalled for, unprovoked, wholly gratuitous. Up to that time she had done nothing either good or bad. It is true the wife told her husband, when she found it out, that she did not care to live with one who had no confidence in her. She did, however, live with him as long as he permitted her to do so. The rebuke was mild, but his guilty conscience made of it an unpardonable offense. He tells her that he has rented out his house, and has provided that she shall board with a Mrs. Peeples in Allendale, while he makes other arrangements. The defendant leaves her there, and goes off for a time. The plaintiff finds that she is not a boarder, but a guest. Mrs. Sams is in the position of one who is the recipient of charity. When her husband returns she tells him she wants to go back to her own family. The time of her stay with her family is not fixed. Neither is the time fixed for the opening of a new home. It is true also that Mr. Sams reserved some rooms in his home for his use, but he did not tell his wife that she might return to the home from which he had taken her. If he had told her to return to the home, it would have been to add insult to injury. It is suggested now that to return to the home was her right and duty. Suppose she had done so, she would have been met on this trial with the indisputable fact that she had returned to a house occupied by an unmarried man. When she had been carefully informed by her husband's letters that her husband's presence at that place, as her protector, was uncertain, she would have lost her reputation as well as her alimony. He took her from his house, left her in Allendale an object of charity; sent her back to her family; never notified her that he was ready for her return; constantly advised her that his movements were uncertain. The defendant husband deserted his wife, the plaintiff, and she was entitled to at least the alimony accorded to her by the judgment appealed from and the counsel fees.

[2] II. The next assignment of error is that the deeds cannot be set aside in this proceeding on account of the statute of limitations. This assignment of error must be sustained. Mrs. Sams knew the facts in 1904, and it is now too late to bring an action to set aside the deeds. The statute needs no construction, but, if it does, it will be found in *Amaker v. New*, 33 S. C. 28, 11 S. E. 386, 8 L. R. A. 687, followed by a line of cases. There are two avenues of relief. This one is closed.

[3] III. The appellant claims that the alimony prayed for is defeated by his offer to

take his wife back. That might have been sufficient if he had stopped there. He did not stop there, however, but alleges that he has always been willing to allow her to return. If his attitude towards his wife is the same that it has been, we are forced to the conclusion that the offer is not bona fide.

The judgment as to alimony is affirmed. The judgment in so far as it sets aside the deeds in this action is reversed.

GARY, C. J., and WATTS and COTHRAN, JJ., concur.

WORKMAN et al. v. COPELAND et al.* (No. 10729.)

(Supreme Court of South Carolina. Oct. 10, 1921.)

1. Specific performance ⇐25—Equity will not decree execution of a written lease in absence of contract for one.

Where there was no agreement for a written lease, equity will not require the execution of one.

2. Specific performance ⇐39—Parol lease for five years void and unenforceable.

Under the statutes a parol lease for five years is void, and unenforceable in equity.

Cothran, J., dissenting.

Appeal from Common Pleas Circuit Court of Laurens County; Ernest Moore, Judge.

Suit by W. H. Workman and another against J. W. Copeland, Sr., and another. From decree for defendants, plaintiffs appeal. Affirmed.

Simpson, Cooper & Babb, of Laurens, for appellants.

Dial & Todd and F. P. McGowan, all of Laurens, for respondents.

FRASER, J. In the view that this court takes of this case, very few words are necessary to determine it. The Copeland Company were conducting a mercantile business at Clinton, S. C. The stores occupied by the company were the individual property of the defendant J. W. Copeland, who was the president and the person who conducted the negotiations between the parties. The plaintiffs claim that by a parol agreement W. H. Workman, on behalf of himself and others, bought the stock of goods and made a lease of the storehouses for a period of five years. Before the end of the first year, Mr. Copeland sold the storehouses to his codefendant. The codefendant denied the lease, and demanded

increased rent after the expiration of a year. This suit was brought for specific performance.

Appellant's argument says:

"There is only one question, Was it error to refuse specific performance of this contract; it being one in parol to give a lease of buildings for a longer time than one year?"

Due consideration will show clearly how impossible it is to grant the relief demanded. The plaintiff W. H. Workman in his testimony stated:

"It never occurred to me to have the lease put in writing till after he talked about selling. I did not know that a verbal lease for five years was not good till later on, when some of them claimed it was not good, when he began to talk about wanting the building."

[1, 2] There being no agreement for a written lease, the court cannot require Mr. Copeland to execute a written lease. The courts may require a person to perform a contract he has made. There was no agreement for a written lease, and the court is powerless to require one. It is equally clear that a parol lease for five years is void under the statutes, and the court cannot enforce a parol contract that the statutes say is void.

There are other insuperable obstacles in the plaintiffs' way, but this is enough.

Let the report of the special referee and the decree of the trial judge be reported.

The judgment appealed from is affirmed.

GARY, C. J., and WATTS, J., concur.

COTHRAN, J. (dissenting). Appeal from a decree of the circuit court, confirming the report of the special master, recommending that the motion of the defendants, made at the conclusion of the testimony for the plaintiffs, to dismiss the complaint, be granted. No testimony on behalf of the defendants was received.

The action is for the specific performance of an alleged parol agreement entered into between J. W. Copeland and W. H. Workman, on February 20, 1919, covering two storehouses in the town of Clinton for five years from that date at a rental of \$500 per annum.

The testimony for the plaintiffs (which was alone before the court) tended to establish the following facts:

A corporation known as the Copeland Company, of which the defendant J. W. Copeland was principal stockholder and manager, in the year 1919 was engaged (as it had been for several years) in an extensive mercantile business, occupying two storehouses in Clinton, which were the individual property of J. W. Copeland. They fronted on the prin-

cipal street of the town, and occupied a most desirable location for business. In February of that year negotiations opened up between Copeland and Workman looking to a purchase by Workman of the hardware stock of goods in one of the stores. The trade was concluded by an agreement, all verbal, by which Copeland agreed to sell to Workman the stock of goods at 90 cents on the dollar, and to lease him the two stores at \$500 per annum for five years, as the special master finds:

"I find also that the lease of those buildings was an inducement to Mr. Workman's entering into this contract, and that under the testimony if it had not been for the fact that he thought he would get possession of the buildings for five years, he would not have purchased the stock of goods."

Workman did not want to take the smaller store, but upon Copeland's insistence agreed to do so; he is positive in his declaration that the location was extremely desirable, that there was no other available place open to him, and that, if he had not been able to secure the lease for five years, he would not have embarked in the business at all; that he was setting up two of his nephews in business and that the acquisition of a stock of goods, without a place of business, was a matter not to be thought of. An inventory of the stock was taken. Workman complied with the terms of the purchase, settling with Copeland in full, and was put into possession of both the stock of goods and the two stores; that he or the firm or corporation subsequently organized paid the rent, \$41.66 per month, regularly, until February 19, 1920. In December, 1919, Copeland notified Workman that his lease would expire on February 19, 1920. Workman replied promptly that he had a verbal contract with him for five years; that "this was the agreement when we bought the stock of goods as a part of the sale." Copeland did not reply until February 12, 1920, repeating, without reference to Workman's letter, his former statement as to the expiration of the lease, and on the 21st, the day after the year was up, notified Workman that he was a tenant at will at \$60 per month. On March 19, 1920, Copeland conveyed the two stores to the defendant Tribble Company. The latter notified Workman on March 22, 1920, that they had bought the stores, and demanded possession by April 1st. They notified Workman that they wanted \$75 per month for one store and \$50 for the other, a mild increase of \$1,000 per annum over the rent previously paid by Workman. Workman refused to give up possession or to pay the increased rent. The defendant D. E. Tribble Company was notified, before they complied with their trade with Copeland for the

stores, that Workman was claiming possession under his verbal lease as stated.

After finding the facts practically as above, the special master concluded: (1) That the parol lease in excess of one year was void for the excess of one year, under section 3502 of the Code; (2) that the parol lease was void under the statute of frauds (sections 3735-3737 of the Code); (3) that in selling the stock of goods Copeland was acting for the Copeland Company, and in making the lease he was acting for himself individually; that the sale and lease could not therefore constitute an entire contract, as there were two separate contracts, made by two separate entities, having no legal connection with each other; (4) that the parol lease was not taken out of the statute of frauds by part performance, for the reason that the possession by the lessee was referable to that part of the contract which was valid, the lease for a year, and that the payment of the rent was made by the month and not by the year. He gives no reason for this distinction, or why it should not be considered as evidence of part performance, if in fact it was made upon the parol lease for five years; (5) that there was no written assignment of the lease to the partnership of Stanton & Johnson or to the corporation Workman Company, and that Workman Company, to establish their right to possession, must show, not only a lease originally valid, but an assignment thereof complying with section 3736 of the Code.

The circuit judge in a decree of more amplified form confirmed the report of the special master upon the grounds above stated, which will form the basis of observations to follow, and from his decree the plaintiffs have appealed.

It is conceded that Copeland did make an oral agreement with Workman that he should have the occupation of the stores for five years at a rental for the two of \$500 per annum. The testimony is all one way as to that fact, and the master so finds, to which the defendants have filed no exception. It is also conceded that in reliance upon that agreement, and upon the further agreement that Copeland would give him a lease, Workman took over one of the stores which he did not need, went into possession of the hardware stock and both houses, paid the purchase price of the goods in full, embarked in a mercantile venture of great risk, with two young men whom he was setting up in business (which he would not have done without the assurance of a suitable location), and regularly paid the rent called for by the agreement. For the purposes of this appeal (there having been a motion to dismiss granted before the defendant put up any testimony) these facts are taken for granted, as being admitted by the defendants.

The question is, Shall the defendant Cope-

land be permitted to repudiate his agreement, and under the cloak of statutory protection perpetrate a gross wrong upon Workman? So far as I am concerned he shall not be, if there is any law in the land to prevent it.

There is no question but that under section 3502 of the Code a parol lease for more than a year does not confer upon the lessee a right of possession for more than 12 months, and that all such leases shall be understood to be for one year only.

It is provided in section 3735 that a parol lease for more than a year shall have the force and effect of an estate at will only.

Under section 3737, no action can be brought upon a parol lease for any length of time, one year or less or more. Davis v. Pollock, 36 S. C. 544, 15 S. E. 718.

There seems to be a conflict between the provisions of sections 3502 and 3735. In the former, a parol lease for more than a year creates a lease for a year; in the latter, an estate at will.

Notwithstanding the imperative terms of inhibition contained in section 3737, against the institution of an action upon a contract of the character there mentioned, not in writing, the court of equity will allow it under circumstances which would amount to a fraud if denied. As is declared in 2 Story, Eq. (14th Ed.) p. 423:

"The distinct ground upon which courts of equity interfere in cases of this sort is that otherwise one party would be enabled to practice a fraud upon the other; and it could never be the intention of the statute to enable any party to commit such a fraud with impunity. Indeed fraud in all cases constitutes an answer to the most solemn acts and conveyances; and the objects of the statute are promoted, instead of being obstructed, by such a jurisdiction for discovery and relief."

The ground on which courts of equity proceed, in holding that part performance of a contract within the statute of frauds takes the case out of the statute, is that it would amount to a fraud on the party who, in reliance on the contract and pursuant thereto, has partly performed it, to permit the other party to refuse performance on his part. The enforcement is made in harmony with the principle that courts of equity will not allow the statute of frauds to be used as an instrument of fraud. This being the basis of the doctrine, it follows that nothing can be regarded as a part performance, to take a verbal contract out of the operation of the statute, which does not place the party in the situation which is a fraud upon him unless the contract be executed. The partial performance must be such as would prevent the court from restoring the promise to the situation in which he was when the agreement was made." 25 R. C. L. 259,

As Judge Story remarks:

"That they [the principles of equity] do, however, interfere in some cases within the reach of the statute, is equally certain. But they do so, not upon any notion of any right to dispense with it, but for the purpose of administering equities subservient to its true objects, or collateral to it and independent of it."

I can see no reason why sections 3502 or 3735 should be invested with a sanctity, not possessed by section 3737, which would relieve them from the application of so just a rule.

As long as the parol contract stands in its original form, and the proceeding is one at law, sections 3502 and 3735 have full force; but in equity they are subject to the same great rules for enforcing justice as prevail in and are the pride of a court of equity.

In 25 R. C. L. 284, it is declared:

"The great weight of authority is to the effect that equity will intervene to protect the rights of one who by reason of part performance has taken an oral lease out of the statute of frauds."

"Thus if a tenant has entered into possession under an oral agreement for a lease and has paid rent, incurred expenses in improvements, and changed his circumstances and conditions, relying upon the oral agreement, to such an extent that a refusal on the part of the landlord to perform operates as a fraud on the tenant, there is such part performance as will take the case out of the statute of frauds, and authorize the court to decree specific performance of the parol agreement." 25 R. C. L. 284; *Zelleken v. Lynch*, 80 Kan. 746, 104 Pac. 563, 46 L. R. A. (N. S.) 659; *Wallace v. Scoggins*, 18 Or. 502, 21 Pac. 558, 17 Am. St. Rep. 749.

"Some courts have inclined to the view that there can be no part performance of an oral lease which will take it out of the statute. It is the general view, however, as in case of oral sales or contracts for the sale of land, that part performance under an oral lease or contract for a lease may be such as to take the transaction out of the operation of the statute. The usual ground on which courts of equity interfere in case of oral leases as to which there has been part performance is that equity will not permit the statute to operate as an engine of fraud, or, in other words, that it will interfere for the purpose of preventing the injustice which would arise from permitting a party to escape from the obligations of his agreement, where the other party, on the faith of such agreement, has in presumptively good faith acted in execution thereof." 25 R. C. L. 567, citing *Halligan v. Frey*, 161 Iowa, 185, 141 N. W. 944, 49 L. R. A. (N. S.) 112; *Parkhurst v. Van Cortlandt*, 14 Johns. (N. Y.) 15, 7 Am. Dec. 427; *Wallace v. Scoggins*, 18 Or. 502, 21 Pac. 558, 17 Am. St. Rep. 749; *Seaman v. Aschermann*, 51 Wis. 678, 8 N. W. 818, 37 Am. Rep. 849.

In England it has been held that taking possession under the parol lease will of it-

self alone constitute the necessary part performance. This principle has been repudiated in many states, and has not been adopted in South Carolina. It is conceded everywhere however, that possession and valuable improvements will do so, upon the ground that they amount to such an alteration in the lessee's position as will warrant the court in entering a decree of specific performance. It follows upon the same reasoning that any acts, on the part of the lessee, which have the effect of so altering his circumstances and condition as to make it inequitable on the part of the lessor to insist upon the statute, will have the same effect. The impossibility of the lessee's retracing his steps in the case at bar really presents a stronger case for specific performance than if he had made improvements after taking possession, for the reason that the improvements might be compensated for in money, but his changed position could not be restored or compensated for.

In a note to 49 L. R. A. (N. S.) 118, it is said:

"The great weight of authority is to the effect that equity will intervene to protect the rights of one who has taken an oral lease out of the statute of frauds by part performance."

Cases supporting the text are cited from C. C. A., Arkansas, California, Connecticut, Illinois, Indiana, Maryland, Massachusetts, Michigan, Minnesota, Nebraska, New Jersey, New York, Ohio, Oregon, Rhode Island, Texas, Virginia, Wisconsin, Canada, Ireland, and England.

It has also been held in a majority of cases that payment alone will not constitute part performance. But in those jurisdictions which uphold the doctrine of part performance it is held that possession and payment of rent under the contract do constitute part performance. Certainly it should follow that possession, payment of rent under contract, and the material alteration of the lessee's circumstances and condition will have that effect.

In a note to 17 Am. St. Rep. 756, Judge Freeman says:

"It follows, as a necessary result of the decisions hereinbefore cited, that whether a lease is oral or written is not very material, if the lessee has entered into possession and paid rent under it, and can establish its terms to the satisfaction of the court to which he resorts for the purpose of compelling specific performance. In other words, a lease may be regarded as a sale of a limited interest in real estate, and though, like a sale of the fee, it ought to be evidenced by some writing in substantial conformity to that exacted by the statute of frauds, it may, like a sale of the fee, be followed by acts constituting such part performance as to remove it from the operation of that statute, and entitle the lessee to com-

pel the lessor to execute the appropriate evidence of the demise."

In *Seaman v. Aschermann*, 51 Wis. 678, 8 N. W. 818, 37 Am. Rep. 849, there was a verbal agreement by defendant (tenant) to lease the plaintiff's store for five years; the plaintiff (landlord) broke off negotiations with another prospective tenant, and went to some expense in altering the store for the defendant's accommodation; the defendant went into possession and paid rent for two years; he declined to execute the lease and plaintiff sued for specific performance. Held, that the landlord was entitled to the relief.

In *Eaton v. Whitaker*, 18 Conn. 222, 44 Am. Dec. 586, it was held that an agreement to lease land is within the statute of frauds, but that part performance will take it out of the statute; that delivery of possession, continued occupation, and payment of rent according to the terms of the agreement are a sufficient part performance for that purpose. The court makes this significant observation:

"There are many cases where contracts for the absolute sale of the fee of lands have been decreed to be executed, on the ground of part performance; and it would seem not a little remarkable, for a court to hold, that a contract for a three years' lease is, in this respect, in a worse condition than would be a sale of the land is perpetuity."

The point has not been suggested, and I am not to be understood as expressing a definite opinion upon it for the lack of time for investigation, but it is questionable whether the parol agreement under the circumstances is within the statute. The trade was an entire one, that the plaintiff should buy the stock of goods and the defendant Copeland should lease the store. The plaintiff's part of the contract was fully performed, and the defendant should be required to perform his. See *Gee v. Hicks*, Rich. Eq. Cas. 5; *Compton v. Martin*, 5 Rich. 14; *Hill v. Smith*, 12 Rich. 698.

That there was, according to these author-

ities, sufficient part performance by Workman to take the case out of the statute and to warrant a decree of specific performance I have not a doubt. Workman fully complied with his bargain; paid the purchase price of the stock of goods; went into possession of the stores under the contract; paid the rent every month; and, what is of the greatest consequence in my opinion, so altered his circumstances and condition, that it would be impossible to restore him thereto; he bought a stock of goods had them on his hands with the burden of disposing of them at a profit, embarked upon a new and uncharted sea for him, with all the risks of storm and shipwreck, none of which he would have undertaken but for Copeland's agreement. To hold that at a time of inflated values and rent profiteering Copeland should be allowed to sell his property and the buyer to raise the rent from \$500 to \$1,500 a year, after the discovery that a verbal lease is good only for one year, is a conclusion to which I do not subscribe.

The argument that Copeland and his company were separate entities, and that for that reason the contracts were separate and distinct, suggests a conclusion that is in the teeth of the facts and has no support in the law. If they were separate entities, I know of no principle of law or justice that would prevent a third party from being bound by his personal undertaking, upon the consideration of which one of the contracting parties assumed obligations to the other. Copeland was deeply interested personally in the corporation and in disposing of the stock of goods which belonged to it; I can see no reason why his personal obligations, which induced the trade with the corporation, should not be supported by the risk of loss which Workman assumed.

I think therefore that the decree should be reversed, and that the case should be re-committed to the special master to complete the testimony and make his report in conformity with the conclusions herein announced, which, however, should not be deemed decisive of the issues of fact in the case.

MEMORANDUM DECISIONS

(182 N. C. 758)

MIDGETT v. NORFOLK SOUTHERN R. Co. (No. 17.) (Supreme Court of North Carolina. Sept. 21, 1921.) Appeal from Superior Court, Dare County; Ferguson, Judge. Civil action by John A. Midgett against the Norfolk Southern Railroad Company to recover damages for an alleged negligent injury to plaintiff's property. Upon denial of liability and issues joined, the jury returned the following verdict: "(1) Did the defendant negligently injure the boat of the plaintiff as alleged? Answer: Yes. (2) What damage, if any, is plaintiff entitled to recover? Answer: Two hundred dollars." From a judgment in favor of plaintiff, the defendant appealed. No error. Thompson & Wilson, of Elizabeth City, for appellant. P. W. McMullan, of Elizabeth City, B. G. Crisp, of Manteo, and Aydlett & Simpson, of Elizabeth City, for appellee.

PER CURIAM. The only exception, presented for our consideration, comes from his honor's refusal to grant the defendant's motion for judgment as of nonsuit. We have carefully examined the evidence, and have reached the conclusion that the reasonable inferences arising therefrom are sufficient to carry the case to the jury. No material benefit would be derived from setting out the evidence, as it presents only a question of fact. Upon the record and the exceptions, we think the judgment should be affirmed; and it is so ordered. No error.

(182 N. C. 767)

ROLLISON v. ALEXANDER. (No. 171.) (Supreme Court of North Carolina. Oct. 12, 1921.) Appeal from Superior Court, Pamlico County; Devin, Judge. Civil action by Charles Rollison against Sam Alexander to recover damages for an alleged negligent personal injury. Upon denial of liability and issues joined, the jury returned the following verdict: "(1) Was plaintiff injured by the negligence of the defendant, as alleged in the complaint? A. Yes. (2) Did plaintiff, by his own negligence, contribute to his injury? A. Yes. (3) What damage, if any, is plaintiff entitled to recover? A. ———." From a judgment in favor of defendant, the plaintiff appealed. No error. D. L. Ward, of Newbern, and F. C. Brinson, of Bayboro, for appellant. Ward & Ward, of Newbern, and Z. V. Rawls, of Bayboro, for appellee.

PER CURIAM. An examination of the instant record leaves us with the impression that the case has been tried in substantial conformity to our decisions. Upon the controverted issues of fact, the jury have answered in favor of the defendant; and we have found no material error which would warrant us in disturbing the result. The appeal raises no

new question of law, and we conclude that the trial below must be upheld. No error.

(182 N. C. 759)

STANDARD MFG. CO. v. RAEFORD POWER & MFG. CO. (No. 20.) (Supreme Court of North Carolina. Sept. 21, 1921.) Appeal from Superior Court, Pasquotank County; Allen, Judge. Civil action by the Standard Manufacturing Company against Raeford Power & Manufacturing Company to recover damages for an alleged breach of contract; plaintiff contending that the defendant had agreed to sell and deliver, as per terms of acceptance, 50,000 pounds of hosiery yarns during the fall of 1919. The negotiations between the parties, leading up to the alleged agreement, are in writing, and consist of certain letters and telegrams, all of which were offered in evidence. His honor, being of the opinion that the plaintiff's evidence was insufficient to establish the existence of a contract, or to show an aggregatio mentium between the parties, granted the defendant's motion for judgment as of nonsuit. Plaintiff appealed. Affirmed. Thompson & Wilson and Geo. J. Spence, all of Elizabeth City, for appellant. Currie & Leach, of Raeford, and Ehringhaus & Small, of Elizabeth City, for appellee.

PER CURIAM. No material benefit would be derived from setting out in detail the correspondence had between the parties, and which forms the basis of this suit. Suffice it to say, we have examined the evidence with care, and concur fully with his honor below that no valid or enforceable contract has been shown or established. The judgment of nonsuit must be sustained. Affirmed.

(182 N. C. 760)

WHITLEY v. KAFIR et al. (No. 27.) (Supreme Court of North Carolina. Sept. 21, 1921.) Appeal from Superior Court, Beaufort County; Allen, Judge. Action by W. H. Whitley against O. O. Kafir and another, for trespass involving boundary. Judgment for defendants, and plaintiff appeals. No error. W. C. Rodman and Ward & Grimes, all of Washington, N. C., for appellant. John H. Bonner and Small, MacLean, Bragaw & Rodman, all of Washington, N. C., for appellees.

PER CURIAM. The only exception in the record relates to his honor's refusal to give one of plaintiff's special prayers for instructions. While the prayer, as requested, probably states a correct principle of law as an abstract proposition, yet we think it was properly refused under the evidence in the instant case. It omitted all reference to the marked lines, and these should have been considered by the jury, even under the facts stated in the prayer. No error.



